

Advancing the interests of illegal drug users,
sex trade workers, and other marginalized
persons through legal education, strategic legal
action, and law reform.



MEMORANDUM

FROM: Noah Quastel, LL.B.
DATE: August, 2001
RE: Illegal Drug Addiction as a Disability

Different courts in Canada have found that addiction, whether to legal or illegal drugs may be a form of handicap or disability, such that discrimination against persons on the basis of addiction is a prohibited. This suggests a number of opportunities for strategic legal action to help ameliorate disadvantage faced by persons with drug addictions. We have heard numerous stories and complaints that person with addictions are discriminated against in searching for housing, in access to public institutions such as Carnegie Centre, and in medical treatment to help end the addiction. Moreover, laws continue to operate to make addicts into criminals rather than to allow for treatment and aid. Anti-discrimination legislation may be useful to resolve these problems.

Based on an analysis of the current legislation and case law, we feel there is a good chance that

judges and adjudicators, in interpreting *any* of the human rights instruments that are binding in British Columbia, will find addiction to drugs to be a disability and hence covered by legislation.

There is a clear opportunity here to expand the scope of human rights legislation to afford previously unrecognized protections to person with drug addictions.

Depending on the situation, one of three instruments may be useful to refer to:

- (a) The Canadian Human Rights Act, R.S.C. 1985, c H-6. This governs all matters that are within the jurisdiction of the federal Parliament, such as the federal public service, or airline companies. It prohibits unjustified discrimination on a wide range of actors, including disability.
- (b) The Canadian Charter of Rights and Freedoms. This is a constitutional document, so any law or government policy can be struck down if it violates the Charter. Section 15 refers specifically to discrimination being prohibited.
- (c) The Human Rights Code, R.S.B.C. 1996, c. 210.

The Human Rights Code, R.S.B.C. 1996, c. 210. This governs all matters that are within the jurisdiction of the provincial legislature, such as private businesses, rental accommodation or provincial and city services. It prohibits unjustified discrimination in the provision of services,

accommodation or facility customarily available to the public, and unjustified discrimination in employment, whether done by government or by private individuals, organizations, or businesses.

It is very likely that the Human Rights Tribunal or the courts would find that discrimination on the basis that someone was a drug addiction would be governed by the Code. It has already been found, and accepted by the Ontario Court of Appeal, that drug addiction and alcohol abuse are a handicap for the purposes of the Ontario Human Rights Code. This was found in *Entrop v. Imperial Oil Ltd.* (2000) 50 O.R. (3d) 18, [2000] O.J. No. 2689 (Ontario Court of Appeal). In that case, the Board found, on uncontradicted expert evidence that drug abuse and alcohol abuse—together substance abuse—are each a handicap. Each was found to be “an illness or disease creating physical disability or mental impairment and interfering with physical, psychological, and social functioning.” There was no dispute as to this at the Appeal level. This potentially opens up a wide range of legal recourses to persons with drug addictions who are denied hotels or apartments, jobs, or other services, simply in virtue of the fact of the addiction.

However, each claim needs to be assessed on its merits, and there will often be an issue as to whether a person is denied a service on the basis of a drug addiction. For instance, if a person

who is an alcoholic is denied entry into a restaurant, the reason given by the restaurant manager may be because the person is drunk and disruptive to the other customers, and not simply because the person is an alcoholic. Moreover, the greater challenge will arise in considering whether discrimination is considered justified. The courts can look to whether the effect of a rule is discriminatory, but discriminatory rules are allowed if they meet a three step test. Such a rule must be adopted for a legitimate purpose (for instance, as part of performance of a job), if it was adopted in honest and good faith and belief that it was necessary for the purpose, and is reasonably necessary for the accomplishment of the legitimate purpose (*Entrop. supra*). At issue here will be whether there is accommodation of persons needs.

For instance, an employer might decide not to hire someone after learning they were addicted to heroin. If a human rights case were raised, the employer would bear the onus of establishing that the handicap would preclude the complainant from performing his or her duties. However, a method of individual testing which is reasonable and objective and clearly demonstrates the complainant's inability to perform adequately might fulfill that role.

The Charter. The Charter of Rights or Freedoms prohibits unjustified discrimination either by laws or by government action. This includes laws and programs of the federal, provincial and city governments, and organizations that are controlled by government, such as community

colleges. Once an action or law is found in a court of law to be discriminatory, the government must convince the court that the interference is justified. The court will not find it justified unless the purpose of the law or activity is in conformity with the Charter, there is a meaningful connection between the law and the purpose of the law, and the infringement with Charter rights is as minimal as possible.

The advantage to having a court finding unjustified discrimination under the Charter is that a court can overturn a law that conflicts with the Charter. Section 15 states that

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

While s. 15 lists (or as the courts say “enumerates”) particular grounds of discrimination, the courts have repeatedly stressed that they will accept analogous grounds of discrimination. The basis for determining an analogous ground is open ended and not defined. The courts have considered, as factors to take into consideration: past discrimination, comparison with already enumerated grounds, historical disadvantage, lack of political power, vulnerability, and that the persons affected cannot change the basis for discrimination, or that the basis for discrimination goes to the core of the person’s identity. For instance, sexual orientation have been found to be an analogous ground, such that denying spousal benefits to gay couples constitutes

discrimination(*Vriend v. Alberta* [1998] 1 S.C.R 493).

In fact, there is good reason to think that the drug addiction would be considered either as a form of physical or mental disability, or as an analogous ground for Charter purposes. First, certain human rights instruments already recognize drug dependency as a prohibited ground of discrimination: This signals an understanding by legislators that this represents a ground of discrimination. Under s.10 of the Canadian Human Rights Act drug dependency is a listed ground. Moreover, in *Canada v. Toronto-Dominion Bank*, [1998] 4 FC 205 at 256, the Federal Court of Appeal held that it would be contrary to human rights legislation to limit the definition of disability to dependence on legal drugs. Second, drug addiction and alcohol abuse are a handicap for the purposes of the Ontario Human Rights Code (*Entrop*, supra.) Third, persons with drug addictions fall into the criteria laid down by the Supreme Court of Canada as suitable for being considered a group open to discrimination, in virtue of comparative social disadvantage, vulnerability, and lack of political power.

Again, it is worth stating that a finding of discrimination under s. 15 of the Charter is only the first step courts consider before going on to look at whether the discrimination is justified in a free and democratic society. Here the onus of proof shifts to the government or person upholding the law or policy to defend the law or possibility. The analysis will be case by case,

and so it is not possible here to give anything more than a summary overview of the framework used. The purpose of the law or activity is in conformity with the Charter and warranted in a free and democratic society, there is a meaningful connection between the law and the purpose of the law, and the infringement with Charter rights is as minimal as possible. For instance laws against trafficking in heroin may be seen to discriminate against heroin addicts, but even so, courts would likely see those laws as directed towards stopping heroin consumption and addiction and bear a meaningful connection to that purpose.

Suggestions

It is our view that the following areas of concern to Downtown Eastside Residents may likely be found to violate the BC Human Rights Code;

- denial of housing,
- access to public services (such as Carnegie Centre),
- use of restaurants,
- discrimination in employment
- lack of access to detox facilities.

when done on the basis that someone has a drug addiction. However, in each there will be justifications that need to be met, including: likelihood of disturbance to others (e.g. a clean hotel), or providing a drug free environment. At this time we suggest further, more specific case law research in conjunction with actual fact situations. It may also be possible that certain government actions could be found to violate the Charter, in particular prison sentences for possession may be unconstitutional, on the grounds that they do not meet addicts needs, as

may be sentences that fail to consider addiction as a mitigating circumstance. It may be worth further research to consider whether drug laws themselves may be considered discriminatory in virtue of the economic and social destitution such laws force on persons who are addicted.