

Aboriginal People and HIV/AIDS: Legal Issues

info sheet 3

This info sheet explains how human rights statutes apply to Aboriginal people, and the protection they do – or do not – afford. It points out that, although HIV-positive Aboriginal people experience discrimination, they seldom seem to seek redress under human rights legislation. Other approaches to discrimination, including HIV/AIDS-related education, are viewed as more effective.

HUMAN RIGHTS LAW

WHAT LEGISLATION DEALS WITH HUMAN RIGHTS?

In all jurisdictions in Canada medical conditions related to HIV infection are recognized as “physical disabilities” or “handicaps,” and are therefore within the scope of the prohibited grounds of discrimination enumerated in human rights statutes. The comprehensiveness of this protection varies somewhat from jurisdiction to jurisdiction.

Generally speaking, human rights statutes apply to governmental and non-governmental actors in the areas of employment, services, and accommodation.

An additional source of legal protection for individuals who experience HIV/AIDS-related discrimination is the *Canadian Charter of Rights and Freedoms*. The Charter applies to governments and matters falling within the authority of governments.

HOW DO HUMAN RIGHTS STATUTES APPLY TO ABORIGINAL PEOPLE?

The jurisdictional divisions that have been imposed on Aboriginal people complicate the application of human rights legislation, particularly with regard to the distinction between on and off reserve.

Provincial statutes: The human rights statute of a province applies to human rights

complaints that arise within the jurisdiction of that province. With respect to Aboriginal people, a provincial statute would be the appropriate avenue for a human rights complaint in circumstances including the following:

- an Aboriginal person living off reserve is discriminated against by an individual or by an enterprise that is not federally regulated;
- an Aboriginal person is discriminated against with respect to a service or enterprise provided by a provincial government on or off reserve; and
- an Aboriginal person living on reserve is discriminated against 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.

Discrimination experienced by a Métis or Inuit person residing in a province generally falls under category 1 above – the provincial statute applies.

The federal statute: The *Canadian Human Rights Act* (CHRA) applies to the federal government and agencies of the federal gov-

This is one of a series of nine info sheets on Aboriginal People and HIV/AIDS: Legal Issues

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ernment, and to enterprises operated in a federally regulated industry.

The CHRA applies to band councils and their enterprises except where s 67 of the CHRA applies. Section 67 operates to immunize the provisions of the *Indian Act* and actions taken pursuant to the *Indian Act* from complaints under the CHRA.

The *Indian Act* confers on band councils authority to make certain by-laws, including those regulating health and residence on reserve. By-laws are subject to ministerial review. Band councils can also make band council resolutions (BCRs), which are not subject to review and can relate to virtually any matter arising on reserve.

The case law suggests that the gap in human rights law created by s 67 is not wide but that it is a cause for concern to individuals who may experience discrimination flowing from the *Indian Act*, or from band councils or federal departments or agencies operating pursuant to the *Indian Act*, including Aboriginal women, two-spirited people (gay, lesbian, bisexual, and transgender people), and people with HIV. This issue is relevant to status Indians as defined by the *Indian Act*.

The Charter. From a legal point of view, the *Indian Act* establishes a system of band governance whereby band councils exercise delegated powers under the authority of the federal government. Where Parliament or a legislature has delegated a power of compulsion to a body or person, the Charter will apply to the del-

egate. Band councils and their representatives operating pursuant to the *Indian Act* are therefore subject to the provisions of the Charter. The Charter is available to fill the gap in human rights legislation created by s 67 of the CHRA.

More controversial is the question of the application of the Charter to Aboriginal governments exercising inherent powers of self-government enshrined in s 35 of the *Constitution Act, 1982*. The federal government takes the position that self-government agreements must provide that the Charter applies to Aboriginal governments and related institutions.

It is the position of the Royal Commission on Aboriginal Peoples (RCAP) that Aboriginal governments occupy the same basic position relative to the Charter as the federal and provincial governments. RCAP suggests that in 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, while respecting individual rights.

ARE HUMAN RIGHTS STATUTES BEING USED?

Aboriginal people with HIV/AIDS experience discrimination. Nonetheless, few people report cases that involve recourse to the human rights system. Other approaches to discrimination are viewed as more effective, including HIV/AIDS-related education.

In no circumstances is HIV/AIDS-related discrimination justified. HIV/AIDS issues need to be addressed with compassion, caring, and understanding.

The information in this series of info sheets, prepared in partnership by the Canadian HIV/AIDS Legal Network (Legal Network) and the Canadian Aboriginal AIDS Network (CAAN), is taken from three discussion papers prepared by Stefan Matiation, based on discussions with key informants working in the field of Aboriginal people and HIV/AIDS: (1) *Discrimination, HIV/AIDS and Aboriginal People*; (2) *HIV/AIDS and Aboriginal People: Problems of Jurisdiction and Funding*; and (3) *HIV Testing and Confidentiality: Issues for the Aboriginal Community*. Copies of the revised, second edition of the papers and of the info sheets are available on the Legal Network website at www.aidslaw.ca, through the Canadian HIV/AIDS Clearinghouse (tel: 613 725-3434, email: aids/sida@cpha.ca), or through CAAN (tel: 613 567-1817; fax: 613 567-4652; email: caan@storm.ca). Reproduction of this info sheet is encouraged. However, copies may not be sold, and the Legal Network and CAAN must be cited as the source of this information. For further information, contact the Legal Network (tel: 514 397-6828; fax: 514 397-8570; email: info@aidslaw.ca) or CAAN.

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