University of Alberta

HIV/AIDS AND AN EVER-CHANGING WORLD OF WORK:
THE PRINCIPLE OF REASONABLE ACCOMMODATION

by

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A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of

Masters of Law

Faculty of Law

Fall 2010
Edmonton, Alberta

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DEDICATION

To

Buki Agboola, née Adido, who loves me more than I love myself.

ABSTRACT

There is a complex relationship between the HIV/AIDS pandemic and the world of work. The complexities in the relationship are strengthened by the long asymptomatic period of the disease and its significant presence among the age group that forms a major part of the work force. The presence of HIV/AIDS in a workplace, if not effectively managed, leads to unpleasant effects such as an increase in the cost of production, which translates into income loss and possibly capital depletion. Superficial knowledge of these factors often makes the workplace hostile and leads to a culture of discrimination in which the well-being and rights of those affected by the virus are either undermined or out rightly ignored. An effective way of mitigating these negative effects is the provision of workplace reasonable accommodation measures. This paper proposes pragmatic legal ways of meeting the reasonable accommodation needs of people living with HIV/AIDS in Canada.

ACKNOWLEDGEMENT

I am most grateful to my supervisor, Professor Timothy Caulfield for his direction and support during the course of my program. Thanks for believing in me and making me discover some of my abilities. We did it!

My sincere appreciation also goes to Wayne Renke and Judy Mill for accepting to sit on my defence committee and for their insightful contributions. I'm amazed by the level of industry you put into their reviews.

I am also grateful to the faculty and staff of Faculty of Law, University of Alberta for their support. In particular I want to acknowledge the help of Frederick Decoste, Erin Nelson, Linda Reif, Nina Hawkins, Andrea Menard and the members of the Health Law Institute. Kim Wilson, you were simply awesome.

I must also acknowledge the support of the Canadian Institute of Health Research for making me part of the Training Fellowship in Health Law, Politics and Ethics. I could not have made it without your tutorship, generous financial support and conference exposure. I also thank the Alberta Law Foundation.

I am very grateful to my parents, Dr. and Barr. Adido and my siblings who endured a lot so I could excel. To Ndukeabasi, Okezi and Vicky, you guys are the best. To all others who have contributed in one way or another to the successful completion of this thesis, I say a big thank you.

And to the Immortal, Invincible, God only wise, my Rock, my Anchor and Support through the years, thank you, thank you, thank you.

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List of Abbreviations

ACCHO:	African and Caribbean Council on HIV/AIDS in Ontario
ADA:	Americans with Disabilities Act
ADAAA:	Americans with Disabilities Amendments Act
AHRA:	Alberta Human Rights Act
AIDS:	Acquired Immunodeficiency Syndrome
ARC:	AIDS-Related Complex
ARS:	Acute Retroviral Syndrome
BCHRC:	British Colombia Human Rights Code
BFOR:	Bona Fide occupational Requirement
CCDIC:	Center for Communicable Diseases and Infection Control
CDC:	Centers for Disease Control
CD4:	Cluster of Differentiation 4
CWGHR:	Canadian Working Group on HIV and Rehabilitation
CHRA:	Canadian Human Rights Act
DNA:	Deoxyribonucleic Acid
EEOC:	Equal Employment Opportunity Commission
FGM:	Female Genital Mutilation
GRID:	Gay-Related Infectious Disease
HAART:	Highly Active Antiretroviral Therapy
HBV:	Hepatitis B Virus
HCV:	Hepatitis C Virus
HHV8:	Human Herpesvirus 8
HIV:	Human Immunodeficiency Virus
ICAD:	Interagency Coalition on AIDS and Development
ICCPR:	International Covenant on Civil and political rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
IDU:	Injection Drug Users
ILC:	International Labour Conference

ILO:	International Labour Organization
KS:	Kaposi's Sarcoma
MHRC:	Manitoba Human Rights Code
MSM:	Men who have Sex with Men
NACA:	National Agency for the Control of AIDS
OHRC:	Ontario Human Rights Code
OHCHR:	Office of the UN High Commissioner for Human Rights
OI:	Opportunistic Infections
PCP:	Pneumocystis Carinii Pneumonia
PLWHA:	People Living with HIV or AIDS
SIV:	Simian Immunodeficiency Virus
STD:	Sexually Transmitted Disease
T Cells:	T-Lymphocyte
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNAIDS:	Joint United Nations Program on HIV/AIDS
WHO:	World Health Organization

"A society is judged by how it responds to those in greatest need. A tragedy such as the HIV epidemic brings a society face to face to those in greatest need. A tragedy such as the HIV epidemic brings a society face to face with the core of its established values and offers an opportunity for the reaffirmation of compassion, justice and dignity."[1]

FOREWORD

Nature and Scope of Thesis

Due to the effects which HIV and AIDS could have on the workplace, many efforts have been made both locally and internationally to manage the work-related effects of the virus. These efforts come mostly in the form of public policies and sensitization about the virus and the drafting and extensive interpretation of legislations to deal with issues as they emerge. Though some amount of success has been recorded with the enforcement of these measures, some executives are still unaware of the desired standards and best practices, while some others seek out ways of avoiding their obligations. A major way of doing this is to make the workplace uncomfortable for affected workers, thereby forcing them out of the system. This is achieved partly by refusing to provide

[1] James D. Watkins, Chair Presidential Committee on the Human Immunodeficiency Virus Epidemic Report (Report dated June 24, 1988)

reasonable accommodation in the workplace for affected workers, and where this is done, they are found to be inadequate and not in line with best practices.

The above is what gave impetus to this paper, which strives at promoting the sound management of HIV/AIDS in the workplace with special reference to the provision of reasonable accommodation. I shall achieve this by first establishing the connection between HIV/AIDS and the workplace. Thereafter, I shall carry out a detailed examination of the current legal framework on reasonable accommodation in Canada, its suitability in dealing with HIV/AIDS in the workplace and its conformity with global standards and best practices. I argue that there is a disconnection between the present state of the law in Canada and the workplace reasonable accommodation needs of people living with HIV/AIDS. I also argue that the present state of the law needs to be upgraded in order to halt the miscarriage of justice. In particular, I recommend the passing of HIV/AIDS-specific laws and the ratification of certain key UN conventions. The above is achieved through discussions spanning the length of five sequential parts that make up the entire body of this paper.

Paper Structure

Part I of the paper begins by discussing the meaning, nature and epidemiology of the HIV virus and AIDS. It also examines the means of transmission and the pathophysiology of the virus in the human body. The global statistics, prevalence rates, distribution and impacts of the virus are also considered. A closer look will be paid to the development of the virus in Canada, the current prevalence rate and the distribution among classes of Canadians. Concluding discussions on the various physical and psychological impacts the

virus has on people and its public health implications will usher in the discussions of the next part.

Part II focuses on the various issues that arise from the relationship between HIV/AIDS and the workplace with special attention given to the concept of reasonable accommodation as it relates to the virus. The concept of reasonable accommodation is also considered in a manner that would bring to the fore its relevance in the workplace. Various forms of accommodations relevant to people living with HIV/AIDS in the workplace will be enumerated and discussed. Also discussed are certain human rights issues that flow from the relationship between the two concepts such as workplace discrimination and stigmatization. This part concludes with reference being made to perceptions and myths people have about HIV/AIDS and the real dangers the virus poses in the workplace.

Parts III and IV form the crux of this paper. These chapters critically examine the current Canadian legal frameworks that govern the provision of reasonable accommodation in the workplace for persons living with HIV/AIDS and the rationale behind the present state of the law. The various efforts made in Canada, both at the national and provincial level, to deal with the issue are considered, and the adequacy and relevance of such efforts are looked at against the nature of the challenge. These are compared with efforts made by the international community. In particular, comparisons will be made between the present laws in Canada, certain UN conventions, and the *Americans with Disabilities Act* of 1990. The examinations carried out here will expose the loopholes in the current state of the law as balanced with the peculiar needs of

workers living with HIV/AIDS. They will also show the need for HIV/AIDS-specific legislations and the ratification of relevant UN conventions.

Part V, the final part of this paper, concludes with four recommendations as to the most efficient ways of ensuring that everyone within the HIV/AIDS spectrum has access to reasonable accommodation measures. It also shows why the concept of reasonable accommodation as it affects people living with HIV/AIDS should give rise to more debates and discussions among stakeholders and lawmakers than is currently the case.

PART I

THE HIV/AIDS EPIDEMIC AND ITS GLOBAL IMPLICATIONS

1.1 Epidemiology and Nature of the HIV Virus and AIDS

The Human Immunodeficiency Virus (HIV) is a lentivirus[2] that causes Acquired Immunodeficiency Syndrome (AIDS), a condition in humans in which the immune system begins to fail, giving way to life-threatening opportunistic infections. Thus, HIV and AIDS are two different concepts. While the HIV virus serves as a causative agent, AIDS is the terminal stage of the disease and a person might have the HIV virus without ever developing AIDS. It should however be noted that there is no direct connection between the simplicity of the above definition and the actual nature of the HIV virus. In fact, defining HIV or AIDS is a difficult task because it is a very complex disease with a lengthy incubation period and multifaceted dimensions.[3] The court in *Thwaites v. Canada (Canadian Armed Forces)*[4] described HIV/AIDS as one of the most complex and deadly diseases ever encountered by mankind. The reason behind its bad reputation is not

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[2] A Lentivirus is a genus of slow viruses of the Retroviridae family, characterized by a long incubation period. Lentiviruses can deliver significant amount of generic information into the DNA of the host cell, so they are one of the most efficient methods of a gene delivery vector. "Lentivirus," *Wikipedia, the free encyclopedia* (8 December 2009), online: Wikipedia <http://en.wikipedia.org/wiki/Lentivirus> (Accessed Thursday, January 7, 2010).

[3] This is because the immunopathogenic mechanisms underlying the disease are extremely complex and the disease process is multifactorial with multiple overlapping phases. Added to this complexity is the fact that the viral burden is substantial and viral replication occurs throughout the entire course of the infection: Anthony Fauci, "Multifactorial Nature of Human Immunodeficiency Virus Disease: Implications for Therapy" (1993) 262:5136 Science at 1011 – 1018; Anthony Fauci, "HIV and AIDS: 20 Years of Science" (2003) 9 Nature Medicine at 839 – 843, online: <http://www.nature.com/nm/journal/v9/n7/full/nm0703-839.html> (Accessed Wednesday, April 7, 2010); Cliff Morrison, "HIV/AIDS Units: Is There Still a Need?" (1998) 9:6 Journal of the Association of Nurses in AIDS Care 16 – 18 at 16. The complex nature of the HIV virus is what has frustrated efforts at developing a drug so far: Dr. Frank Plummer, the Public Health Agency of Canada's Chief Science Advisor, "*HIV/AIDS is a Very Complex Disease – That's Why Developing a Drug is Taking So Long*." See "Public Health Researcher Extraordinaire: Meet Dr. Frank Plummer," (Summer 2008) *Future Health*.

[4] *Thwaites v. Canada (Canadian Armed Forces)* [1994] 3 F.C. 38 (TD) [*Thwaites*]

only the fact that there is presently no known cure for the disease, but also because the virus is in a perpetual state of transformation with new strains continually being discovered. Despite its evolving and complex nature, definitions still serve the purpose of aiding in record keeping and making medical and public health classifications.

AIDS was first recognized as a new disease in the United States in 1981 when clinicians in New York, Los Angeles, and San Francisco began to see young homosexual men with *Pneumocystis carinii* pneumonia (PCP)[5] and Kaposi's sarcoma (KS),[6] unusual diseases for young adults not known to be immunosuppressed.[7] Despite the discovery of the disease in 1981, its cause was not identified until 1983 when scientists in France and the United States traced the cause of AIDS to a virus called the Human Immunodeficiency Virus (HIV). Two years later, blood tests to detect the presence of HIV in patients were developed.[8] The exact origin of the HIV virus was however not detected until 2006, twenty-five years after the first AIDS cases emerged. Scientists were finally able to give direct evidence of a missing link between a chimpanzee virus and the one that causes human AIDS. Thus contrary to other existing theories, it is now believed that the HIV virus plaguing humans originated from wild chimpanzees in sub-

[5] Pneumocystis pneumonia (PCP) or pneumocystosis is a form of pneumonia, caused by the yeast-like fungus *Pneumocystis jirovecii*. *Pneumocystis* is commonly found in the lungs of healthy people. But, being a source of opportunistic infection, it can cause a lung infection in people with weak immune system such as people with HIV/AIDS.

[6] Kaposi's sarcoma (KS) is a tumor caused by Human Herpesvirus 8 (HHV8) and it appears as nodules or blotches typically found on the skin. It became more widely known as one of the AIDS defining illnesses in the 1980s.

[7] "Pneumocystis Pneumonia – Los Angeles," *Centers for Disease Control and Prevention* (1981) 30 Morbidity & Mortality Wkly Report at 250 – 252. The first report in the medical literature that alerted the world to this new immunodeficiency syndrome appeared in June 1981 and described five young homosexual men in Los Angeles with PCP.

[8] Carol Ballard, "AIDS and other Epidemics", in *What If We Do Nothing* Series, (London: Franklin Watts, 2009), at 8

Saharan Africa, specifically in a corner of Cameroon,[9] and was transferred to humans during the late 19th or early 20th century.

HIV evolved from the closely related Simian immunodeficiency virus (SIV) and was transferred from non-human primates to humans as a type of zoonosis.[10] There are two strains of the HIV virus: HIV-1 and HIV-2. HIV-1, which is the more virulent of the types of HIV viruses, is closely related to a virus found in chimpanzees.[11] Using HIV-1 sequences preserved in human biological samples along with estimates of viral mutation rates, scientists calculate that the jump from chimpanzee to humans probably happened during the late 19th or early 20th century, a time of rapid urbanization and colonization in equatorial Africa.[12] Despite knowledge of the origin of the HIV virus, there are still debates and several theories as to how the SIV virus made its cross and became HIV in humans. A fact that can however not be debated is that despite its humble

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[9] Lawrence Altman, "Science Trace Link between Chimp Virus and HIV" *New York Times*, Online Edition (26 May 2006), online: <http://query.nytimes.com/gst/fullpage.html?res=9E06E2D7113EF935A15756C0A9609C8B63&sec=health&spon> (Accessed Thursday, January 7, 2010). This publication is a report of a study carried out by Dr. Beatrice H. Hahn, a virologist at the University of Alabama in Birmingham. Dr. Hahn led the international team that conducted the study, which combined genetics and epidemiology; "Origin of AIDS," *Wikipedia, the free encyclopedia*, (2009, December 8), online: Wikipedia <http://en.wikipedia.org/wiki/Origin_of_AIDS> (Accessed Thursday, January 7, 2010).

[10] A zoonosis is any infectious disease that can be transmitted (in some instances, by a vector) from non-human animals, both wild and domestic, to humans or from humans to non-human animals (the latter is sometimes called reverse zoonosis).

[11] Michael Worobey, *et al.*, "Direct Evidence of Extensive Diversity of HIV-1 in Kinshasa by 1960," *Nature* 455 (October 2008) at 661–4, online: <http://www.nature.com/nature/journal/v455/n7213/full/nature07390.html> (Accessed Monday, January 11, 2010).

[12] Bette Korber, *et al.*, "Timing the Ancestor of the HIV-1 Pandemic Strains," *Science* 288:5472 (June 2000) at 1789–96, online: <http://www.sciencemag.org/cgi/content/full/288/5472/1789> (Accessed Monday, January 11, 2010).

beginning and within a decade of its first recognition in the United States, AIDS had grown to become a pandemic disease.[13]

1.2 Global Statistics of HIV/AIDS

HIV and AIDS are global issues and AIDS-related illness remains one of the leading causes of death in the world. HIV/AIDS is ushering itself into communities previously little troubled by the epidemic and is strengthening its grip on areas where AIDS is already the leading cause of death in adults. What more, the virus is found mainly within the age group that forms a substantial part of the workforce.[14] According to the most recent data on the epidemic released in 2009 by the Joint United Nations Program on HIV/AIDS (UNAIDS) and the World Health Organization,[15] the number of people living with HIV worldwide continued to grow in 2008, reaching a record high estimate of about 33.4 million [31.1 million – 35.8 million]. A comparison between the 2008 figures and previous years show a significant percentage increase in the number of infection cases. For instance, the total number of people living with the virus in 2008 was more than 20% higher than the number in 2000, and the prevalence was roughly threefold higher than in 1990. Also, about 2.7 million [2.4 million – 3.0 million] people were newly infected with the HIV virus in 2008. It is also estimated that 2

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[13] A pandemic is an epidemic of infectious disease that is spreading through human populations across a large region; for instance a continent, or even worldwide. A widespread endemic disease that is stable in terms of how many people are getting sick from it is now a pandemic.

[14] "HIV/AIDS and the World of Work," *International Labour Conference*, Report IV (1), 98th Session, (Geneva, 2009), at 6-7. According to UNAIDS & WHO 2007 AIDS Epidemic Update, over 33 million adults aged from 15 to 49 years were living with HIV at the end of 2007. Although the bulk of the working-age population and of the labour force is covered by the age range 15 to 49 years, the HIV prevalence estimates nevertheless excludes persons living with HIV in the age group 50 to 64 years who are still of working age and in many cases in the labour force.

[15] UNAIDS & WHO AIDS Epidemic Update, 2009. Online: <http://data.unaids.org/pub/Report/2009/JC1700_Epi_Update_2009_en.pdf> (Accessed Tuesday, January 12, 2010).

million [1.7 million – 2.4 million] deaths occurred worldwide in 2008 due to AIDS-related illness, roughly 10% lower than in 2004.[16]

However, when the 2008 figures and those of other recent years are compared with those published in preceding years, a percentage decrease is noticed in the present number of people living with HIV. For instance, since the publication of the ILO code of practice in 2001, the number of adults aged 15 to 49 years and children under 15 years living with HIV rose globally from about 29 million to over 33 million in 2007 – a 14 per cent increase.[17] However, the 2007 figure is not significantly different from that of 2008 noted above. Thus, the epidemic appears to have stabilized in most regions with the major increases noticed in a few regions like Sub-Saharan Africa, Eastern Europe, Central Asia and other parts of Asia due to the high rate of new infections in these places. By far, Sub-Saharan Africa continues to withstand the worst of the epidemic, accounting for 71% of all new HIV infections in 2008. It is estimated that about 22.4 million people were living with HIV in 2008 in Sub-Saharan Africa as opposed to the 1.4 million people living with the virus in North America.[18]

1.2.1 HIV/AIDS in Canada

Ever since Canada recorded its first case of AIDS in 1982 among Canadians from Haiti living in Quebec,[19] HIV and AIDS has continued to remain an issue of concern in Canada, as it is world over. From the time HIV testing

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[16] *Ibid.*
[17] "HIV/AIDS and the World of Work," *supra* note 14
[18] "UNAIDS & WHO AIDS Epidemic Update*," supra* note 15 at 21.
[19] "The Global Epidemic," *Canadian Broadcasting Corporation (CBC) News,* Online Edition (24 November 2009), online: <http://www.cbc.ca/health/story/2009/11/24/f-aids-hiv-global-epidemic.html> (Accessed Tuesday, November 24, 2010); Terry Albert & Gregory Williams, "The Economic Burden of HIV/AIDS in Canada," Canadian Policy Research Networks Inc. (1998) Renouf Publishing Co. Ltd. at 10

began in November 1985 to December 31, 2008 (date of last surveillance report), there have been 67,442 positive HIV test reported to the Center for Communicable Diseases and Infection Control (CCDIC).[20] This translates to about 70,400 after adjusting for underreporting and duplicates. Of these, it is further estimated that approximately 22,300 have already died. The resultant effect of this is that there were about 48,100 Canadians living with HIV infection in 2008 who have been diagnosed with HIV (tested positive) and were therefore aware of their HIV status. However, the actual number of Canadians living with HIV presently exceeds the figures published above. This is because there is still a large number of HIV cases unaccounted for as there are persons currently living with HIV and AIDS in Canada who are unaware of their status partly due to the long viral latency period that marks the period between HIV infection and symptom development.[21]

When compared with some other regions of the world, it would be easy to conclude that Canada is one of the countries least affected by the epidemic. However, a careful consideration of surveillance reports published through the years shows that there continues to be an increase in the number of people living with HIV and AIDS in Canada. It was recently reported by CBC News that every two (2) hours, someone in the country becomes infected with HIV.[22] Data from

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[20] "Estimates of HIV Prevalence and Incidence in Canada, 2008," (2009) *Surveillance and Risk Assessment Division, Centre for Communicable Diseases and Infection Control, Public Health Agency of Canada*, online: <http://www.phac-aspc.gc.ca/aids-sida/publication/survreport/estimat08-eng.php> (Accessed Tuesday, January 12, 2010).

[21] As at 2008, it was estimated that about 16,900 (range of 12,800 – 21,000) persons, or 26% of prevalent cases, were unaware of their HIV infection. This figure is slightly less than the estimate of 27% who were unaware of their HIV status in 2005. "Estimates of HIV Prevalence and Incidence in Canada, 2008," *supra* note 20.

[22] "The Global Epidemic," *supra* note 19.

the most recent national HIV and AIDS surveillance carried out in 2008[23] also shows that the number of people living with HIV (including AIDS) continues to rise, from an estimated 57,000 in 2005 to 65,000 in 2008 (a 14% increase) (See Table 1 below).[24] It appears that the number of new infections in 2008 (estimated range between 2,300 and 4,300) was about the same as or slightly greater than the estimated range in 2005 (2,200 to 4,200). It is also important to note that the distribution of HIV and AIDS among the Canadian population is not even as the prevalence has been noticed to be more among certain communities.[25] There is also a higher prevalence rate in cities as opposed to more conservative settlements.[26]

Despite the relative stability in infection rate in Canada, there is expected to be a continuous increase in the number of people living with HIV/AIDS. This forecast is due to two primary factors, the first being the steady rate of infection. The other reason for the expected change in magnitude is the increase in life expectancy of infected people brought about by new treatments and medical

[23] "Estimates of HIV Prevalence and Incidence in Canada, 2008," *supra* note 20.

[24] There is also an increase when the 2005 figures are compared with that of 2002. In addition, in 2002, an estimated 56,000 people were living with HIV infection (including AIDS), representing an increase of about 12% from 1999. See Health Canada, "Estimates of HIV Prevalence and Incidence in Canada, 2002," (1 December 2003) *Canada Communicable Disease Report*, Vol. 29, No. 23.

[25] Angela Hill, "HIV: A Growing Concern in Saskatchewan," *Prince Albert Daily Herald* (19 August 2009). According to health officials, HIV in Saskatchewan's aboriginal community is comparable to the epidemic found in some African countries. The province logged 174 HIV cases in 2008, a three-fold increase since 2004, and aboriginals are the largest group affected.

[26] Bill Kaufmann, "Canada: Number of Newly Reported HIV Cases in Alberta Up 29 Percent from Two Years Ago," *Canadian Press* (12 September 2008). It is here reported that in 2007, the Province of Alberta logged 225 new HIV cases, up from 175 two years ago. Of these, 99 were in Calgary and 89 in Edmonton. According to Capri Rasmussen of AIDS Calgary, Calgary has now overtaken Edmonton for having the largest portion of new cases. She also stated that the reason might be an increase in Calgary's population, with more young people moving to the city for jobs. According to the group, Edmonton has more cases linked to intravenous drug use, while Calgary tends more toward homosexual transmission.

advances, especially the use of highly active antiretroviral therapy (HAART).[27] Several people with HIV now live normal prolonged lives. The above means that the future could witness an increase in the needs and care requirements of people living with HIV/AIDS. This increase would also have a significantly influence on the workplace being that the majority of the people living with HIV and AIDS are within the working age group.[28] An indispensable response to this would be the increase in workplace care and reasonable accommodation measures.

Table 1: Estimated number of prevalent HIV infections in Canada and associated ranges of uncertainty at the end of 2008 and 2005 (point estimates, ranges and percentages are rounded)[29]

	MSM	MSM – IDU	IDU	Heterosexual/ Non-endemic	Heterosexual/ Endemic	Other	Total
2008	31,330 (25,400-37,200)	2,030 (1,400-2,700)	11,180 (9,000-13,400)	10,710 (8,300-13,100)	9,250 (6,800-11,700)	500 (300-700)	65000 (54,000-76,000)
%	48%	3%	17%	17%	14%	1%	
2005	27,700 (22,400-33,000)	1,820 (1,200-2,400)	10,100 (8,100-12,100)	9,050 (7,000-11,100)	7,860 (5,800-9,900)	470 (280-660)	57,000 (47,000-67,000)
%	48%	3%	18%	16%	14%	1%	
MSM: men who have sex with men; IDU: persons who inject drugs; Heterosexual/non-endemic: heterosexual contact with a person who is either HIV-infected or at risk for HIV or heterosexual as the only identified risk; Heterosexual/endemic: origin in a country where HIV is endemic; Other: recipients of blood transfusion or clotting factor, perinatal and occupational transmission.							

1.3 Transmission and Pathophysiology of HIV

As seen above, there is a continuous global increase in the number of people living with HIV/AIDS. The discourse that naturally flows from this deals with the means via which the virus spreads and what can be done to stop it in its tract. Certain conditions must be fulfilled for HIV to be transmitted from one

[27] "HIV/AIDS in Canada," *Wikipedia, the free encyclopedia* (23 January 2010), online: Wikipedia <http://en.wikipedia.org/wiki/HIV/AIDS_in_Canada> (Accessed Friday, February 5, 2010).
[28] "HIV/AIDS and the World of Work," *supra* note 14 at 6 – 7.
[29] Culled from: "Estimates of HIV Prevalence and Incidence in Canada, 2008," *supra* note 20.

person to another. There must be an exit point for the virus out of an infected person and an entry point into the body of the uninfected person. In addition, the concentration of HIV virus in the body fluids of the infected person must be in sufficient quantity in order to have any significant impact on the uninfected person. This is important because interactions with body fluids containing trivial amounts of HIV virus might not lead to an infection. Though HIV is found in varying concentrations in body fluids such as blood, semen, vaginal fluid, breast milk, saliva, urine and tears, contact with saliva, tears or sweat has never been shown to result in the transmission of HIV.[30] Finally, the HIV virus must make its way into the bloodstream of the uninfected person in order for transmission to occur.

There are two major ways through which the HIV virus makes its way into the bloodstream of an uninfected person, these are sex and contact with contaminated blood. Sexual contact here includes vaginal and anal intercourse and oral sex involving the mouth and either the penis or vagina. Because there is a high concentration of the HIV virus in the blood, semen, vaginal fluids and lining of the genital area of an infected person, it is easy for the virus to be transmitted during sexual interaction. The HIV virus can be transmitted both in heterosexual and homosexual contacts.[31] The second major way through which the virus is

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[30] "HIV and Its Transmission," *CDC Fact Sheet* (July 2009), online: <http://www.cdc.gov/hiv/resources/factsheets/transmission.htm> (Accessed Thursday, February 25, 2010).

[31] It should however be noted that men who have sex with men continue to be the risk group most severely affected by HIV in Northern America. Indeed, HIV/AIDS was initially and briefly known as "gay-related infectious disease" (GRID). Additionally, statistics show that this is the only risk group in the U.S. in which the annual number of new HIV infections is increasing. See "HIV and AIDS among Gay and Bisexual Men," *CDC Fact Sheet* (August 2009), online: <http://www.cdc.gov/NCHHSTP/newsroom/docs/FastFacts-MSM-FINAL508COMP.pdf> (Accessed Monday, February 15, 2010). The same trend has not been shown to exist in some

transmitted is through contact with infected blood. This occurs mainly through transfusions of infected blood or blood clotting factors, the sharing of contaminated needles and/or syringes especially among injecting drug users, and the reuse of non-sterile and unreliable sterile syringes. In order of relevance, the bulk of HIV infections in North America are transmitted via homosexual coitus, injecting drug use, and heterosexual sex.[32] Relying on the last 2008 surveillance report,[33] sex accounts for about 78 per cent of all HIV transmissions in Canada.[34]

Apart from the above two ways, another form of HIV transmission is that which occurs between mother and child. Babies born to HIV-infected women may become infected before, during birth, or through breastfeeding after birth.[35] HIV can also be transmitted, to a lesser degree, through other means such as when un-

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parts of the world like some countries in Africa. For instance, in Nigeria, Female Sex Workers record the highest HIV prevalence rates. See "The National HIV/AIDS Behavior Change Communication Strategy 2009-2014," *The National Agency for the Control of AIDS (NACA)* (2008), at 104, online: <http://www.naca.gov.ng/index.php?option=com_docman&task=cat_view&gid=27&&Itemid=268> (Accessed Monday, February15, 2010).

[32] Amy Lansky, *et al.*, "HIV Behavioural Surveillance in the U.S.: A Conceptual Framework" (2007) 122 Public Health Reports, *HIV Behavioural Surveillance*, 16 – 23 at 18; It should however be noted that the biomedical facts are that the virus transmits many hundreds times faster through the blood than through heterosexual coitus: Correa Mariette & Gisselquist David, "Reconnaissance Assessment of Risks for HIV Transmission through Health Care and Cosmetic Services in India" (2006) 17:11 International Journal of STD & AIDS at 743-8.

[33] "Estimates of HIV Prevalence and Incidence in Canada, 2008," *supra* note 20.

[34] Due to the huge relevance sex plays in the transmission of HIV virus, it is sometimes categorized as a sexually transmitted disease. It has however been suggested that in some developing countries an important proportion of HIV infections could be from blood exposure. This conclusion is the result of a 2005 study carried out on sexual and blood exposures among people living with HIV/AIDS in four states in southern India – Tamil Nadu, Karnataka, Maharashtra and Goa. What makes the Indian situation seemingly different from the data produced from developed countries is that the lack of attention paid to non-sterile invasive healthcare and cosmetic services in India contrasts sharply with what's happening in developed countries: Correa Mariette & Gisselquist David, *supra* note 32; In China, though HIV infection began with injection drug users and in villages in rural Henan province that were involved in faulty plasma collection practices, there is a fear that it may now be spreading more to the general population mainly through heterosexual transmission: Giovanna Merli, et al., "Modeling the Spread of HIV/AIDS in China: The Role of Sexual Transmission" (2006) 60:1 Population Studies, 1 – 22 at 1.

[35] However, substantial progress has been made toward eliminating mother-to-child transmission. Thus such occurrences are presently few and far between: Amy Lansky, *et al.*, *supra* note 32 at 17.

sterilized tools are used to perform certain procedures like tattooing, body piercing and other cosmetic procedures.[36] HIV can however not be transmitted via kissing, sneezing, coughing, sharing of utensils, injecting with sterile needles and protected sex. HIV can also not be transmitted through insect bites such as mosquitoes.[37] But of more relevance to this paper is the fact that there is also no risk of HIV transmission through casual contact, including that which occurs between workers in the workplace.

HIV disease is a continuum of progressive damage to the immune system from the time of infection to the manifestation of severe immunologic damage by opportunistic infections (OI),[38] neoplasms, wasting, or low CD4 lymphocyte count that define AIDS.[39] After the HIV virus makes its way into the blood stream of a newly infected person, it attacks and slowly destroys the immune system by

[36] Another notable way through which HIV can be transmitted, especially in Sub-Saharan Africa is through circumcision and female genital mutilation (FGM). FGM is practiced in many countries, especially in Africa and parts of the Middle East, and at times tools are used on many individuals without any form of sterilization: Margaret Brady, "Female Genital Mutilation: Complications and Risk of HIV Transmission," (2009) 13 AIDS Patient Care and STDs No. 12 at 709-716.

[37] When a mosquito transmits a disease agent from one person to another, the infectious agent must remain alive inside the mosquito until transfer is completed. Studies with HIV clearly show that the virus responsible for the AIDS infection is regarded as food to the mosquito and is digested along with the blood meal. As a result, mosquitoes that ingest HIV-infected blood digest that blood within 1-2 days and completely destroy any virus particles that could potentially produce a new infection. Also, mosquitoes do not ingest enough HIV particles to transmit the virus by contamination: Wayne Cranes, "Why Mosquitoes Cannot Transmit AIDS" (1993) Rutgers Cooperative Extension Fact Sheet # FS736.

[38] Opportunistic Infections are diseases caused by an opportunistic organism. Opportunistic organisms are organisms that often exist in the body but cause no harm because the body's immune system and other natural defenses keep them under control. However, when the natural defenses are compromised, as usually happens when infected with the HIV virus, the organisms seize the "opportunity" to invade the tissues and cause disease. Except for deaths caused by AIDS-dementia complex and HIV wasting syndrome, it is not technically correct to say that a person has died of AIDS. Rather, the person has succumbed to one of the opportunistic diseases. See Benjamin Weeks & Edward Alcamo, *AIDS: The Biological Basis*, 5th ed. (Jones & Bartlett Publishers, 2009) at 94.

[39] Dennis H. Osmond, "Epidemiology of Disease Progression in HIV Infection: Incubation Period, AIDS Survival Time, Laboratory Markers, and Cofactors," in P. T. Cohen *et al.*, eds. *The AIDS Knowledge Base*, 3rd ed. (Philadelphia: Lippincott Williams & Wilkins, 1999) at 43

targeting the T-lymphocyte[40] of the immune system. More specifically, the host cells for HIV are the helper T-lymphocytes and the cytotoxic T-lymphocytes. Destruction of these cells, as determined by a T-lymphocyte count, points to impending symptoms, as they are the cells, which directly or indirectly, protect the body from invasion by certain bacteria, viruses, fungi and parasites.[41] These cells are also involved in the body's defense and influence the development and function of scavenger cells in the immune system. As HIV continues to replicate itself, the destruction of T-lymphocytes goes on methodically and inexorably. As soon as the count of helper T-lymphocytes drops below 100 cells per microliter of blood, the crippling of the immune system is virtually complete.[42] When the immune system is crippled, an infected person is most likely to experience a set of symptoms usually referred to as AIDS-Indicator Conditions.[43]

The incubation period for AIDS is estimated to be about 10 years. Before then, the HIV virus goes through various stages of progression. Various efforts have been made at classifying the progressive stages of HIV infection. According to the Centers for Disease Control (CDC), the progression of HIV disease can be broadly divided into four stages:[44]

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[40] Also called T cells, T-lymphocytes are a type of leukocyte (white blood cell) that is an essential part of the immune system. T cells are one of two primary types of lymphocytes – B cells being the second type – that determines the specificity of immune response to antigens (foreign substances in the body. The abbreviation T, in T cell, stands for thymus, since this is the principal organ responsible for the T cell's maturity. "T cell," *Encyclopædia Britannica* (2010), online: Encyclopædia Britannica <http://www.britannica.com/EBchecked/topic/579428/T-cell> (Accessed Saturday, January 30, 2010).

[41] Benjamin Weeks & Edward Alcamo, *supra* note 38 at 116.

[42] *Ibid.* at 101.

[43] This simply means symptomatic HIV disease that usually occurs at the middle stage of the disease. It is characterised by fever with generalized lymphadenopathy, diarrhea, weight loss, minor opportunistic infections and cytopenias.

[44] "1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS among Adolescents and Adults," *Centers for Disease Control and Prevention* (1992) 41 Morbidity and Mortality Wkly Report at 1-19.

(i) *Stage One*. This is the stage of acute primary infection. The symptoms of HIV infection at this stage may last a few weeks or up to 6 months.

(ii) *Stage Two*. There are few or no visible symptoms at this stage making it an asymptomatic infection stage. However, minor laboratory abnormalities may be detected, but immune-deficiency-related infections or cancers are not present.

(iii) *Stage Three*. This symptomatic infection stage consists of persistent generalized lymphadenopathy and is synonymous with AIDS-Indicator Conditions. The lymphadenopathy lasts for six months or more and occurs in two or more areas of the body, excluding the groin area.

(iv) *Stage Four*. This is the point at which the patient begins experiencing symptoms from immunodeficiency because of the continuing loss of T-lymphocytes.[45]

The last of the above four stages usually ushers in AIDS. A person is said to have AIDS when the symptoms of ARC are severe and accompanied with opportunistic infections and/or a wasting phenomenon.[46] However, a person may

[45] Another notable classification of the stages of HIV infection is the system developed by the Walter Reed Army Medical Center. The Walter Reed Staging Classification for HIV Infection is based on current concepts of the immunopathogenesis of AIDS and attempts to provide an objective scale of the progression of the disease (HIV infection to AIDS). The Walter Reed stages are defined according to virologic/serologic evidence of HIV infection, CD4 +T-helper lymphocyte subset depletion, loss of cutaneous delayed hypersensitivity, and appearance of opportunistic infections. See generally: Daniel Stein, *et al.*, "Immune-Based Therapeutics: Scientific Rationale and the Promising Approaches to the Treatment of the Human Immunodeficiency Virus-Infected Individual," 17 *Clinical Infectious Diseases* (University of Chicago Press, 1993) No. 4 at 749-771. *Contra* Rachel Royce *et al*., "The Natural History of HIV-1 Infection: Staging Classifications of Disease," 5 *AIDS* (1991) at 355–364, cited in P. T. Cohen *et al.*, eds. *supra* note 39 at 5.

[46] For some patients, the diarrhea associated with AIDS can be so profound that a condition called HIV wasting syndrome ensues. Wasting syndrome is defined as involuntary weight loss of 10% of baseline body weight plus either chronic diarrhea (two loose stools per day for more than 30 days) or chronic weakness and documented fever (for 30 days or more, intermittent or constant) in the absence of a concurrent illness or condition other than HIV infection that would explain

have HIV but never manifest the actual syndrome of AIDS. The above classification is important in dealing with reasonable accommodation issues as the form of accommodation required by an infected person would depend on the stage of viral progression being dealt with. A person at the initial stage of viral infection would not need as much workplace restructuring as one who has started experiencing symptoms of immunodeficiency. This is because the impact of the virus on the body of the infected individual is minimal at the initial stage. However, the level of care needed increases as the disease progresses and the health and physical condition of the infected person deteriorates. Classification is also relevant in establishing workplace safety precautions in order to protect other workers from possible workplace transmission.[47] This can be achieved through the provision of preventive tools and a safe working system.

1.4 The Physiological Impact of HIV/AIDS

HIV/AIDS is a multifaceted disease affecting every aspect of the life of its host. Apart from compromising the immune system, the virus also influences the physiological and psychological wellbeing of the infected individual. The impact of the virus however varies from one individual to another, making each HIV/AIDS situation as unique as the people involved.[48] This factor makes the management of the disease and the care for those infected with the virus

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the findings. It is usually caused by low food intake, poor nutrition absorption and altered metabolism. Webster's New World Medical Dictionary, 3rd ed. (John Wiley & Sons, Inc., 2008) s.v. "wasting phenomenon"

[47] It should however be noted that the preponderance of scientific evidence conclusively shows that it is virtually impossible for HIV to be transmitted in most work environment through everyday work activities: Gerald O'Brien & Mara Koerkenmeier, "Persons with HIV/AIDS in the Workplace: Implications for Employee Assistance Professionals" (2001) 16:3 Employee Assistance Quarterly at 14.

[48] Sarah Watstein & Karen Chandler, *The AIDS Dictionary* (New York: Facts on File, 1998) at 226.

somewhat taxing. Adding to the above complexity is the fact that after infection, the disease goes through a series of transformations, each stage having its own symptoms and effects on the body. For instance, while symptoms such as fever, headache, fatigue, and swelling in the lymph nodes, particularly those in the neck and groin characterize the initial stages of infection, they are present for a short while and vary substantially from the latter symptoms of the disease, especially when accompanied by opportunistic infections. Thus, the type of care needed changes along with the symptoms.

Though varied in its nature and effects, the major symptoms noticeable with infected people include, but are not limited to, rapid onset of headache, weight loss, intermittent fever, malaise, extreme fatigue, chronic diarrhea, leucopenia, anemia, constantly enlarged lymph nodes, oral thrush and skin rash. Other symptoms include paresthesia, vascular complications,[49] encephalopathy with seizures, sensory or gait deficits, progressive dementia, painful and stiff joints, vision problems, and constantly contracting bacterial, fungal, and viral infections. By far, the biggest concern for infected people is the HIV wasting syndrome, which is usually accompanied by either chronic diarrhea lasting up to 30 days or chronic weakness and fever lasting up to 30 days. The syndrome usually leads to the loss of muscle as well as fat, and once lost, the weight is difficult to regain. This leads to constant fatigue which makes physical activities stressful and hard and increases the need for frequent rest.

[49] This usually comes in the form of nonbacterial endocarditis, usually with neoplasm or severe infection. This can produce transient ischemic attacks and focal ischemic stokes.

The above symptoms could be reduced by the use of highly active antiretroviral therapy (HAART).[50] However, the use of HAART drugs is in some cases accompanied by side effects especially during the first few weeks of treatment with a new medication. The major side effects include loss of appetite, hair loss, anxiety, nausea, fatigue, headaches, mental problems, depression, nervousness, dizziness, insomnia and nightmares.[51] Thus, HAART regimens also have the ability to further diminish rather than enhance the quality of life of persons living with HIV/AIDS. The difficulty in tolerating medication or following frequent and complex dosing schedules may interfere with activities of daily life. Meal times, travel, work or leisure activities often need to be carefully coordinated with times when various pills must be taken or when side effects are least likely to impair functioning. Recent research with persons taking these regimens suggests that many patients are very concerned that medication taking has too much become a central focus of their lives.[52] When this is considered together with the stress they pass through due to the changes in their physical

[50] This is the term used to refer to the combined taking of several, typically three or four, antiretroviral drugs. Antiretroviral drugs are medications for the treatment of infection by retroviruses, primarily HIV. Due to the fast rate at which the HIV virus replicates itself, combinations of antiretrovirals create multiple obstacles to HIV replication to keep the number of offspring low and reduce the possibility of a superior mutation. If a mutation that conveys resistance to one of the drugs being taken arises, the other drugs continue to suppress reproduction of that mutation.

[51] RonniLyn Pustil, ed., "A Practical Guide to HIV Drug Side-Effects for People Living with HIV/AIDS," *Canadian AIDS Treatment Information Exchange (CATIE)* (2002) 1st ed., at 39, online: <http://img.thebody.com/catie/pdfs/side_effects.pdf#page=39> (Accessed Monday, March 8, 2010).

[52] Valerie Stone *et al.*, "HIV/AIDS Patients' Perspectives on Adhering to Regimens Containing Protease Inhibitors," (1998) 13 J Gen Intern Med. 586-593; cited in Sheryl Catz & Jeffrey Kelly, "Living with HIV Disease," in Andrew Baum, Tracey Revenson & Jerome Singer, eds., *Handbook of Health Psychology* (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2001) at 843.

bodies, self-images, personal and job relationships, the effect might be catastrophic.[53]

Because of the above transformations, the behavior of people living with HIV/AIDS may change. They may become withdrawn, aggressive, and rude to colleagues and friends. Such attitudes may increase in instances where the infected person feels victimized. Infected people can also experience a decrease in self-esteem, as they are no longer confident in themselves or what they can achieve.[54] This lack of confidence is further increased by the feeling of being dependent on others. The dependency occurs when the infected person must rely heavily on family and friends for emotional and financial support, particularly when they have to apply for social services assistance. The final aspect of dependence is the fear of a protracted illness that will drain the family and friends both financially and emotionally.[55] The sum total of the above is that the well-being of the infected individual is compromised. It is thus important that support be made readily available to them. An effective form of support is the provision of reasonable accommodations in the workplace to help cushion the various negative effects the disease has on them.

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[53] Cathleen Bezuidenhoudt, *et al.*, "The Psychological Impact of HIV/AIDS: People are More Than Statistics" (January 2006) Future Leaders Summit on HIV/AIDS at 18, online: <http://org.elon.edu/summit/essays/essay4.pdf> (Accessed Monday, 8 April 2010).

[54] *Ibid.*

[55] Sarah Watstein & Karen Chandler, *supra* note 48 at 227.

PART II

ACCOMMODATING HIV AND AIDS IN THE WORKPLACE

2.1 The Relationship between HIV, AIDS and the Workplace

HIV and AIDS have made an impact on every sector of the society, be it trade and commerce, science and technology, family, health care, environment, education, religion or industry. However, it has one of its strongest influences in the work environment, creating a real, dynamic and complex relationship between HIV/AIDS and the world of work. A major reason for this connection is that the highest prevalence estimates of HIV and AIDS are recorded among the working-age population, which ranges between 15 and 49 years.[56] Put more succinctly, the vast majority of persons infected with HIV/AIDS are within the working age bracket. This could be best illustrated using the 2009 figures. Out of the 33.4 million persons living with HIV in 2009, about 31.3 million were adults of working age.[57] What this means is that about nine out of ten people living with HIV and AIDS belong to the working age group.[58] The above analysis makes a compelling case for the provision of reasonable accommodation for this large group of persons in order to enable them to function effectively in their life-enhancing activities.

Until recently, the usual response of people living with HIV/AIDS in the workplace was to quit their jobs due to very many reasons ranging from fatigue to

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[56] "HIV/AIDS and the World of Work," *International Labour Conference*, Report IV (1), 98th Session, (Geneva, 2009), at 6-7.
[57] "UNAIDS & WHO AIDS Epidemic Update,*" supra* note 15.
[58] Juan Somavia, Director General of the ILO, Statement for World AIDS Day 2005, in "HIV/AIDS and the Workplace" International Labour Organization Statement, online: <http://www.ilocarib.org.tt/portal/index.php?option=com_content&task=view&id=1111&Itemid=990> (Accessed Thursday, April 08, 2010).

high stress levels, complications arising from medications and lack of tolerance or support from their supervisors and colleagues. However, recent years have witnessed an increase in the number of HIV-infected workers within the workforce. This change in attitude is brought about mainly by the increased capacity of the medical community to fight the progression of HIV-related diseases via the use of HAART and other therapies.[59] Infected persons are on average living longer than was previously the case and are more likely to remain within the workplace for extended periods of time.[60] Additionally, some persons living with HIV who initially quit their jobs because of their failing health are now interested in reentering the workplace because the new drug regimens have helped them to recover to a healthier state.[61] Many HIV-positive people are returning to the workforce and staying productive. With such huge numbers, not only is it difficult to ignore the impact the virus has on the workplace, it is also easy to see that the workplace has to be at the forefront of any HIV/AIDS-oriented program or policy if the same is to record any significant success.

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[59] Gerald O'Brien & Mara Koerkenmeier, *supra* note 47 at 12.

[60] The HIV virus slowly attacks and destroys the body's defenses leading to fatigue and other infections which disable infected persons from performing their functions effectively. The recent method of combining antiretrovirals fights against this by frustrating the replication of the HIV virus and prevents superior mutation. The resultant suppression in viral load ensures that infected persons are able to go about their daily activities and stay productive at work. See Jane Simoni, Hyacinth Mason, & Marks Gary, "Disclosing HIV Status and Sexual Orientation to Employees" (1997) 9:5 *AIDS Care* at 589 – 599.

[61] Jay Greene, "Employers Learn to Live with AIDS" (1998) 43:2 HR Magazine at 96-101, online: <http://findarticles.com/p/articles/mi_m3495/is_n2_v43/ai_20365901/?tag=content;col1> (Accessed Thursday, 11 March 2010); The interest in returning to the workplace is however met with some obstacles mainly in the form of disability policies, public insurance and the competitive nature of the present workforce: Fred McGinn, Jacqueline Gahagan & Elaine Gibson, "Back to Work: Vocational Issues and Strategies for Canadians Living with HIV/AIDS" (2005) 25:2 Work: A Journal of Prevention, Assessment & Rehabilitation at 163-71; Brent Braveman *et al.*, "HIV/AIDS and Return to Work: A Literature Review One-Decade Post-Introduction of Combination Therapy (HAART)" (2006) 27:3 Work: A Journal of Prevention, Assessment & Rehabilitation at 295-303.

However, the complex nature of the relationship that exists between HIV/AIDS and the workplace cannot be appreciated by a simple analysis of the above figures. There is also the need to have a firm grasp of the potential effects the HIV virus could have on both the workplace and uninfected workers. It is the fear of these impacts that lead to the exclusion of people living with HIV/AIDS from the workplace. If not properly managed, having people with HIV and AIDS as part of a workforce could raise the cost of doing business and have a bearing on growth in the quantity and quality of labour supply. An increase in the cost of doing business could be brought about by many factors including the reduction in productivity, excessive absenteeism, increased labor turnover, loss of experienced personnel, loss of skill, increased vacancy rate until replacement is hired, greater recruitment and training and retraining costs. Other factors include the decline in workers' morale, deterioration of labor relations, health and safety concerns, and increased company health care and death benefits costs. Also of great significance is the indirect costs occasioned by HIV/AIDS due to premature mortality, which depletes the pool of trained and skilled workers.[62] These all translate into increase in cost and decline in profits and productivity.

The severity of the above impacts is better appreciated when we consider the effects they are having on companies in countries with high prevalence rate of HIV infections. For instance, six corporations in South Africa and Botswana were

[62] Colin Dodds *et al*., "The Cost of HIV/AIDS in Canada" (2001) Glen Haven, NS: GPI Atlantic, Genuine Progress Index for Atlantic Canada, online: <http://www.gpiatlantic.org/pdf/health/costofaids.pdf> (Accessed Thursday, 11 March 2010). In Canada, the loss in "human capital stock" due to HIV/AIDS is greater than any other cause of death, including car accidents, suicide, stroke and heart attack, because it claims its victims at a younger age: Robin Hanvelt *et al.*, "Indirect Cost of HIV/AIDS Mortality in Canada" (1994) 8:10 AIDS: Official Journal of the International AIDS Society at F7-1358.

the subject of a 2001 study aimed at calculating the financial impact of the HIV epidemic on companies.[63] The study found that "AIDS tax" was as much as 5.9 percent of the corporations' total labour cost. The term "AIDS tax" as used here describes factors such as increased medical costs, decreased productivity, and other costs associated with HIV/AIDS in the workforce. As the immune system of persons infected with HIV/AIDS become increasingly compromised, they fall victim to more infections, take more sick days and longer disability leaves, and are increasingly unable to work. With similar results achieved in several other companies, it is no doubt that HIV/AIDS is a serious threat to the economic productivity and profitability of countries with high infection rates as well as to the global economy. As it is widely accepted, the HIV/AIDS epidemic is still largely in front of us and not behind us.[64] Thus, if the prevalence rate of the disease continues to rise, these effects might become noticeable in companies world over.[65]

Apart from the possible business impact, there is also the fear that the HIV virus could be transmitted from infected workers to the uninfected members of the workforce. These fears are however without merit as employing or working with a person with HIV does not put uninfected employees at any more risk of contracting the virus than they would normally be exposed to in the work

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[63] Sydney Rosen, *et al*., "AIDS is Your Business" (2003) 81:1 Harvard Business Review, online: <http://hbswk.hbs.edu/archive/3338.html> (Accessed Wednesday, March 17, 2010).

[64] Catherine Hankins, Margaret Handley & Sylvie Gauthier, "Towards an HIV/AIDS Research Agenda for the 1990s" (1992), A Background Discussion Paper, in *Canadian Association for HIV Research.*

[65] This also applies to Canada as the epidemic continues to evolve in unforeseen and frightening ways. As reported recently, the epidemic in Canada remains severe and deeply troublesome and a lot more effort needs to be put into curbing its spread in order to avoid negative future implications. See "The Global Epidemic," *supra* note 19; "Canada's Report on HIV/AIDS 2002" *Public Health Agency of Canada*, online: <http://www.phac-aspc.gc.ca/aids-sida/publication/reports/report02/index-eng.php> (Accessed Saturday, July 10, 2010).

environment.[66] The preponderance of scientific evidence conclusively shows that it is virtually impossible for HIV to be transmitted in most work environments through everyday work activities.[67] Apart from the fact that the HIV virus is quite fragile and dies quickly when outside the body, there must also be an exchange in bodily fluids for the virus to be transmitted from one individual to another. This exchange is not a usual characteristic of everyday jobs. In addition, usual workplace interactions such as handshakes, hugs and casual touching and close working conditions do not increase the chances of getting infected. The HIV virus is also not transmitted by sharing telephones, office equipment, or furniture, sinks, toilets, showers, dishes, utensils, food, water, or by sneezing or coughing and thus poses a lesser risk in the workplace compared to other forms of occupational diseases.[68] The risk of HIV transmission only exists in settings where there is the possibility of blood contact. This occurs mainly in the medical field in places such as hospitals or emergency services. Moreover, in such settings, the risk of HIV transmission is extremely small.[69]

In Canada, there have been only two documented probable cases, and one definite case, of occupational transmission of HIV since the inception of the AIDS

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[66] Linda Robinson, HIV Clinical Pharmacy Specialist with the Windsor Region Hospital and chair of the Ontario HIV Pharmacist Professional Specialty Group (as she was then); cited in "One Life. HIV and AIDS in the Workplace" (2008) Benefits Canada, Bristol-Myers Squibb Canada, at 5, online: <http://www.benefitscanada.com/pdfs/bc_hivaids_en_0908.pdf> (Accessed Tuesday, 23 March 2010).

[67] Gerald O'Brien & Mara Koerkenmeier, *supra* note 47 at 14.

[68] The risk of infection after exposure to HIV infected blood is about 0.3%, whereas it is estimated to be up to 100 times greater for HBV (Hepatitis B Virus) (30%) and may be between 3 and 10% for HCV (Hepatitis C Virus): Julie Louise Gerberding, "Management of Occupational Exposure to Blood Borne Viruses" (1995) 332 N Engl J Med at 444-51; Vincenzo Puro, Nicola Petrosillo & Giuseppe Ippolito, "Risk of Hepatitis C Seroconversion After Occupational Exposures in health Care Workers," (1995) 23 Am J Infect Control at 273-77

[69] Jeff Mello, "Prevalent Employer Discriminatory Behaviors toward Employees with HIV and the Likely Impact of the ADA" (1994) 45 Labor Law Journal at 323-337; Gerald O'Brien, "Employer Defenses to Discriminatory Actions against Persons with HIV/AIDS" (1995) 11:1 Journal of Job Placement at 37 – 41.

epidemic.[70] These cases involved significant exposures to fluids containing high concentrations of HIV. The definite case involved a health care provider in Lower Mainland, British Columbia, who was caring for a person with advanced HIV disease. The provider was not wearing gloves and sustained a shallow puncture wound from a small gauge needle. There was a small amount of blood at the wound site. Two and a half weeks later, the provider experienced acute retroviral syndrome (ARS) and was HIV-positive.[71] It should however be noted that not all needle stick injuries lead to infection. In fact, of the more than 1,000 needle stick injuries recorded in B.C. in the preceding 5 years, this is the first reported seroconversion.[72] Where the necessary safeguards are put in place in line with laid down standards and best practices, there should be little fear of transmission even in occupations that involve exposure to blood. For instance, the risk would have been greatly reduced in the above case if the health care provider was wearing gloves. Thus, few employers can successfully defend discrimination on the

[70] "Forced HIV Testing," (November 2007) Canadian HIV/AIDS Legal Network, online: <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1258> (Accessed Thursday, 11 March 2010).

[71] "Protocols Help Protect against Getting HIV — But You Have to Use Them" [an editorial comment], British Columbia Centre for Excellence in HIV/AIDS, *Canada Communicable Diseases Report* 1996; 22(7) at 54–59, online: <http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/96vol22/dr2207ec.html> (Accessed Thursday, 11 March 2010). The other reported probable cases of workplace-related HIV transmission in Canada have been attributed to possible occupational transmission, both involving laboratory workers. The first case was a biochemist in Ontario who was diagnosed with AIDS in 1990 and whose only risk factor for HIV was work in the early 1980s with blood that was probably contaminated with HIV. The second case involved a laboratory technician in Quebec diagnosed with HIV infection in the early 1990s and whose only known risk factor was possible exposure to cultured virus during research activities; this case is still under investigation. Although in both cases there were numerous instances where transmission could have occurred, in neither case was a specific incident identified.

[72] *Ibid.*

grounds of the threat of transmission posed by a person with HIV.[73] Rather, a case can be made for the implementation of reasonable accommodation measures that would help erase the possibility of workplace transmissions.

Due to the many negative effects HIV and AIDS could potentially have on the workplace and the misconceptions that flow there from, people living with HIV/AIDS are often faced with a lot of resistance in the workplace. These resistance may be overt (e.g., refusing employment based on HIV status, breach of privacy rights, viral test as condition precedent for job placement, inadequate health coverage) or more subtle (e.g., stigmatization and lack of reasonable accommodation measures). According to the ILO, AIDS is threatening fundamental rights in the world of work. From non-discrimination in employment, to poverty reduction through access to work, AIDS jeopardizes fundamental ILO principles of social justice and equality, as well as decent and productive work in conditions of freedom, equality, security and human dignity.[74] Though HIV/AIDS-related discrimination in employment is formally condemned world over, discrimination and stigmatization are still an enduring feature of labour markets everywhere in the world.[75] One such form of discrimination is the refusal to establish workplace measures geared towards the accommodation of employees infected with the HIV virus, i.e., the total disregard for reasonable

[73] This view has been expressly put forward by some US courts. See the cases of *School Board of Nassau County, Florida. v. Arline*, 480 U.S. 237 (1987) and *Chalk v. U.S. District Court Central District of California*, 840 F.2d 701 (9th Cir. 1988).

[74] "HIV/AIDS and the Fundamental Rights at Work," ILO Global Programme on HIV/AIDS and the World of Work (ILO/AIDS) (June 2001), online: <http://www.ilo.org/public/english/region/asro/newdelhi/download/publ/hivaids/rights.pdf> (Accessed Thursday, April 08, 2010).

[75] Tomei Manuela, "Discrimination and Equality at work: A Review of the Concepts," (2003) 142 International Labour Review at 401.

accommodation principles. The remaining of this chapter shall be spent talking about these principles and how they apply to HIV/AIDS cases.

2.2 HIV, AIDS and the Principle of Reasonable Accommodation

Reasonable accommodation refers to any change or adjustment made to a job or work environment or in the way things are customarily done so as to permit a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of the job, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability.[76] Reasonable accommodation involves one of three things:

(1) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(2) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(3) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.[77]

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[76] Deborah Kearney, *Reasonable Accommodations: Job Descriptions in the Age of ADA, OSHA, and Workers' Comp*. (New York: Van Nostrand Reinhold, 1994) at 11.

[77] U.S. Code of Federal Regulations, Title 29, Vol. 4, Part 1630 (Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act), Sec. 1630.2(o), Revised as of July 1, 2001, online: <http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=29&PART=1630&SECTION=2&YEAR=2001&TYPE=TEXT> (Accessed Tuesday, 30 March 2010)

Making reasonable accommodation adjustments might require the employer to alter, change, vary, adapt, or modify discriminatory workplace standards in order to fit the present and future needs of the workforce.[78] The provided accommodation is not meant to change the essential functions of the job. It only mandates the employer to make reasonable alterations, structural and otherwise, to the workplace in order to accommodate disabled members of his workforce. The central purpose of this duty is to promote, within the bounds of reason, the ability of individuals to participate fairly and equally in the workplace through the elimination of the discriminatory effects of workplace standards[79] and the eradication of systematic discrimination. The duty to accommodate applies to both existing and future employees who have disabilities. It is a fundamentally important aspect of human rights legislations and an integral part of the right to equality in the workplace. As stated by the Canadian Supreme Court in *Commission scolaire régionale de Chambly v. Bergevin*,[80] if the aims of human rights legislations are to be fulfilled, an employer must take reasonable steps to accommodate those employees that are adversely affected by the employment rules. Anything less defeats the purpose of such legislation and makes it a hollow enactment of little value in the workplace.[81] The requirements of reasonable accommodation are essential if there is to be a true equality and fairness in the workplace.

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[78] Kevin MacNeill, *The Duty to Accommodate in Employment*, Release No. 12 (Canada Law Book Inc., 2009), Part 1 at I-1
[79] *Ibid.*
[80] *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525 at 544 [*Bergevin*].
[81] *Ibid.*

The concept of reasonable accommodation arose as a means of treating discriminatory regulations and rules not discriminatory on their face but which have discriminatory effects, sometimes termed adverse effect discrimination.[82] This implied duty to accommodate originated under American jurisprudence, especially in cases concerning Title VII (Equal Employment Opportunity) of the *Civil Rights Act* of 1964.[83] Novel concepts of the duty to provide reasonable accommodation could be distilled from early judicial pronouncements in cases such as *Griggs v. Duke Power Co.*,[84] where the Court held that the absence of discriminatory intent did not redeem employment practices that are fair in form but discriminatory in impact.[85] Thus, a special obligation was placed on employers to do something affirmative to accommodate an individual's disability.[86] Though the duty to provide reasonable accommodation began with regard to religious discrimination, it has now been expanded to cover other forms of discrimination.

Globally, many jurisdictions now have rules dealing with reasonable accommodation of disabled persons in various sectors of society. In Canada, the laws governing the provision of reasonable accommodation were borrowed from American jurisprudence.[87] Though there are slight differences between the duties under both jurisdictions, the duty to accommodate under human rights legislations

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[82] *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd*., [1985] 2 S.C.R. 536 at 550 [*Simpson-Sears*].

[83] Pub. L. 88-352, 78 Stat. 241, July 2, 1964; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 at 522 [*Central Alberta Dairy Pool*].

[84] *Griggs v. Duke Power Co.*, [1976] 401 U.S. 424 [*Griggs*]; *Dewey v. Reynolds Metals Co.*, [1971] 402 U.S. 689 [*Dewey*].

[85] Sally Brandes, "Religious Discrimination in Employment – The Undoing of Title VII's Reasonable Accommodation Standard" (1977 – 1978) 44 Brook. L. Rev. at 599.

[86] Raymond Noe *et al.*, (ed.), *Human Resource Management: Gaining a Competitive Advantage*, 3rd ed. (Boston, MA: McGraw-Hill, Irwin, 1999) at 91.

[87] *Simpson-Sears*, *supra* note 82 at 550; *Central Alberta Dairy Pool*, *supra* note 83 at 505 & 522.

in the United States and Canada are similar. There are presently various sources of this duty to accommodate under Canadian law, however, the principal source remains human rights legislations which are interpreted and applied by human rights tribunals and boards of inquiry. Labour arbitrators and human rights tribunals have also penned a considerable amount of jurisprudence concerning the duty to accommodate.[88] Traces of the duty can also be found in other legislations such as the *Employment Equity Act*[89] and the *Ontario Police Services Act*.[90] The duty to accommodate takes on many forms, depending on the particular type of disability to be addressed and the facility to which access is sought.[91] Also contributing to this diversity is the fact that the duty is a subjective one and the specific needs of each individual have to be considered in order to tailor an accommodation that would suit his or her needs.

The subjective test is also used to quantify the adequacy of the accommodation made.[92] In HIV/AIDS-related accommodation, there is need to consider the effects of the virus and medication on the employee in order to determine the sufficiency of a proffered accommodation. Risk is also a paramount factor that has to shape any such accommodation in order to ensure that health

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[88] Kevin MacNeill, *supra* note 78, Part 1 at I-1; See for instance the case of *Thwaites* (*supra* note 4) where the importance of searching for reasonable alternatives or accommodating individuals with disabilities were stated; See also *Re Canadian Safeway* [2000], 89 L.A.C. (4th) 312 (Sims), *Willoughby v. Canada Post Corp*. [2007] C.H.R.D. No. 44.

[89] S.C., 1995, c. 44.

[90] R.S.O. 1990, c. P.15; see section 47.

[91] Several conditions have been regarded as disabilities by the courts, human rights tribunals and labour arbitration boards in Canada. These include HIV/AIDS (*Thwaites* supra note 4); depression (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 [*Berg*]); obesity (*Royal v. Dalgliesh*, [2000] 37 C.H.R.R. D/178 (B.C.C.H.R.) [*Royal*]); drug dependence (*Canadian Civil Liberties Association v. Toronto Dominion Bank*, [1998] 32 C.H.R.R. D/373 (F.C.A.) [*Toronto Dominion Bank*]); stress (*Re Sault Area Hospitals*, [2001] 94 L.A.C. (4TH) 230); et cetera.

[92] See *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241 [*Eaton*].

and safety measures are not compromised. Thus, accommodations should be such that eliminate any possible risk of transmission to other employees, even though in practice, such risks are more in theoretical than real. Another common factor that underlies the nature of HIV-related workplace accommodation is that the need for such accommodation is not always an immediate one. As stated by *Bill MacDonald*, an individual can be HIV positive for many years before showing any effects of the disease and consequently a person could continue working for a long time without any adjustment in his or her working conditions.[93] However, as the disease progresses, the need to provide accommodation in the workplace would arise. The duty here would be a continuous one that has to be modified as the disease progresses until the individual reaches a state of total incapacity, if ever.

Though the duty to accommodate was initially developed in order to accommodate religious differences, the duty is now constantly invoked to address general workplace disability issues. Through the various rules expounded under the principle, individuals who had hitherto been excluded from equal participation in the workplace are now able to stay longer at work and maximize their potentials. The duty to accommodate however only comes to the aid of otherwise qualified individuals who are unable to perform the essential functions of their jobs. In order to constitute an essential function, the duties should be an integral aspect of the position that employees in that position actually perform on a regular

[93] Bill MacDonald, "AIDS in the Workplace: Edmonton Demonstration Project" (1994) 3 Health L. Rev. No. 2 at 12.

basis.[94] In addition, People with a disability have the right to have their individual needs accommodated, up to the point of undue hardship, in order to allow them to perform the essential duties of their job.

This leads us to a general qualification applicable to the duty to accommodate in the workplace, i.e., that the employer is obligated to accommodate the disabled employee up to the point of "undue hardship."[95] The employer is required to take every possible step to ensure that the accommodation needs of the employee are met, short of undue hardship to him and his establishment. What this means is that an otherwise qualified individual with HIV/AIDS would not be protected by anti discrimination laws if the accommodations that the employee requires in order to perform his/her essential duties place undue hardship on the employer. There are various illustrations of what would be deemed unreasonable for an employer to do in his bid to accommodate an employee living with HIV/AIDS. There are however, no all-encompassing rules that cover every conceivable situation. The employer has to consider many factors, including the prevailing workplace policies and the needs of the employee, some of which have received legislative attention.

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[94] Gerald O'Brien & Mara Koerkenmeier, *supra* note 47 at 19; Due to the progressive nature of HIV/AIDS, the health of the infected individual may decline at a slow rate. Because of this, the employee's productivity may gradually diminish over time. Thus, it may be extremely difficult for employers to pinpoint the exact moment in time when an employee with HIV/AIDS is no longer able to perform his/her essential functions, even with the provision of necessary accommodations.

[95] Michael Lynk, "Disability and the Duty to Accommodate in the Canadian workplace" (2008) online: http://www.ofl.ca/uploads/library/disability_issues/ACCOMMODATION.pdf (Accessed Thursday 25 March 2010); "Undue hardship" in this context could be defined as any measure undertaken by an employer to accommodate a disabled employee that would be excessively costly, extensive, substantial, or disruptive, or would fundamentally alter the nature or operation of a business. In *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 S.C.R. 650, Canada's Supreme Court stated that undue hardship "implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate." See para. 122.

The rule against undue hardship to the employer is expressly provided for in most Canadian human rights legislations, both federal and provincial, or inferred by the courts.[96] Some factors that have been viewed as potential source of undue hardship to the employer include financial cost, disruption of a collective agreement, problems of morale of other employees,[97] interchangeability of workforce and facilities, safety[98] and the size of the employer's operation.[99] Financial cost is an important factor that is always taken into consideration in determining whether undue hardship would result from accommodating a person with a disability. This is because an establishment cannot be suffered to run at a loss in its bid to accommodate employees. As stated in *Thwaites*, an employer would not be able to rely on undue hardship unless it would be forced to take action requiring significant difficulty or expense that would clearly place upon the business enterprise an undue economic administrative burden.[100] The *Canadian Human Rights Act* mentions three grounds, health, safety and cost, as the grounds

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[96] See section 15(2), *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [CHRA]; section 17, *Ontario Human Rights Code*, R.S.O. 1980, c. 340 [repealed and superseded by *Human Rights Code*, S.O. 1981, c. 53] [HRC].

[97] *Sopinka J.* in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 [*Renaud*] stated at 988 that employee morale is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based on attitudes inconsistent with human rights are an irrelevant consideration.

[98] It was once thought that an employer, relying on safety reasons, could establish a BFOR by merely showing that the employment of such in individuals would result in a marginal increase of risk to public safety: *Bhinder v. Canadian National Railway Co*. [1985] 2 S.C.R. 561 [Bhinder]. However, it is now clear that the standard that the employer must meet is that the group of persons in question excluded by the employment practice will present a "sufficient risk of employee failure": *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202 at 210 [*Etobicoke*]; *Central Alberta Dairy Pool*, *supra* note 83 at 513.

[99] *Central Alberta Dairy Pool*, *supra* note 27; In all cases, as *Cory J.* noted in *Bergevin*, *supra* at 24 at 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case."

[100] *Thwaites*, *supra* note 4.

that could lead to undue hardship.[101] It is doubtful that the courts would be constrained by the above limitation as new developments that can only be remedied by other grounds emerge.

Overall, it is not possible to lay down specific rules as to what constitutes undue hardship in HIV/AIDS-related cases. The facts of each case would have to be considered on its own merits. The degree to which each of the above factors could lead to undue hardship to the employer varies. It is not a one-size-fits-all remedy. In every situation, the burden is on the employer to show that he acted bona fide and in the interest of the employee, the business and the general workforce.[102] Some decided cases state that the employer must show that his attempts to accommodate were serious,[103] conscientious,[104] genuine[105] and demonstrate its best efforts.[106] The law looks beyond the actual acts of the employer to the efforts that fuel his actions. The courts would try to find out if based on all the available facts and the surrounding circumstances, the employer could be said to have tried his reasonable best.

In making accommodations, the employer is required to do more than simply investigate whether any existing job would suit the needs of the disabled employee. He is expected to determine whether other positions in the workplace are suitable for the employee or whether existing positions can be adjusted,

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[101] Section 15(2).
[102] Thomas Brierton, "'Reasonable Accommodation' under Title VII: Is it Reasonable to the Religious Employee?" (2002) 42 Cath. Law. 165 at 168.
[103] *Krznaric v. Timmins Police Services Board*, [1997] 98 C.L.L.C. 230-004 (Ont. Div. Ct.) [*Krznaric*].
[104] *CUPW v. Canada Post Corp.*, [1997] 6 Lancaster's Equity and Accommodation Reporter 5 [*CUPW*].
[105] *Holmes v. Attorney-General of Canada*, [1997], 97 C.L.L.C. 230-022 (F.C.T.D.) [*Holmes*].
[106] *CAW, Local 3204 v. Royal Oak Mines* [1997], 6 Lancaster's Equity and Accommodation Reporter 3 [*Royal Oak Mines*].

adapted or modified for the employee's benefit.[107] In *Calgary District Hospital Group v. U.N.A., Local 121-R*,[108] the arbitrator reiterated this point when he stated that the duty to accommodate "requires more than determining that an employee cannot perform existing jobs." Having determined that the employee could not perform any existing job, the employer ought to have turned its attention to whether, and in what manner, existing nursing jobs could have been adjusted, modified or adapted – short of undue hardship to the hospital – in order to enable the employee to return to work despite her physical limitations."[109] Such modifications must be practical, useful and be in consonance with health and safety standards. The duty to invent or modify positions does not however place a duty on the employer to create a position that would be of no economic value to the organization for it would amount to undue hardship if the employer is expected 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.[110] As stated by the Federal Court in *Holmes v. Canada (A.G.)*[111] the employer is not required to "act as a placement officer or create a new position expressly suited for the disabled employee comprising new duties that were previously non-existent and that do not suit its needs."[112]

At times, accommodation might include training the members of staff on how to cope with disability in the workplace, if the cost of such training would

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[107] Michael Lynk, *supra* note 95 at 2.
[108] *Calgary District Hospital Group v. U.N.A., Local 121-R.*, [1994] 41 L.A.C. (4th) 319 [*Calgary District Hospital Group*].
[109] *Ibid*., at 326.
[110] Michael Lynk, *supra* note 95.
[111] *Holmes*, *supra* note 105.
[112] *Ibid*., at 145 and 200.

not amount to undue hardship.[113] This is especially useful in dealing with HIV/AIDS-related issues in the workplace because most of the challenges faced by workers with HIV/AIDS are due to lack of information and proper education on the virus, its mode of transmission and prevention. In HIV/AIDS-related cases, it might also be useful to educate other employees in order to dispel myths and deal with workplace stigmatization and discrimination. Employees recently affected by one form of disability or the other would also have to be taught how to work effectively despite the disability. This is especially useful when they have to go through job restructuring or reassignment. This view was supported in the case of *York County Hospital v. O.N.A.*,[114] where the arbitrator observed that the grievor had received very little, if any, training to handle her recent job assignments. The arbitrator went on to state that in view of the grievor's present career goals, it would have been prudent for the employer to have arranged for training in the education department."[115] Training should be carried out without necessarily giving up the status of the infected employee. This can be better achieved when training is an integral part of the workplace structure and policy. There is therefore the need for employers to ensure that they have functional HIV/AIDS workplace policies which cover diverse workplace issues within the HIV/AIDS spectrum.

The employer is not at liberty to relent on this duty to provide accommodation at the slightest show of hardship. The use of the term "undue"

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[113] *Michael Lynk supra* note 95 at 20.
[114] *York County Hospital v. O.N.A.*, [1992] 26 L.A.C. (4th) 384 [*York County Hospital*].
[115] *York County Hospital, supra* at 405; *Metropolitan Toronto Reference Library Board v. C.U.P.E., Local 1582*, [1995] 46 L.A.C. (4th) 155 [*Metropolitan Toronto Reference Library Board*].

implies that some amount of hardship is acceptable. It is only "undue hardship" that satisfies the test and the employer must show more than mere negligible efforts in his bid to accommodate the employee. The employer must also prove more than minor inconveniences before the complainant's right to accommodation can be defeated.[116] When it comes to HIV/AIDS, various forms of modifications are required in the workplace in order to accommodate the needs of infected persons. At the initial stage of infection, the needed modifications might be minimal being that at this stage people who are HIV positive are competent to perform virtually any task. The need for more elaborate accommodation measures might however increase as the disease progresses and the immune system deteriorates. In addition, the form of opportunistic disease that attacks the body of the infected person would influence the type of accommodation that is needed.[117] Broadly speaking below are examples of some workplace modifications that would be useful to individuals living with HIV/AIDS.

2.2.1 Specific Workplace Accommodation Needed by People Living with HIV/AIDS

a. *Modified Tools*. Workplace modifications are often viewed as the provision of adaptive equipment such as accessible workstations and ergonomically appropriate appliances. However, in the case of HIV and

[116] *Renaud, supra* note 41 at 984; Thus, the *de minimis* cost approach as adopted by the US Supreme Court in *Trans World Airlines, Inc. v. Hardison*, [1977] 10432 U.S. 63 [*Hardison*] cannot be applied in Canada.

[117] James Slack, "The Americans with Disabilities Act and the Workplace: Management's Responsibilities in AIDS-Related Situations" (1995) 55: 4 Public Administration Review, 365 – 370 at 368; For instance, someone with fungal infections, such as candidiasis or histoplasmosis, might require different kinds of accommodations than someone with viral infections like CMV or shingles. Overall, each illness and situation, indeed, each individual, will have to be analyzed fully in order to determine appropriate and effective accommodations.

AIDS, the required modifications come more in the form of workplace preventive measures and tools that would reduce the likelihood of workplace-related infections. Medical devices or instruments designed with safety features may enhance the safety of workers in different ways in a variety of situations.[118] This is especially relevant in the medical field. These measures would also help improve interaction between infected workers and other employees as there would be no fear of possible workplace-related transmission. The needed supplies include the provision of gloves, self-sheathing needles[119] and first aid boxes equipped with lint, gauze, disinfectants, plasters, etc. These supplies are however only effective when used appropriately and consistently.

b. *Provision of Assistance*. The duty to accommodate may entail assigning an attendant to assist an infected person carry out certain portions of his or her job, such as portions of the jobs involving strenuous activities. In addition, there might be the need to get the support of another person in order to get accustomed to a modified work situation. The work of the assistant or job coach is to prepare the employee for his or her daily duties, train on work procedures and habituate the employee to the work environment.[120] This does not however place any burden on the employer

[118] Ann Do, *et al.,* "Occupationally Acquired Human Immunodeficiency Virus (HIV) Infection: National Case Surveillance Data During 20 Years of the HIV Epidemic in the United States" (2003) 24:4 Infection Control and Hospital Epidemiology 86 – 96 at 93.

[119] Self-sheathing needles are needles with covers that the user can slide back over the needle after use. The cover, or sheath, locks into place: Betsy Bates, "New Regulation Calls for Self-Sheathing Needles. (Office-Based Physicians Affected)" (2001) 36:19 OB GNY News at 22-23.

[120] Eva Heckl & Ingrid Pecher (Coordinators), "Practices of Providing Reasonable Accommodation for Persons with Disabilities in the Workplace" (2008) Austrian Institute for SME Research, Vienna.

to hire two individuals for a job meant for one nor is the employee allowed to relegate important functions of his job to the assistant.[121]

c. *Modification of Neutral Policies*. Making reasonable accommodation might require an employer to permit an exception to an otherwise neutral rule in favor of the infected employee. This exclusion should however not be interpreted as being discriminatory against the other employees and should be offered without comment to all employees as to their status. The exceptions could involve policies dealing with leaves of absence, part-time work, breaks and job rescheduling. For instance, an employee taking medication for a disability who experiences midday grogginess might need a break to lie down in the employee lounge, despite an employer's policy against napping. Also, employers can offer flexibility in allowing staff to have snacks during meetings (which may reduce nausea) or take unscheduled washroom breaks (to take medication privately or to deal with diarrhea).

d. *Job Restructuring*. There might be need to restructure the job description of the infected person so long as it does not fundamentally affect the nature of the job or diminish the productive potentials of the job. While maintaining the essential features of the job, the employer can eliminate heavy-duty aspects of the job in order to accommodate the diminished physical strength of the employee due to increase in viral load. Restructuring might involve eliminating marginal job tasks, shifting

[121] Barbara Lindemann & Paul Grossman, *Employment Discrimination Law*, 4th ed. (Washington, DC: BNA Books, 2007) Vol. 1 at 888.

nonessential assignments between employees, and redesigning job procedures to accommodate the infected person.[122]

e. *Job Reassignment*. As opposed to job restructuring, the employee could be assigned to a vacant position within the company.[123] Job reassignment is essential in order to ensure that the infected employee is in a position where he can maximize his potentials and add the greatest value to the organization. The assignment should be to an equivalent position in terms of pay and should be carried out where there is a vacancy in order to avoid overstaffing a particular position. The employee should possess the needed skill, experience, education, and other job-related requirements of the position and should be able to perform the primary job tasks of the new position.[124]

f. *Work from Home*. Where the nature and quality of the job would not be compromised, the employee could be allowed to work from home. However, this form of job restructuring is not open to all forms of jobs. Also, the employer might not be required to go through the stress and expense of installing sophisticated or upgraded machinery at the employees home in order to enable him work from home.

g. *Flexi-Time*. Modern work organization has undergone a structural change and is now entailing new forms of work next to the "nine-to-five" fulltime employment.[125] One such change is the provision of flex-hours that allows

[122] *Ibid.* at 902.
[123] Gerald O'Brien & Mara Koerkenmeier, *supra* note 47 at 20.
[124] John Veiga, *et al*., "Toward Greater Understanding in the Workplace" (1999) 13:2 Academy of Management Executive 81 – 87 at 83.
[125] Eva Heckl & Ingrid Pecher, *supra* note 120.

the individual to work during the hours he or she feels most well. If for instance an individual with HIV infection needs medical treatment that is available only at certain times that conflict with established work shifts, the employer must modify the schedule to accommodate the individual's treatment, unless modifying the schedule is itself an undue hardship. A modified schedule may involve adjusting arrival or departure times, providing periodic breaks, altering when certain job tasks are performed, allowing an employee to use accrued paid leave, or providing additional unpaid leave. Flexible work schedules may also help an employee adhere to HIV treatments. For example, side effects from antiretrovirals tend to be most pronounced in the first few weeks of treatment, so an employee may request assignment to less demanding work, less travel or time off when starting a new medication.[126]

h. *Part-time Work Schedules*. Part-time work schedules are a form of flexi-time that allows the employee to work during certain standardized working hours.[127] Part-time work placements might be useful where the employee is unable to work for long hours or where frequent breaks or time offs are needed by the employee. Some employers may offer staff the opportunity to shift from full-time to part-time work, then back again as they adjust to treatment.

i. *Job Creation*. The employer might, in a bid to accommodate an employee, create a totally new position. The employer is however not required to

[126] "One Life. HIV and AIDS in the Workplace" (2008) Bristol-Myers Squib Canada at 9, online: Benefits Canada, <http://www.benefitscanada.com/pdfs/bc_hivaids_en_0908.pdf> (Accessed Saturday, 10April, 2010).
[127] Barbara Lindemann & Paul Grossman, *supra* note 121 at 905.

create a position that is redundant or has no economic value to the business. The employee might be instrumental in giving directions as to his present abilities and the type of jobs he could reasonably perform.

j. *Leave of Absence*. Leave of absence might be needed by a person living with HIV in order to afford him/her the opportunity of seeking medical attention, recuperating from medical procedures or sudden bouts of infection or getting rest when needed. The leave sought for should however not be indefinite or sporadic in nature. Also, an employer does not have to provide more paid leave than it provides to other employees.

k. *Breaks*. Breaks might be needed in order to create time for rest and to take medication. The type of breaks needed could fluctuate between short breaks at the employee's workstation and extended rest breaks like in cases where the employee has to recover from the effects of medication. These breaks could come as a few minutes extension from the lunch break.

As pointed out earlier, the duty to provide reasonable accommodation is a revolving duty and an employer has to be ingenious in coming up with models that would meet the needs of his employees and make business sense. The above are just a few illustrations of the forms reasonable accommodations could take. The list is by no means closed. A potential concern that readily flows from providing accommodations for people living with HIV and AIDS is the task of ensuring that the confidentiality of the infected person is maintained at all times. This could be a very difficult task for the infected employees and employers to deal with when co-workers feel that the provided accommodations are unfairly

distributed "perks."[128] Employers and supervisors would have to develop ways of ensuring that the other workers are pacified without necessarily disclosing the status of the infected employees.[129] This is also not a valid reason to discontinue the provision of accommodation for without these kinds of accommodations, a person with HIV may be unable to cope with both treatment and work, and will quit one or the other. Either way, the employer will lose a valuable employee.

Haven gone through the various relationships that exist between HIV/AIDS and the workplace, and the importance of reasonable accommodation in ensuring that the relationship is a mutually beneficial one, I shall in the next part, take a closer look at the laws dealing with reasonable accommodation in Canada, especially as it affects employees infected with the HIV virus. Human rights legislations, both at the federal and provincial levels will be analyzed in order to bring to the fore the progress made so far in Canada at addressing the various issues and concerns raised by the discussion thus far. This analysis would also show the lacunae in the present laws, lacunae that would better be filled through the development of specialized HIV/AIDS legislations.

PART III

[128] Gerald O'Brien & Mara Koerkenmeier, *supra* note 47 at 20.

[129] The EEOC has suggested one approach to this dilemma in its Enforcement Guidance on the ADA and Psychiatric Disability, No. 915-002 (3/25/97). The 16th Guideline states that "a statement that an individual receives a reasonable accommodation discloses that the individual probably has a disability because only individuals with disabilities are entitled to reasonable accommodation under the ADA." The employer is also allowed explain that it is "acting for legitimate business reasons or in compliance with federal law." Online: <http://www.eeoc.gov/policy/docs/psych.html> (Assessed, Tuesday 30 March 2010).

CANADA, HIV/AIDS AND REASONABLE ACCOMMODATION

3.1 Nature and Development of the Duty

The concept of reasonable accommodation has long been identified in Canada as a means of ensuring equality and blurring dissimilarities found among people in various sectors of the society. More specifically, it is viewed as an effective means of taking into account the peculiar needs of identifiable categories of individuals covered by a ground of discrimination. The duty to provide reasonable accommodation for people with various distinctions first appeared in the legal landscape in the mid-1980s as a corollary of the right to equality[130] and grew to become the single most important development in Canadian labor arbitration in the 1990s.[131] This development was borne out of the need to better accommodate differences and foster equality among all persons. As stated in *The Royal Commission Report* on the accommodation of differences, "Ignoring differences and refusing to accommodate them is a denial of equal access and opportunity. It is discrimination."[132] Thus, in order to better accommodate differences, a duty is placed on the State and executives of corporations to adjust the legitimate standards, practices or policies they apply to all people, without distinction, to suit the particular needs of people covered by a ground of discrimination. This chapter examines the duty to provide reasonable

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[130] Pierre Bosset, "Reflections on the Scope and Limits of the Duty of Reasonable Accommodation in the Field of Religion" (Feb. 2005); an unofficial translation of the French-language document adopted at the 497th meeting of the Commission des droits de la personne et des droits de la jeunesse held on Sept. 10, 2004, online: <http://www.cdpdj.qc.ca/en/publications/docs/religion_accommodation_opinion.pdf> (Accessed Tuesday, May 11, 2010).

[131] Michael Link, "Accommodating Disabilities in the Canadian Workforce" (1999) 7 C.L.E.L.J. at 183.

[132] Justice Rosalie Abella, "Employment and Immigration Canada, Employment Equity: A Guide for Employers" (1987) note 1 at 3.

accommodation at both the federal and provincial levels in Canada, the boundaries of the duty and the various limitations to its application.

The duty to accommodate had its first judicial recognition in the 1985 case of *O.H.R.C. & O'Malley v. Simpson-Sears*.[133] In a key decision delivered by the Supreme Court of Canada, the court concluded that to give meaning to the standard of equal treatment, the employee's right required "reasonable steps towards an accommodation by the employer"[134] that involved changing work schedules. The Supreme Court also laid down the test for establishing prima facie discrimination under human rights statutes. According to the court:

> "It [discrimination] arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristics of the employee or group, obligations, penalties, or

[133] *Simpson-Sears, supra* note 82; In this case, the appellant, Mrs. O'Malley, was working as a sales clerk in a major department store when she joined the Seventh-Day Adventist Church. A tenant of this faith was that Sabbath must be strictly kept, which prevented her from working on Saturdays. Since she could not work on Saturdays when required to do so, her employer demoted her to a part-time position. The complainant alleged discrimination on the ground of creed. Her appeal was upheld and the Supreme Court held that a rule of employment honestly made for sound economic or business reasons, and equally applicable to all employees, may nevertheless be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

[134] *Ibid.,* at 555.

> restrictive conditions not imposed on other members of the workforce."[135]

Where it is shown that a working rule has caused discrimination to an employee, a duty is placed on the employer[136] to make reasonable efforts at accommodating the needs of the employee, short of undue hardship to the employer in the conduct of his business. The Supreme Court in *Simpson-Sears* had to refer to the preamble of the *Ontario Human Rights Code*[137] in order to distil its broad policy. *McIntyre J*, while delivering the court's judgment stated that it was not a sound approach to say that, according to established rules of construction, no broader meaning can be given to the Code than the narrowest interpretation of the words employed. According to him, the accepted rules of construction are flexible enough to enable the Court recognize in the construction of a human rights code the special nature and purpose of the enactment and give to it an interpretation that will advance its broad purposes.[138] Such broad considerations are now the basis on which emerging grounds not hitherto contemplated by the legislators are being brought within the preserve of human rights legislations. This is so in the case of HIV/AIDS-related discrimination.

The challenge that the court faced in the above case is still present today, i.e., the need to stretch statutory provisions in order to accommodate new

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[135] *Ibid.*, at 551; also cited favourably in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, at para. 22 [*Brooks*].

[136] The duty to provide reasonable accommodation is placed on every employer of labor without any exception. The application of the duty and the exact obligation of each employer however depends on the law governing the form of employment being contemplated. For instance, while federal government departments, agencies, and Crown corporations and federally regulated private entities are obligated by the Canadian Human Rights Act, other companies are bound to the extent provided by the various provincial legislations.

[137] *Ontario Human Rights Code*, R.S.O. 1980, c. 340

[138] *Simpson-Sears*, *supra* note 82 at 546-47; see *Lamer J.* in *Insurance Corporation of British Columbia v. Heerspink* [1982] 2 S.C.R. 145, at 157-58 [*Heerspink*].

challenges as they emerge. In any case, the courts have to decide whether in all the circumstances of the case and within the general context of the statute being considered, a right or duty does arise. Presently, the scope of the duty to accommodate, though still covered by the principle of equality, has been encapsulated in most instances by a specific duty not to discriminate based on disability. Consequently, the duty to provide reasonable accommodation by employers for disadvantaged employees now finds expression mainly in anti-discriminatory provisions of our statutes**.** Discrimination in this sense is given an all-encompassing meaning to cover cases that involve disadvantaged groups of people, whether or not expressly mentioned by these statutes. A good example of such a definition is that proffered by *McIntyre J.* in *Andrews v. Law Society of British Columbia*.[139] He described discrimination as:

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

[139] *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143 at 174-75 [*Andrews*].

based on an individual's merits and capacities will rarely be so classed."[140]

By the above definition, it would be considered as an act of discrimination if an employer fails to ensure that the workplace is suitable enough to accommodate a disadvantaged person. Employers have the responsibility of adjusting workplace settings and policies in order to accommodate persons with disabilities. The duty not to discriminate cannot be escaped by an employer pleading innocence. There could be discrimination even if the employer is unaware of the fact that he is discriminating against an employee, even where the employer acted *bona fide*. As stated in *Simpson-Sears*, intent is not a required element of discrimination.[141] A distinction is made between "direct discrimination" and "adverse effect discrimination" in connection with employment. Direct discrimination occurs where an employer adopts a practice or rule that on its face discriminates on a prohibited ground. On the other hand, adverse effect discrimination arises where an employer for genuine business reasons adopts a standard that is on its face neutral, and which will apply equally

[140] For a broader definition of discrimination, reference could be made to Article 1 of the *Discrimination (Employment and Occupation) Convention 1958 (No. 111)* (ratified by Canada on the 26th of November 1964). It defines discrimination to include: "(1)(a) any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies."

[141] As stated by *McIntyre J* in *Simpson-Sears*, *supra* note 82 at 549, to take the narrower view and hold that intent is a required element of discrimination under the Code place a virtually insuperable barrier in the way of a complainant seeking a remedy. It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, would create, as *in Griggs v. Duke Power Co.*, 401 U.S. 424 [1971], injustice and discrimination by the equal treatment of those who are unequal (*Dennis v. United States*, 339 U.S. 162 [1950], at 184).

to all employees, but which has a discriminatory effect upon a prohibited ground on one or more employees.[142] To take a narrower view and hold that intent is a required element would place a virtually insuperable barrier in the way of a complainant seeking remedy, as it would be extremely difficult in most circumstances to prove motive.[143]

3.2 Legislative Framework for the Duty

Having examined the nature and development of the duty to provide reasonable accommodation in Canada, I shall now examine the scope of the duty as outlined by the Charter and the various human rights legislations and interpreted by the courts. Canada being a federal state consisting of a federal government, ten provinces and three territories, legislative powers is shared among the various levels of government. Hence, in order to have a comprehensive view of the legal framework governing HIV/AIDS-related discrimination in the workplace, including that which regulates the provision of reasonable accommodation, we would have to address the *Charter*, the various human rights statutes applicable at the different levels and case law. This is because the primary source of the duty to accommodate in Canadian employment law is found in

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[142] In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 R.C.S. 3 [*Meiorin*], this dual approach formulated in *O'Malley* was replaced by a unified approach. The reasons for this unification are: the artificiality of the distinction between direct and adverse effect discrimination; disconcerting that different remedies are available depending on the stream into which a malleable initial inquiry shuts the analysis; the standard itself is discriminatory because it treats some individuals differently from others on the basis of a prohibited ground; the distinctions between the elements an employer must establish to rebut a prima *facie case* of direct or adverse effect discrimination are difficult to apply in practice; the conventional analysis may serve to legitimize systematic discrimination and, a bifurcated approach may compromise both the broad purposes and the specific terms of the *Human Rights Code*. See *McLachlin J.* at 18-29.

[143] See also the case of *Etobicoke*, (*supra* note 98) at 209 where the Court in Ontario found mandatory retirement provisions agreed upon in a collective agreement discriminatory, even though "there was no evidence to indicate that the motives of the employer were other than honest and in good faith."

human rights legislation that exists at the federal level and in all the provinces and territories as expounded by cases.[144] The duty to accommodate can also be found in other statutes such as the *Employment Equity Act*,[145] and to a lesser legal degree, in policies and persuasive directives.

A flaw in the system that will be made evident as the various legislative provisions are examined is that it is impossible to state the exact nature, application and boundary of the duty as it differs from one situation to the other, making the duty a complex one. Part of these challenge stems from the fact that the various legislations do not have a uniform definition of the duty to provide reasonable accommodation or the persons to whom the duty is owed, making the application of the duty cumbersome. As stated by *Kathryn Meehan*,[146] deciding when the duty applies, and defining its exact boundaries, has perplexed arbitrators, tribunals and judiciary alike. This has resulted in a complex web of duties and obligations leaving the boundaries of accommodation hard to determine. These complexities could however be simplified by the passing of a HIV/AIDS-specific law which would deal extensively with various measures that could be taken to accommodate persons infected with the HIV virus. I shall now examine a few of the present Canadian legislative provisions dealing with the duty to provide reasonable accommodation.

3.2.1 Charter Protection

3.2.1.1 The Canadian Charter of Rights and Freedoms

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[144] Kevin MacNeill, *supra* note 78.
[145] *Supra* note 89.
[146] Kathryn Meehan, "McGill University Health Centre: Some Clarification on Discrimination and the Duty
to Accommodate" (2006-07) 13:3 C.L.E.L.J. at 419.

Any discussion of the principle of reasonable accommodation as an equality right starts with the *Canadian Charter of Rights and Freedoms*[147] (herein after referred to as The *Charter*) which is the main constitutional protection of human rights in Canada and applies to all legislative and government actions at the federal, provincial and territorial levels.[148] The *Charter* was adopted as part of the Canadian Constitution in 1982[149] and guarantees specific individual rights against government infringement. By virtue of the fact that the Constitution is the grand norm of the country, any other law in force that violates any *Charter* provision is of no effect to the extent of its inconsistency.[150] The same rule applies to actions that go contrary to *Charter* provisions. The *Charter* is a human rights instrument way ahead of its league as it sets Canada as an accepted global leader in the development of human rights, having become the first instrument in the world to constitutionalize protection for disability rights.[151]

The *Charter* guarantees several equality rights found in section 15, which applies to all laws and other actions by governments in Canada. Due to the importance of this section, I shall take the liberty of stating its provisions. It provides:

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[147] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c. 11; The provisions of the *Charter* duplicates provisions found in the *Canadian Bill of Rights, S.C. 1960, c. 44 (R.S.C. 1985, App. III)* which did not adequately protect disadvantaged groups. Though the Bill of Rights does not apply to the provinces and is merely a statute unlike the Charter, it is still in force and has not yet been repealed.

[148] Section 32 of the Charter.

[149] However, the equality rights sections did not come into force until 3 (three) years later. The purpose of the delay was to provide time for the federal government and each province to review its body of laws and make those amendments that were necessary to bring the laws into conformity with section 15.

[150] See Section 52 (1) of the Constitution Act which provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect; *Blainey v. Ontario Hockey Association* [1986] 54 O.R. (2d) 513 (C.A.) [*Blainey*].

[151] Kathryn Meehan, *supra* note 146 at 420.

> (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, color, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, color, religion, sex, age or mental or *physical disability*.[152] (Emphasis mine)

The above provision is broad in scope. In order to appreciate its far-reaching effects, we have to note the impact of the words "in particular" as used therein. This choice of words show that the grounds listed by the section are not intended to be the only grounds to which the section applies. Thus, the Latin maxim *expressio unius est exclusio alterius*[153] cannot be applied to the provisions of section 15. Section 15 can be interpreted, and has been so interpreted, in light of novel factors and distinctions that challenge the equality rights of people.

[152] Subsection 32(2) provides that section 15 shall not have effect until three years after section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, section 15 had effect on April 17, 1985

[153] Latin: The expression of one thing is the exclusion of another. In construing statutes, contracts, wills, and the like under this maxim, the mention of one thing within the statute or other document implies the exclusion of another thing not so mentioned. The maxim, though not a rule of law, is an aid to construction.

However, as stated by *McIntyre J.* in *Andrews*, in order for a non-listed ground to fall within the scope of section 15, it has to be analogous to a listed ground. Analogous grounds are grounds that are similar in some important way to the grounds listed in section 15.[154] The listed and analogous grounds approach concentrates on the personal characteristics of those claiming to have been treated unequally, and asks, among other things, whether those in that group have been subjected to historical disadvantage, stereotyping and prejudice.[155]

One of the groups of people who have been treated unequally are those infected with the HIV virus. They continually face stigmatization that leads to discrimination and exposure to a lot of prejudice.[156] This is a global issue which also exists in Canada. According to *Erica Lawson* of the Faculty of Medicine, University of Toronto, people with HIV/AIDS are still stigmatized mainly due to certain misconceptions about the virus and already existent biases.[157] In an investigation undertaken in 1988-89 by the B.C. Civil Liberties Association[158] on

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[154] Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Carswell, 2009) at 1194.

[155] The "enumerated or analogous grounds" approach as stated by the court in *Andrews* was adopted by the Federal Court of Appeal in *Smith, Kline & French Laboratories v. Canada (Attorney General*) [1987] 2 F.C. 359; Mary Hurley, "Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions" (2003; *Revised* March 2007) BP-402E, Parliamentary Information and Research Service, Library of Parliament, Ottawa at 3, online: <http://www2.parl.gc.ca/content/lop/researchpublications/bp402-e.htm#bflexible> (Accessed Tuesday, May 11, 2010).

[156] Canadian HIV/AIDS Legal Network, "Stigma and Discrimination Are Fuelling the HIV/AIDS epidemic in Canada" (2005) Canadian HIV/AIDS Legal Network News Release.

[157] Erica Lawson, "HIV/AIDS, Stigma Denial, Fear and Discrimination: Experiences and Responses of People from African and Caribbean Communities in Toronto" (2006), African and Caribbean Council on HIV/AIDS in Ontario (ACCHO) & HIV Social Behavioral and Epidemiological Studies Unit, University of Toronto.

[158] "AIDS Discrimination in Canada: A Study of the Scope and Extent of Unfair Discrimination in Canada against Persons with AIDS, and Those Known or Feared to be HIV Positive" (1989) *Civil Liberties Association*, Vancouver: B.C., cited in Theodore de Bruyn, "HIV/AIDS and Discrimination: A Discussion Paper*"* (1998) *Canadian HIV/AIDS Legal Network and Canadian HIV/AIDS Society*, Montreal at 37; In a review of 53 states in the US and international opinion surveys conducted between 1983 and 1988 it was found that, for instance, 25 percent of respondents would refuse to work alongside someone with HIV/AIDS: Robert Blendon & Karen Donelan, "Discrimination against People with AIDS: The Public's Perspective" (1988) 319:15

HIV/AIDS-related discrimination in Canada, reports of 83 cases of discrimination were received. These reports, which the Association believed represented only a portion of actual incidents at the time included 32 employment-related cases, 8 in the food industry, 7 in the health care, 9 in other areas of employment, and 8 in unidentified areas of employment. This writer has no evidence to show that the public's attitude towards people living with HIV/AIDS has improved in any way, as most people still get concerned when they have to work with a person living with HIV/AIDS. In an information sheet issued by the Canadian HIV/AIDS Legal Network,[159] it was stated that stigma and discrimination associated with HIV/AIDS are still pervasive in Canada, although the forms they take and the context in which they are experienced have changed. It is thus incontestable that the term "disability" as used in section 15 of the *Charter* can be interpreted to include HIV/AIDS-related discrimination.[160]

New England Journal of Medicine at 1022-1026; Also, the 1992 French survey of knowledge, attitudes, behaviors and practices, *les Comportements sexuels en France*, found that 14 percent of men and 13 percent of women would refuse to work with an HIV-positive person: J. Marquet *et al.*, "Public Awareness of AIDS: Discrimination and the Effects of Mistrust" in David FitzSimons *et al.*, eds., *The Economic and Social Impact of AIDS in Europe* (London: National AIDS Trust, 1995) 219-233 at 228.

[159] Theodore de Bruyn, "An Epidemic of Stigma and Discrimination" (1999) A Discussion Paper on HIV/AIDS and Discrimination, Canadian HIV/AIDS Legal Network and the Canadian AIDS Society

[160] *Brown v. British Columbia (Minister of Heath)* [1990] 66 D.L.R [*Brown*]; According to Peter W. Hogg, *supra* note 154, only three grounds have been recognized by the Supreme Court as being analogous. They are citizenship (*Andrews, supra* note 139), marital status (*Nova Scotia v. Walsh* [2002] 4 S.C.R. 418 [*Walsh*]) and sexual orientation (*Egan v. Canada* [1995] 2 S.C.R. 513 [*Egan*]). However, the Canadian Human Rights Commission and several provincial Human Rights Commissions have issued policy statements to the effect that HIV/AIDS falls within the meaning of "disability" under the CHRA and comparable Human Rights Codes, respectively. This goes with the frequently stated principle that human rights legislations are to be interpreted broadly and purposefully. This principle has been confirmed in numerous decisions such as *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* [1987] 8 C.H.R.R. D/4210 (S.C.C.) at p. D/4225 [*Canadian National Railway Co.*]; *Nova Scotia Confederation of university Faculty Assns. v. Nova Scotia (Human Rights Commission)* [1995] 27 C.H.R.R. D/421 (N.S.S.C.) [*Nova Scotia Confederation of University Faculty Assns.*].

The protection guaranteed under section 15 also extends to cover cases where reasonable accommodation is needed. As noted by *Gibson*,[161] it is a necessary corollary of the rule that discrimination may be indirect and unintended that a law may have to make reasonable accommodation for those who, due to religious affiliation or disability are discriminated against by otherwise neutral laws. If the above were not the case, section 15 would not adequately shield the groups of people it seeks to protect. For instance, when it comes to dealing with HIV/AIDS in the workplace, a substantial number of the discrimination-related issues that presently arise deal with the lack of reasonable accommodation. This is so especially since issues such as compulsory testing; contract termination and direct discrimination in the workplace have received a lot of attention. Our focus needs to tilt towards other indirect forms of discrimination and exclusion.

The provision of section 15(2) is also a relevant to the development of reasonable accommodation programs. This subsection makes it clear that affirmative actions or equity programs in favor of disadvantaged individuals are not precluded by subsection (1).[162] The focus of subsection (2) is to enable governments to pro-actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation.[163] Through the subsection, the *Charter* preserves the right of governments to implement such programs without fear of challenge under subsection (1) by a person who is not a member of the disadvantaged group. This totally blurs out the chances of "reverse

[161] Dale Gibson, *The Law of the Center: Equality Rights* (Toronto: Carswell, 1990) at 133.
[162] The section provides that "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
[163] See *R v. Kapp* [2008] SCC 41 [*Kapp*].

discrimination" cases. Though the subsection deals with large scale programs and activities and not with specific workplace issues, it could however be used as an enabling law to formulate policies and programs which provide standards that would define forms of accommodation appropriate in HIV/AIDS cases and various other situations.

3.2.1.2 Quebec Charter of Human Rights and Freedoms

Quebec has its own *Charter of Human Rights and Freedoms*[164] which was adopted in 1975. As stated by *Gonthier J.* in *Beliveau St-Jacques v. Federation des employees et employes de services publics inc.*,[165] the Quebec Charter has a "special quasi-constitutional status" which implies that its provisions prevails over contractual (including employment) agreements made by parties. The Quebec Charter has broad provisions recognizing full and equal exercise of human rights and freedoms without distinction, exclusion or preference based on many grounds including handicap.[166] This is the only human rights instrument in the country that makes use of the term "handicap" which has been described by the Quebec Human Rights Commission as "a disadvantage resulting from impairment, that is, a loss, a malformation or an abnormality of an organ, of a structure or of a mental, psychological, physiological or anatomical function."[167] The above definition covers HIV/AIDS and has been so held by the Commission and interpreted by the

[164] *Quebec Charter of Human Rights and Freedom*, R.S.Q. 1977, c. C-12.
[165] *Beliveau St-Jacques v. Federation des employees et employes de services publics inc.* [1996] 2 S.C.R. 345, at para. 116 [*Beliveau St-Jacques*].
[166] See Section 10, Quebec Charter
[167] "The Concepts of Impairment and Disadvantage in the Definition of Handicap, as a Ground for Discrimination," official position of the Commission des droits de la personne, 5 December 1986, cited in McGill Centre for Medicine, Ethics and Law, *Responding to HIV/AIDS in Canada*, (Toronto: Carswell, 1990) at 11-6.

courts. In the case of *Re: Alain L.*[168] the complainant, a registered nurse, alleged that a hospital refused to hire him because he was HIV infected, and brought an action before the Québec Human Rights Commission alleging wrongful discrimination on the basis of "handicap" in the hiring practices of a prospective employer, in violation of sections 10 and 17 of the Québec Charter. The Commission upheld the claim, considering HIV infection to be a handicap within the meaning of the *Charter*.

Establishing discrimination under section 10 of the Quebec Charter requires a three-step analysis as noted by *Abella J.* of the Supreme Court in the case of *McGill University Health Centre v. Syndicat des employes de L'Hopital general de Montreal*.[169] First, there must be distinction, exclusion or preference. Second, this distinction, exclusion or preference must be based on a protected ground. Third, it must have the effect of nullifying or impairing the right to full and equal recognition and exercise of the human right or freedom.[170] When the provisions of section 10 is read in conjunction with section 16,[171] which is on non-discrimination in employment, including conditions of employment, a duty can be established for employers making reasonable accommodations in the workplace for people living with HIV/AIDS.

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[168] *Alain L.* File #8706004809-0001-0; COM-327-8.1.1.14 (Québec H.R.C.) [*Alain L*]; see also *Louise L.* File # 8806005204-0001-0; COM-324-8.1.5 (Québec H.R.D.) [*Louise L*].

[169] *McGill University Health Centre v. Syndicat des employes de L'Hopital general de Montreal* [2007] 1 S.C.R. 161, at para. 38 [*McGill University Health Centre*].

[170] *Ibid.*, at para. 46; See also Kathryn Meehan, *supra* note 146 at 431.

[171] Section 16 provides: "No one may practice discrimination in respect of the hiring, apprenticeship, duration of the probation period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment."

Though the Quebec Charter is similar to the federal Charter, it has more far-reaching provisions that deal specifically with equality in the workplace. The Quebec Charter has the characteristics of a hybrid legislation between a charter and a human rights code. This would account for why it has the luxury of directly dealing with various types of discrimination. A draw back however of the Quebec Charter is that it does not deal with the exact extentsand delimitation of the duties owed as can be found in human rights codes. This would explain why the duty to accommodate is not specifically spelled out in the Quebec Charter and reliance has to be made to the development of the obligation by the courts and tribunals.

3.2.2 Protection under Human Rights Legislations

3.2.2.1 Federal Protection

Despite opinions that human rights statutes should not be construed as broadly as *Charter* provisions, the courts are still willing to stretch the provisions of human rights statutes to cover novel cases of discrimination and disabilities.[172] One of such statutes is the *Canadian Human Rights Act*[173] (CHRA) which was enacted by the federal parliament in 1977. The rationale behind the Act is to protect people from being victimized based on some grounds of discrimination

[172] There are opinions which state that *Charter* and human rights provisions should not be interpreted in the same light. For instance, *Garson J.* of the British Columbia Supreme Court clearly rejected the proposition that the analysis should be the same for a *Charter* challenge and for a human rights code complaint in *Withler v. Canada (Attorney General)* [2006] B.C.J. No. 101 (QL) (S.C.) at paras. 131-33 [*Withler*]. However, writers like *Kathryn Meehan* (*supra* note 146 at 436) are of the view that for a host of reasons, not the least of which is consistency between tribunals, arbitrators and judges in analysing discrimination claims, it is logical for the legal framework to be similar (if not identical) for deciding whether a prima facie case of discrimination exists under the *Charter* and under human rights legislations. I align my views with this latter opinion as lack of uniformity is equally a form of differentiation and discrimination.

[173] *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

such as age, sex, race and disability.[174] Unlike the *Charter*, the CHRA applies to both public and private entities. It protects against discrimination by federal government departments, agencies, and Crown corporations, and by First Nations band councils. In the private sphere, it protects against discrimination by federally regulated entities such as chartered banks, national airlines, TV and radio stations, inter-provincial communications and telephone companies, inter-provincial transport companies, and other federally regulated industries such as certain mining operations.[175]

Section 7(b) of the CHRA, which deals with employment, states that it is discriminatory to differentiate adversely in relation to an employee, based on a prohibited ground of discrimination. An action can be brought under any of the grounds listed in section 3(1) so long as discrimination can be proved. Of special interest to people living with HIV/AIDS is the seventh of the eight grounds that deals with disability. "Disability" is defined briefly by the Act to mean "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."[176] A more comprehensive description of what disability entails, especially as it involves discrimination includes "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental

[174] Section 3 lays down the grounds of discrimination. It states: "For the purposes of this Act, national or ethnic origin, color, religion, age, sex, marital status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination."

[175] "The Canadian Human Rights Act: a Guide" (1998) *Canadian Human Rights Commission*, online: <http://www.atucanada.ca/content_Resources_And_Publications/pdf/legislation/CanadianHumanRightsAct.pdf> (Accessed Tuesday, May 11, 2010).

[176] See section 25.

freedoms in the political, economic, social, cultural, civic, or any other field. It includes all forms of discrimination, including denial of reasonable accommodation".[177]

HIV/AIDS is covered by the above omnibus definition. It is viewed as a physical disability and has been so interpreted by human rights tribunals and courts in the same light as the *Charter*.[178] In the case of *Thwaites*,[179] HIV/AIDS was considered a "disability" within the meaning of section 3(1) of the CHRA and thus was a prohibited ground of disability.[180] *Thwaites* also points to the fact that lying at the heart of the anti-discriminatory provisions of the Act is the duty to provide reasonable accommodation for people with different forms of disability. At the Tribunal stage of the case,[181] an interesting connection was drawn between reasonable accommodation and human rights provisions of not only the CHRA but also other human rights laws of the country. It was stated in this case that:

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[177] Article 2, *Convention on the Rights of Persons with Disabilities*: In March, 2007, Canada signed the Convention and indicated ratification would follow. However, three years have now passed and Canada is yet to ratify the Convention. What is interesting about the Convention is that it expressly sees lack of reasonable accommodation as a ground of disability discrimination. See text of a letter from the Canadian Workers Group on HIV and Rehabilitation (CWGHR), the Canadian HIV/AIDS Legal Network and the Interagency Coalition on AIDS and Development (ICAD), urging the Government of Canada to ratify the United Nations Convention on the Rights of Persons with Disabilities (ICRPD), online: <http://stopaids.ca/content/pub_printerfriendly.cfm?PubID=280&CAT=4&lang=e> (Accessed Tuesday, May 11, 2010).

[178] Richard Elliott & Jennifer Gold, "Protection against Discrimination based on HIV/AIDS Status in Canada: the Legal Framework" (2005) 10: 1 *HIV/AIDS Policy & Law Review* at 3.

[179] *Thwaites*, *supra* note 4.

[180] See also *Canadian Pacific Ltd v. Canadian Human Rights Commission* [1990], Court file A-514-89 (Fed. C.A.) [*Canadian Pacific Ltd*]. This is the appeal from *Fontaine v. Canadian Pacific Ltd* [1989], 29 CCEL 192 (Canadian Human Rights Tribunal) [*Fountaine*]. In *Fontaine*, there was concession to the fact by Canadian Pacific Ltd that a person who suffers from the HIV is under a disability within the meaning of subsection 3(1) of the CHRA and it was concluded that CP contravened section 7 of the CHRA by refusing to continue to employ Mr. Fontaine because of a prohibited ground of discrimination, namely, his infection with the HIV virus. The case was appealed to the Federal Court of Appeal, which unanimously upheld the Tribunal's decision.

[181] T.D. 9/93, decision rendered on June 7, 1993.

> "The importance of searching for reasonable alternatives or accommodating the individual to permit him or her to do the job or to lessen any risk (if risk is a factor) is now the bedrock of human rights law in this country. Indeed, without such accommodation, the protection given by the CHRA to certain groups, the disabled in particular, would be quite illusory."

The above statement shows the importance of making provision for reasonable accommodation for disabled persons. For persons with disabilities, the right to accommodate goes to the very heart of equality.[182] For an employer to show that he acknowledges the differences of his complex workforce, he has to adapt the working environment to suit their various needs. A failure to do so would amount to disregard of their various disabilities and lead to differentiation and lack of equality in the workplace. This duty is however subject to the qualification of reasonability. The needed accommodation should not cause undue hardship to the employer as to compel an employer in such a situation could be an interference of his liberty. Though the provision of accommodation is an important factor in managing HIV/AIDS in the workplace, the law only requires that such efforts be reasonable. An employer is relieved of his obligation to provide reasonable accommodation if the provision of same would be cumbersome or lack any business significance.

[182] Anne Molloy, "Disability and the Duty to Accommodate", (1992) 1:23 Can Lab. Law Journal at 26.

In order to ascertain whether a proposed accommodation or plan is reasonable, an application can be made to the Canadian Human Rights Commission or other provincial human rights commissions which are the commissions responsible for the administration of human rights instruments. The commissions have the authority to approve special programs and facilities to meet the needs of disabled people in a workplace[183] and such special programs or plans cannot be viewed as being discriminatory.[184] Though these provisions in the CHRA are broad enough to cover federal plan implementations on a mega scale, covering a large group of people, they can also be interpreted to cover individual cases of disability.

The Canadian Human Rights Commission is also the body which ensures that the *Employment Equity Act*[185] (EEA) is complied with. To this end, the Commission conducts audits to determine whether employers meet the statutory requirements of the Act. One of these statutory requirements is the implementation of employment equity by instituting positive policies and practices for making such reasonable accommodations that would be required by persons in "designated groups"[186] i.e. women, aboriginal peoples, *persons with disabilities* and members of visible minorities.[187] Under the EEA, employers have a duty to adapt their business systems to comply with the legislation. This form of

[183] See section 17(1), CHRA.
[184] See section 16(1), CHRA.
[185] *Supra* note 89; The *Employment Equity Act* represents the first effort in Canada to legislate a group approach to systematic discrimination in employment.
[186] See section 5(b), EEA.
[187] See section 3, EEA.

affirmative action plan,[188] if properly implemented, has the potential of breaking down historical patterns of discrimination and would give way to a system in which the accommodation of all forms of disability are built into its structure.[189]

3.2.2.2 Provincial Human Rights Statutes

Generally speaking, the laws prohibiting discrimination within employment fall within provincial jurisdiction. Consequently, the provincial level is home to a plethora of acts, codes, directives and policy documents all geared, expressly or indirectly, towards the provision of reasonable accommodation to people with various forms of disability and specifically, HIV/AIDS. All the provinces adopt a rights-based approach and view people living with HIV, AIDS or full-blown AIDS as people with a handicap[190] or a disability, [191] whether generally or physically.[192] Another difference between the various approaches is that while a few human rights statutes make particular reference to the duty to provide reasonable accommodation, such duties can only be inferred from others. There is therefore no uniform definition of what is classified as a disability for the purpose of HIV and AIDS. Despite these differences, there are still a lot of similarities in the way the provinces address the need to provide reasonable accommodation for people with disability.

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[188] An affirmative action plan refers to policies that take race, ethnicity, or sex into consideration in an attempt to promote equal opportunity or increase ethnic or other forms of diversity. The impetus towards affirmative action is twofold: to maximize diversity in all levels of society, along with its presumed benefits, and to redress perceived disadvantages due to overt, institutional, or involuntary discrimination.

[189] See the American case of *United Steelworkers of America v. Weber* [1979] 443 U.S. 193 [*Weber*].

[190] Quebec; under the former *Ontario Human Rights Code* (1981, S.O. 1981, c. 53), the term "handicap" was used in Section 5 of the Code.

[191] Northwest Territories, Nunavut and Saskatchewan

[192] Alberta, British Columbia, Manitoba, Newfoundland, New Brunswick, Nova Scotia, Ontario, Prince Edward Island and Yukon.

In order to bring people living with HIV/AIDS directly within the ambit of anti-discriminatory provisions, most of the human rights commissions have at one time or the other issued policy statements in order to protect people infected with HIV, people perceived to be infected with HIV and people relating with those infected with HIV from discrimination. For instance, the Quebec Human Rights Commission in a paper, which was officially adopted in April 1988,[193] identified both AIDS and HIV infection as handicaps within the meaning of the Quebec *Charter of Human Rights and Freedoms*.[194] The same approach has been adopted by the Ontario Human Rights Commission in its Policy Statement on HIV/AIDS-Related Discrimination[195] issued as far back as June 8 1989 where the Commission made it clear that people infected with HIV or who have HIV-related illness are protected by the Ontario *Human Rights Code*.[196] More recently, in April 2003, the Manitoba Human Rights Commission released a Policy and Procedures Manual which was aimed at defining "physical and mental disability" as used in section 9 of the *Manitoba Human Rights Code*.[197] The Manual, in interpreting *disability,* followed the broad and flexible approach as established by the Supreme Court of Canada in *Mercier*[198] and interpreted the term to include invisible disabilities such as HIV/AIDS. I shall briefly treat some of these provincial human rights statutes, paying particular attention to provinces which

[193] "AIDS and Human Rights" (1988) *Quebec Commission des droits de la personne*, a translation from French of the original paper adopted at the 305th sitting of the Commission held on April 29, 1988, by resolution COM-305-9.1.1.
[194] *Supra* note 165.
[195] Policy Statement on HIV/AIDS-Related Discrimination (1989, Reprinted 1991) *Ontario Human Rights Commission* at 2.
[196] *Ontario Human Rights Code*, R.S.O. 1990, c. H-19.
[197] *Manitoba Human Rights Code*, S.M. 1987-88, c. 45.
[198] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City),* [2000] 1 S.C.R. at 665 [*Boisbriand*].

have direct provisions dealing with the duty to provide reasonable accommodation.

In Alberta,[199] an individual living with HIV/AIDS seeking protection based on disability would have to have recourse to the recent *Alberta Human Rights Act*[200] (AHRA) which became effective on October 1, 2009. The Act came into being as an added attempt at safeguarding the inherent dignity and inalienable rights of persons and extending the equality rights of Albertans to apply to all persons (including corporations) residing in the Province of Alberta.[201] The new Act, like the former *Human Rights, Citizenship and Multicultural Act*, prohibits discriminatory practices in various sectors of the public, and more specifically in employment. Section 7(1) (b) of the Act protects workers from discrimination with regard to employment and employment practices due to several grounds including physical disability. In the hearing of *E. (S.T.) v. Bertelsen*[202] before the Alberta Board of Inquiry, the parties conceded to the fact that full-blown AIDS was a physical disability. The above reasoning of the Board of Inquiry, though

[199] According to the Public Health Agency of Canada Surveillance Report (Dec. 31, 2006), it is estimated that approximately 4,553 people in Alberta live with HIV/AIDS. Also in 2006, the Alberta Health and Wellness reported 218 new HIV infections in Alberta. Thus no equality-based law can ignore this number of people either in its direct provisions, application or enforcement.

[200] *Alberta Human Rights Act*, Chapter A-25.5; The Act protects people from discrimination by private companies, businesses, organizations and other individuals. Section 1(1) makes every law of Alberta inoperative to the extent that it authorizes or requires the doing of anything prohibited by the Act.

[201] The *Alberta Human Rights Act* is a replacement of the repealed the *Human Rights, Citizenship and Multicultural Act* R.S.A. 2000, c. H-14. The major changes made in the new Act is the introduction of "sexual orientation" as a protected ground of discrimination and the definition of "marital status" to exclude persons of the opposite sex.

[202] *E. (S.T.) v. Bertelsen* [1989] 10 C.H.R.R. D/6294 (Alta. Bd. Inq.) [*Bertelsen*].

limited to full-blown AIDS, should extend to include HIV infection under the new Act in light of recent developments in the law.[203]

Though the AHRA makes no particular reference to reasonable accommodation in employment, employers in Alberta have long had a legal duty to accommodate the individual needs of employees who have disabilities.[204] This means that they must make special effort to provide people with disabilities with whatever they need to do their job. The rights guaranteed there under are made subject to refusals, limitations, specifications or preference based on a bona fide occupational requirement.[205] In an age of technological advancement and dynamic health and safety workplace standards, it would be difficult to conceptualize a workplace where adequate structures cannot be put in place to accommodate employees living with HIV/AIDS. This is so even in health care settings, employment requiring travel to countries where there is an immigration ban on people who are HIV positive and traditional public safety cases. Employers can still take steps to restructure the workplace or work schedule in order to avoid negative employment consequences for employees who are HIV positive.

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[203] In *Quebec (Commission des droits de la personne du Quebec) and PM v. GG and Ordre des dentistes du Quebec* [1995] R.J.Q. 1601, the tribunal held that there was no reason to distinguish between asymptomatic and symptomatic HIV infection in determining whether one has a "handicap" within the meaning of human rights law. This is because the stigmatization, social rejection, and fear of rejection resulting from HIV-positive status are as much related to a "handicap" as the functional disabilities associated with symptomatic HIV infection or AIDS.

[204] "HIV/AIDS and Employment Rights/Responsibilities," Briefing Document of AIDS Calgary Awareness Assoc., online: <http://www.aidscalgary.org/files/publications/HIV_EmployersRightsResponsibilities.pdf> (Accessed Tuesday, May 11, 2010).

[205] See Section 7(3). A bona fide occupational requirement (or BFOR, for short) is a standard or rule that is integral to carrying out the functions of a specific position. For a standard to be considered a BFOR, an employer has to establish that any accommodation or changes to the standard would create an undue hardship. When a standard is a BFOR, an employer is not expected to change it to accommodate an employee. The Supreme Court of Canada in *Meiorin*, *supra* footnote 142 at 3 established a three-step process to determine if a specific accommodation is BFOR because it creates an undue hardship. They are: establish a rational connection, establish good faith and establish reasonable necessity.

The *British Columbia Human Rights Code*[206] (BCHRC) also prohibits certain types of discrimination in employment including discrimination based on physical disability without any direct reference to the duty to provide reasonable accommodation.[207] Although the term "physical disability" is no where defined by the Code, the British Columbia Council of Human Rights in a 1988 decision held that AIDS amounted to physical disability within the meaning of the Code.[208] This was in the case of *Biggs & Cole v. Hudson*[209] where the Council found that persons with AIDS have a "physical disability" within the meaning of the British Columbia Human Rights Act and so could not be discriminated against. This decision is important as it sees AIDS as a protected disability regardless of whether the complainant suffered any physical impairment and regardless of the progress of the disease. However, the limitation of this decision is that it does not cover everyone within the HIV/AIDS spectrum as persons just infected with the HIV virus are left without any form of protection.

3.2.3 Specific Duty to provide Reasonable Accommodation

Unlike the provinces considered above, there are presently three jurisdictions that have express provisions in their human rights statutes dealing with the duty to accommodate in the workplace. These jurisdictions are Ontario, Manitoba and Yukon Territory. The *Ontario Human Rights Code*[210] (OHRC) in

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[206] *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210.
[207] See Section 13(1).
[208] Although the legislation that was been interpreted in this case was the British Columbia *Human Rights Act*, S.B.C. 1984, c.22, the provisions are the same as those under the present Human Rights Code.
[209] *Biggs & Cole v. Hudson* [1988] 9 C.H.R.R. D/5391 [*Biggs*].
[210] *Supra*, footnote 197; The Code is one of the first laws of its kind in Canada. Before 1962, various laws dealt with different kinds of discrimination. The Code brought them together into one law and added some new protections. The Code is administered and enforced by the Ontario Human Rights Commission. The Code does not apply to federally regulated activities

protecting against discrimination based on disability adopts a broad approach close to that found in the Canadian Human Rights Act.[211] The OHRC defines "disability" as including "any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness" and goes on to enumerate a number of diseases covered by the term.[212] Though HIV/AIDS is not expressly itemized by the OHRC as a disability, the Code is somewhat progressive in that it expressly covers various forms of illness under the umbrella of disability. There is scarcely any need to seek external interpretation of the meaning of disability as used by the OHRC as its scope can easily be appreciated when considered.

The provisions of the OHRC on the duty of employers to provide reasonable accommodation in the workplace for disabled employees are extensive. In particular, section 17 of the Code sets out this duty and, as expressly stipulated in an OHRC's policy statement, the duty to accommodate "may be of particular value to persons with HIV or with HIV-related illness."[213] In particular, section 17(2) makes it clear that a person is not incapable to perform essential duties or requirements of a job unless the needs of that person cannot be

[211] See Section 5(1) which states that "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 *disability*."

[212] See Section 10(1)(a); This is similar to the definition of "physical disability" in Section 2, *Human Rights Act* of New Brunswick, R.S.N.B. 1973, c. H-11. Here, physical disability is defined to mean "any degree of disability, infirmity, malformation or disfigurement of a physical nature caused by bodily injury, illness or birth defect and, without limiting the generality of the foregoing, includes any disability resulting from any degree of paralysis or from diabetes mellitus, epilepsy, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair, cane, crutch or other remedial device or appliance"; see also section 44 of the *Alberta Human Rights Act*, *supra* footnote 201.

[213] Brian A. Grosman & John R. Martin, *Discrimination in Employment in Ontario* (Canada Law Book, 1994) at 135; Policy Statement on HIV/AIDS-Related Discrimination, *supra* footnote 196.

accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. Section 24 of the Code also qualifies this duty in cases where the provision of accommodation would cost undue hardship on the person responsible for accommodating those circumstances.[214] In the case of *Mount Sinai Hospital v. O.N.A.*,[215] the Arbitrator stated that the duty to accommodate derives from the right to equal treatment under the OHRC. He went on to state that the right to equal treatment extends beyond an enquiry concerning whether a disabled person is incapable of performing the essential duties or requirements of a particular, existing position. Rather, the Code should be read to achieve the broad remedial purposes of integration and continued participation of disabled employees within the workforce, subject to claims of undue hardship on the part of the employer.

Interpreting the Code in the above light gives rise to an inclusive system in which people with HIV/AIDS continue to remain relevant in the organizational scheme of affairs. This can best be achieved by an organization through a HIV/AIDS workplace policy that seeks to keep workers living with HIV/AIDS engaged up to the point where they can no longer work or when undue hardship ensues. The development of such HIV/AIDS workplace policy is in line with best practices and serves as reference materials to guide both the employer and the employee. The form of accommodation envisaged here would include a continuous reduction in physically exerting jobs as their physical capacity to

[214] See Section 24 (2).
[215] *Mount Sinai Hospital v. O.N.A.* [1996] 54 L.A.C. (4th) 261[*Mount Sinai Hospital*].

handle such jobs deplete. Employers should also be willing to negotiate rest breaks, days off without pay or part time jobs. In every case, there should be a *consensus ad idem* between both parties.

The employee with a disability has a key role in finding an appropriate accommodation. The employee has an obligation not only to bring the disability to the knowledge of the employer or the employer's agent such as a supervisor or a human resource person,[216] but also to help in arriving at an appropriate accommodation. As stated in *Central Okanagan School District No. 23 v. Renaud,*[217] "concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation." The duty to accommodate is not necessarily a one-way street but a multi-party inquiry and the employee has a role to play in the attempt to arrive at a reasonable compromise.[218] He however does not have a duty to originate a solution. The employee also has an obligation to accept reasonable accommodation and the employer's duty is discharged if a proposal that would be reasonable in all circumstances is turned down. The employer must however ensure that information shared is kept confidential between both parties as disclosure without the employee's consent goes contrary to the rules on privacy of person. This is especially important in HIV/AIDS-related disclosures.

[216] The need to disclose status is because the employer cannot be held liable for discriminating against an employee for a disability that he did not know about or was not reasonably expected to know about.
[217] *Supra* note 97 at 984.
[218] *McGill University Health Centre, supra* note 170 at 178.

The conduct of the complainant is always considered in order to determine whether the duty to accommodate has been fulfilled.[219] If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed.[220] The employee has to be reasonable and supportive in the quest for reasonable accommodation. This rule is especially relevant in HIV/AIDS cases because the person living with the virus would be in a better position to know what would suit his or her needs especially since the virus does not remain quiescent but progresses with time. There would be the continual need to tailor the workplace to fit the progression of the disability and the employee's ability to function effectively.

The need to ensure that workplace arrangements are continually tailored to meet the needs of persons with disability was recently stressed in the case of *Tofflemire v. Metro (Windsor) Enterprises*.[221] In this case, the respondents were found guilty of discrimination under the OHRC because their offer of reasonable accommodation was inflexible and did not respond to changes in the applicant's circumstances. This was despite the fact that the respondents had provided reasonable accommodation to the applicant in the past. In providing reasonable accommodation for a person infected with HIV/AIDS, the employer must be ready to make changes to the accommodation as the disease progresses from the initial infection stage to when the employee develops full-blown AIDS. The duty

[219] *Renaud, supra* note 97 at 994. As stated by the court at page 995, "The employee cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged." The employee would have to ensure that his or her conduct does not tip the scales in favor of undue hardship to the employer.
[220] *Deschamps J.* in *McGill University Health Centre, supra* note 170 at 173.
[221] *Tofflemire v. Metro (Windsor) Enterprises* [2009] HRTO 1471 [*Tofflemire*].

cannot be fulfilled by a one-off act, but must constantly go through a process of modification to fit the needs of the disabled person as they arise.

Under the *Manitoba Human Rights Code*,[222] (MHRC) failure to make reasonable accommodation is inherent in its definition of discrimination. Section 9(1) (d) of the Code defines discrimination to include "failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2)." Subsection (2) goes on to list several applicable characteristics including "physical or mental disability or related characteristics or circumstances." With this definition of discrimination in mind, the Code then provides that no person shall discriminate with respect to any aspect of an employment or occupation.[223] In addition, it is not discrimination to make reasonable accommodation for the special needs of an individual or group if those special needs are based on prohibited grounds of discrimination.[224]

While recognizing the role of reasonable accommodation in fostering equality of opportunity and treatment, the MHRC also tries to balance the rights of business and that of the individual. Thus, accommodations that create undue hardship due to cost and other factors are deemed unreasonable. However, ignorance of the law and lack of intention on the part of the employer is not a

[222] *Supra* note 198.
[223] *Ibid.*, section 14(1); The same section however limits the application of the rule in cases where "the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation."
[224] *Ibid.*, section 11(a).

defense to acts of discrimination.[225] In the 2007 case of *L.H. v. Vietnamese Non-Profit Housing Corporation*[226] before the Manitoba Human Rights Board of Adjudication, the complainant alleged that her employers failed to reasonably accommodate her due to her physical disability (cancer) contrary to section 14 of the Manitoba Human Rights Code. The respondent was found guilty of same though his actions were unintentional and he was ignorant of the law.

The specific duty to provide reasonable accommodation can also be found under the *Human Rights Act*[227] of Yukon Territory. The Act places on every person a responsibility to make reasonable provisions in connection with employment, accommodations, and special services for the special needs of others if those special needs arise from physical disability.[228] An employer would however not be guilty of discrimination if he is unable to accommodate the person with the physical disability due to reasonable requirements or qualifications.[229] This qualification exist in all human rights codes in Canada and is commonly referred to as a bona fide occupational requirement (BFOR). [230] The BFOR standard is such an integral part of the principle of reasonable accommodation that the latter has been described as a constituent element of a BFOR defense to a complaint of discrimination based on a prohibited ground of discrimination.[231]

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[225] See section 9(3).
[226] *L.H. v. Vietnamese Non-Profit Housing Corporation* [2007] C.L.L.C. 230-022.
[227] *Yukon Human Rights Act* S.Y.T. 1987, c. 3.
[228] *Ibid.*, section 8.
[229] *Ibid.*, section 10(a).
[230] Section 15(a), Canadian Human Rights Act; section 24, Ontario Human Rights Code; section 13(4), British Columbia Human Rights Code; section 7(3), Alberta Human Rights Act; section 12(1), Manitoba Human Rights Code, et cetera.
[231] Kevin D. MacNeill, *supra* note 78 at 2-1.

A BFOR is a standard or rule that is integral to carrying out the functions of a specific position. It is a quality or an attribute that employers are allowed to consider when making decisions on the hiring and retention of an employee. Once an employer can show a BFOR standard as a basis for exclusion of a certain group of persons with disability, the employer would have no duty to accommodate. Hence, a bona fide occupational defense forecloses any duty to accommodate.[232] It is however not enough to label a standard as being a BFOR for a requirement that is prima facie discriminatory against an individual, even if it is in fact "occupational" is not bona fide. In every case, a BFOR must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons.[233] The standard must also relate in an objective sense to the performance of the employment concerned.

Due to the exclusionary potential of the BFOR defense, the courts are always willing to limit the ambit of its application. One way of achieving this is to insist that the BFOR exception must be interpreted restrictively so that the larger objects of the human rights legislations are not frustrated.[234] As stated by *Sopinka J.* in *Zurich Insurance v. OHRC*,[235] "one of the reasons such legislation [human rights legislations] has been so described [of a special nature] is that it is often the

[232] *Bhinder, supra* note 98.
[233] See *McIntyre J.* in *Etobicoke*, supra note 98 at 208.
[234] *University of Alberta v. Alberta Human Rights Commission* [1993] 17 C.H.R.R. D/87 at D/9696 [*Alberta Human Rights Commission*]; *Etobicoke*, *supra* note 98 at 208; *Bhinder*, supra note 98 at 589; *Ville de Brossard v. Quebec* [1988] 2 S.C.R. 279 at 307 [*Ville de Brossard*].
[235] *Zurich Insurance v. OHRC* [1992] 2 S.C.R. 321 at 374 [*Zurich Insurance*].

final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable member of society, exceptions to such legislation should be narrowly construed". In order to streamline the application of the defense, a unified test has been established to determine whether an employer has discriminated against an employee with a disability. This test was laid down in the oft-cited Supreme Court case of *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (Meiorin)*.[236] The employer must establish the following three elements on the balance of probabilities to avoid a finding of discrimination:

(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.[237]

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[236] *Meiorin*, supra note 142 at 3; Before the formulation of this test in *Meiorin*, there were two major ways of treating human rights violations: either as direct discrimination pursuant to the analysis in *Etobicoke* (*supra* note 98), or as adverse effects discrimination pursuant to the analysis in *Simpson-Sears, supra* note 82).

[237] *Ibid*., at 32; This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer.

The essence of this new approach in *Meiorin* is to ensure employers accommodate the characteristics of individual employees as much as is reasonably possible, while taking a strict approach to any exceptions from the accommodation duty. The approach seeks to establish a real connection between the standard and the job function. The standard must be a necessity of the job and must be applied with the best of intensions by the employer. The last test places the employer on inquiry. He is expected to go the extra mile by seeking out eventful ways of accommodating the employee, even if it leads to a modification of the workplace. If fully embraced by employers, by being entrenched in the workplace policy on disabilities, it could serve as a proactive measure for dealing with disability in the workplace as and when they arise.

Be that as it may, it would be tricky for an employer to plead the BFOR defense as the reason for his refusal to accommodate a person living with HIV/AIDS in his organization. This is because there are very few instances in which being free from HIV/AIDS would be a BFOR and an employer would have to prove that such a requirement is essential to the safe, efficient and reliable performance of the essential functions of a job or is a justified requirement for excluding those infected. This narrow approach to the BFOR rule is important so as not to defeat the aim behind the reasonable accommodation rule. It also helps to ensure that disabled persons are not unreasonably prejudiced in their place of work. For instance, in the South African case of *Hoffman v. South African Airways (SAA)*[238], SSA's defense of BFOR was rejected by the Constitutional

[238] *Hoffman v. South African Airways*, Case CCT 17100, Constitutional Court of South Africa, 28 September 2000 [*Hoffman*].

Courts even though they showed that part of the job of a cabin attendant involved traveling to different countries and it was not advisable for someone with HIV to have the required yellow fever vaccination. The court also held that being HIV negative was not an inherent requirement of the job of being a cabin attendant and SAA should have taken greater steps to investigate how Hoffman's immune system could have dealt with traveling and the possibility of getting a strange disease. A similar approach would have been adopted by the Canadian courts had the case arisen in Canada.

Thus far, I have examined the legal framework protecting people living with HIV/AIDS from work-related discrimination as it pertains to the provision of reasonable accommodation in Canada. An observation that stands out from the analysis of the various human rights legislations and their interpretations by the courts is that though Canada has strong laws dealing with equity, discrimination and equality in employee participation at work, the law is still unsettled on the extent to which an employer is to go in providing reasonable accommodation for employees with disabilities. Also, as can be seen from the decided cases in Alberta and British Columbia, the courts are not yet in agreement on what could safely be defined as a disability. Thus, there is no unified protection for people living with HIV/AIDS. It is evident that more efforts are needed at strengthening and enforcing the existing legal framework in order to eliminate all forms of discrimination and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS. I shall in the next part make reference to efforts made by the international community in accommodating

people living with HIV/AIDS in the workplace. This might serve as a persuasive voice for where Canada ought to be heading.

PART IV

INTERNATIONAL RESPONSE TO HIV/AIDS AND THE RIGHT TO WORK

In the preceding chapters, I have been able to establish that there is a strong relationship between HIV/AIDS and the workplace and the extent to which the legal framework in Canada protects people living with HIV/AIDS from discrimination in the workplace through the development of reasonable accommodation standards. Similar efforts are also replicated in countries around the globe. A study of the International Labour Organization's NATLEX[239] data base shows that a lot of countries have not only recognized the link between HIV/AIDS and the world of work and the strategic importance of the workplace in addressing certain HIV/AIDS-related concerns, but have also made concerted efforts at developing HIV/AIDS workplace initiatives in line with standards suggested by international instruments. These initiatives take on diverse forms, ranging from conventions and recommendations to policies, guidelines, general and specific provisions contained in constitutions and general legislations (civil codes and labor codes) such as legislations to protect people with disabilities.[240] Other initiatives include the development of case law and jurisprudence relating to discrimination on the grounds of real or perceived HIV or AIDS status, clauses

[239] NATLEX is the ILO's database of national labour, social security and related human rights legislation maintained by the ILO's International Labour Standards Department. Records in NATLEX provide abstracts of legislation and relevant citation information, NATLEX contains over 80,000 records covering 196 countries and over 160 territories.

[240] For a global overview of disability legislation, see *The General Survey of the Committee of Experts on the application of Conventions and Recommendations on Convention No. 159 and Recommendation No. 168, ILO: Vocational Rehabilitation of the Disabled Report III (Part 1B)*, 1997, International Labor Conference, 86th Session, Geneva.

contained in collective agreements, and measures with regard to health care professionals.

I shall here under undertake a brief assessment of some international instruments and legislations dealing with HIV/AIDS-related workplace discrimination and the duty to provide reasonable accommodation. I shall pay particular attention on the United Nations international labor law structure and the *Americans with Disabilities Act* 1990,[241] all with a view at appraising the Canadian HIV/AIDS workplace legislative framework. At present, a lot more effort is needed in the management of HIV/AIDS within the Canadian work force and the analysis below will show exactly what needs to be done. Through this chapter, I aim to support my earlier position on the need for Canada to improve the state of its present legislations dealing with the duty to provide reasonable accommodation for persons living with HIV/AIDS. I would also make a case for the promulgation of HIV/AIDS-specific legislations in Canada and the ratification of certain key international instruments dealing with disabilities and the duty to provide reasonable accommodation in the workplace.

4.1 The United Nations

Since the *United Nations* (UN)[242] was founded in 1945, it has been committed to a number of global goals, among which is a desire to achieve better working standards and respect for human rights in the global workplace. The UN

[241] The *Americans with Disabilities Act* [1990], Pub.L. 101-336, 104 Stat. 327, enacted July 26, 1990, codified at 42 U.S.C. § 12101 [ADA].

[242] The United Nations (UN) is an international organization which aims at facilitating cooperation in international law, international security, economic development, social progress, human rights, and the achieving of world peace. It replaced the League of Nations and was founded in 1945 after World War II. The UN currently has 192 Member States, including Canada which joined the UN at its inception in 1945. More information about the UN including all its documents are available on the UN website, <http://www.un.org/en/>.

made its first notable impact on the world of work in 1948 when it recognized the right to work as an explicit human right under article 23 of the *Universal Declaration of Human Rights* (UDHR).[243] The UN has since made several efforts at ensuring that human rights standards and equality rights are enforced in the workplace.[244] One of such efforts came with the establishment of the *Joint United Nations Programme on HIV and AIDS*, or UNAIDS[245] which has come up with many programs, Declarations and Resolutions, all aimed at tackling the various challenges posed by HIV and AIDS.[246] In December of 2006, the UN General Assembly took another significant stride by adopting the *Convention on the*

[243] The *Universal Declaration of Human Rights*, GA Res. 217 (III), GAOR, 3rd Session, Part 1, Pg. 71; Article 23 provides for the "*right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment*". The UDHR soon led to the adoption of two separate conventions in 1966, i.e. *International Covenant on Civil and Political Rights* (ICCPR) (Adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976 in accordance with Article 49) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (Adopted 16 Dec. 1966, GA Res. 2200 (XXI), 21 UN GAOR Supp. (No. 16) at 49 Doc A/6316 (1966), 993 UNTS 3, entered into force 3 January 1979). Both of these conventions also have specific provisions on the right to work and rights at work.

[244] The universal principles of non-discrimination and respect for privacy, health and social security are contained in the UDHR and are based on the principle of equal rights: Louis N'Daba & Jane Hodges-Aeberhard, *HIV/AIDS and Employment*, (International Labour Office: Geneva, 1998) at 14.

[245] UNAIDS was established in 1994 by a resolution of the UN Economic and Social Council and was launched in January 1996. It is the main UN advocate for accelerated, comprehensive and coordinated global action on the HIV epidemic. The *International Guidelines on HIV/AIDS and Human Rights* were first issued in 1998 by UNAIDS and the Office of the UN High Commissioner for Human Rights (OHCHR) and supported repeatedly by UN Member States through resolutions adopted at the UN Commission on Human Rights. The *International Guidelines* emphasize that States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors. States are also to provide for speedy and effective administrative and civil remedies for discrimination: *International Guidelines on HIV/AIDS and Human Rights*, Consolidated version, 2006, UNAIDS and OHCHR, available at UNAIDS website: <www.unaids.org>; *HIV, Disability and Human Rights: Opportunities offered by the United Nations Convention on the Rights of Persons with Disabilities*, A Discussion Paper, 2008, Canadian HIV/AIDS Legal Network at 10.

[246] For examples of UN Declarations and Resolutions on HIV/AIDS, see *UN Political Declaration on HIV/AIDS* [2006], A/RES/60/262; *UN Declaration of Commitment on HIV/AIDS* [2001], A/RES/S-26/2; *UN Millennium Development Goals* [2000], A/RES/55/2; *UN Security Council Resolution* 1308 [2000].

Rights of Persons with Disabilities[247] ("Disability Convention"), which is a convention that seeks to protect persons with disabilities. Though the Convention does not include a definition of "disability" or expressly mention HIV or AIDS,[248] States are required to recognize that persons living with HIV, who are exposed to stigma and discrimination, fall under the protection of the Convention.[249]

The Disability Convention protects persons who have long-term physical, mental, intellectual or sensory impairments (as is the case with HIV/AIDS)[250] and condemns any form of distinction, exclusion or restriction on such persons based on these disabilities.[251] It also recognizes that the provision of reasonable accommodation measures is an effective way of blurring such distinctions. State parties are admonished to take all appropriate steps to ensure that reasonable accommodation standards are enforced in order to promote equality and aid the

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[247] *International Convention on the Rights of Persons with Disabilities*, adopted by UN General Assembly Resolution 61/106 (13 December 2006). The convention came into force in 2008. Though signed by Canada in March of 2007, it is yet to be ratified.

[248] *HIV, Disability and Human Rights: Opportunities Offered by the United Nations Convention on the Rights of Persons with Disabilities*, *supra* note 246 at 9.

[249] *Persons with Disabilities Particularly Vulnerable to HIV/AIDS*, 2009, WHO Podcast, World Health Organization, Geneva, Online: <http://www.who.int/mediacentre/multimedia/podcasts/2009/disabilities_hiv_20090610/en/index.html> (Accessed Friday, 28 May, 2010).

[250] Article 1; Some have called for the creation of an international human rights convention to address discrimination and other human rights violations against people living with HIV or AIDS (PLWHAs). Others have felt that such an effort is impractical and unnecessary. Impractical, because it can take decades to develop and negotiate a treaty through the United Nations, even where there is interest among Member States. Unnecessary, because international human rights treaties have already been interpreted as prohibiting discrimination based on health status, including HIV and AIDS, which also means that discrimination in the enjoyment of all other human rights protected by these treaties is also prohibited.: HIV, *Disability and Human Rights: Opportunities offered by the United Nations Convention on the Rights of Persons with Disabilities*, *supra* note 246 at 4.

[251] See Article 2 which states that "Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation."

elimination of discrimination.[252] By article 27, State parties have a duty to safeguard and promote the realization of the right to work, by taking appropriate steps, including passing legislations aimed at ensuring that reasonable accommodation is provided to persons with disabilities in the workplace. Thus, the Convention not only recognizes the importance of accommodation measures for the benefit of persons with disabilities, but also places an obligation on State parties to develop legislations that would outline the boundaries of this duty. It cannot be said that Canada has made great success at doing this.

The duty to outline the boundaries of reasonable accommodation measures can also be found in policy directives issued by certain specialized UN agencies. The vast majority of UN HIV/AIDS efforts in the workplace have been made via the International Labour Organization (ILO), which is a specialized agency of the United Nations that deals with labour issues.[253] Since its inception, the ILO has been interested in equality of opportunity and fair treatment of workers in the workplace.[254] This interest can be gleaned from several Policy documents and

[252] Article 5; Reasonable Accommodation is defined by the Convention to mean necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

[253] The ILO was established in 1919 as an agency of the League of Nations following the Treaty of Versailles, which ended World War I. It is the only surviving major creation of the Treaty of Versailles which brought the League of Nations into being and it became the first specialized agency of the UN in 1946. As a UN specialized agency, it seeks the promotion of social justice and internationally recognized human and labour rights. The ILO formulates international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights. It also provides technical assistance primarily in the fields of vocational training and vocational rehabilitation, employment policy, labour administration, labour law and industrial relations, working conditions, management development, cooperatives, social security, labour statistics and occupational safety and health. Currently there are 183 nations that are member States of the ILO including Canada which is a founding member of the organization. More information about ILO is available on its website, <http://www.ilo.org/global/lang--en/index.htm>.

[254] This principle was recognized in Article 41(2) of the original ILO Constitution and was re-stated by the International labour Conference (ILC) in its 1944 declaration in Philadelphia

Declarations which deal with HIV and AIDS in the workplace, most of which consider the restructuring of the work environment by making reasonable alterations to workplace structures and policies as an essential aspect of any HIV/AIDS-related workplace anti-discriminatory measure. Of all the ILO documents dealing with HIV/AIDS in the workplace, the most significant concerning the provision of reasonable accommodation are the *WHO/ILO Joint Declaration on AIDS and the Workplace* (1988)[255] and the *ILO Code of Practice on HIV/AIDS and the World of Work* (2001).[256] In 1988, the ILO in association with the World Health Organization adopted the Joint Declaration on AIDS and the Workplace which is a consensus statement adopting ten universal principles and basic elements for a national HIV/AIDS workplace policy.[257] After laying down the general working rule that HIV infection by itself is not associated with any limitation in fitness to work, it goes on to state that if at all fitness to work is impaired by HIV-related illness, *reasonable alternative working arrangements should be made*.[258] This became the first of many statements and commitments made by the ILO at establishing the need for employers to adequately accommodate people living with HIV/AIDS in the workplace.

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concerning the future aims and objectives of the ILO: Article 427 (2) of the *Peace Treaty of Versailles*, points 7 and 8; Henrik Karl Nielsen, "The Concept of Discrimination in ILO Convention No. 111" (1994) 43:4 The International and Corporate Law Quarterly. 827 – 856, at 827.

[255] Global Programme on AIDS, Statement from the Consultation on AIDS and the Workplace, 1988, WHO & ILO, Geneva, online: <http://www.ilo.org/public/english/protection/trav/aids/publ/statementwhoiloeng.pdf> (Accessed Tuesday, 25 May 2010).

[256] The ILO Code of Practice on HIV/AIDS and the World of Work, 2001, International Labour Office, Geneva, online: <http://www.ilo.org/public/english/protection/trav/aids/code/languages/hiv_a4_e.pdf> (Accessed Tuesday, 25 May 2010).

[257] ILO, *The role of the organized sector in reproductive health and AIDS prevention*, Report of a Tripartite Workshop for Anglophone Africa held in Kampala, Uganda, 1995, International Labour Office, Geneva, at 8 – 9.

[258] Part 5(B)(7), Statement from the Consultation on AIDS and the Workplace.

After the 1988 adoption of the Joint Declaration, the ILO has adopted several other instruments dealing with HIV/AIDS and discrimination in the world of work, notable among which are the *ILO Declaration* on *Fundamental Principles and Rights at Work* (1998)[259] and the *Resolution Concerning HIV/AIDS and the World of Work* (2000).[260] However, some of the above instruments are limited in their application as they do not make direct reference to the need to provide reasonable accommodation for people living with HIV/AIDS. Be that as it may, reference is often made to them and they serve as key instruments for the promotion of human rights standards which States ought to adhere to and sometimes serve as persuasive authorities for adjudicators.[261] Their most notable accomplishment however has been the development of certain key ILO Conventions that have binding effects on States who have ratified and passed

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[259] *ILO Declaration* on *Fundamental Principles and Rights at Work*, 1998, 86th Session, International Labour office, Geneva. This declaration reaffirms the commitment of the international community "to respect, to promote and to realize in good faith" the rights of workers and employers to freedom of association and the effective right to collective bargaining, and to work towards the elimination of discrimination in respect of employment and occupation. The *Declaration* underlines that all member countries have an obligation to respect these fundamental principles. See Brian Langille, "Can We Rely on the ILO?" (2008) 13 Canadian Labour and Employment Law Journal at 273; *contra* Brian Langille, "Core Labour Rights – The True Story" (2005), 16 E.J.I.L. at 1.

[260] *ILO Resolution Concerning HIV/AIDS and the World of Work*, 2000, 88th Session, International labour Office, Geneva. One of the rationale behind the Resolution was to manage HIV/AIDS in the world of work in terms of: discrimination in employment, social exclusion of persons living with HIV/AIDS, additional distortion of gender inequalities, increased number of AIDS orphans, increased incidence of child labour, and the retention of older persons in the labour force. See also the *UN Declaration of Commitment on HIV/AIDS*, UN General Assembly, 26th Special Session, doc. A/RES/S-26/2, 2 August 2001, available online: <www.un.org/ga/aids/docs/aress262.pdf> (Accessed Wednesday, 26 May 2010).

[261] Canada supported the adoption of the 1998 *Declaration* and the official position of the federal government is that *"Canada attaches great importance to the Declaration … as a key instrument for the promotion of the fundamental principles of freedom of association and collective bargaining … Its implementation will contribute significantly to improving the lives of working people and their families."*: *Canada and the International Labour Organization (ILO)*, July 2009, National Union of Public and General Employees, at 3, Online: <http://www.nupge.ca/files/images/pdf/ilo_backgrounder_june08.pdf> (Accessed, Wednesday, 19 May 2010).

them into laws.[262] The importance of these Conventions in setting guidelines for the adoption of reasonable accommodation measures within the global workforce will be discussed below.[263]

By far, the most notable effort made by the ILO in managing workplace HIV/AIDS-related discrimination came in 2001 when it launched its *Code of Practice on HIV/AIDS and the World of Work*.[264] The Code of Practice has been described as "the best single document on HIV/AIDS the UN has ever produced."[265] This description is fitting as the Code has served as a key reference document for several HIV/AIDS-related developments world over. It provides workers, employers and governments with global guidelines – based on international labour standards - for addressing HIV/AIDS and its impact at the enterprise, community and national levels.[266] In Canada, as with the rest of the

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[262] International rules or treaties lead to domestic rules which can be applied, enforced, or otherwise made effective in the adopting State: Brain Langille, *supra* note 20 at 277; *Health Services and Support-Facilities Subsector Bargaining Ass'n v. British Columbia* [2007] 2 S.C.R. 391 [*B.C. Health Services*].

[263] These Conventions include, the *Discrimination (Employment and Occupation) Convention*, 1958, (No. 111) and the *Vocational Rehabilitation and Employment Convention*, 1983 (No. 159). Convention No. 159 is one of the most relevant to the issue of accommodation. It contains norms which aim at ensuring effective equality of opportunity for disabled persons, including HIV-infected workers: Louis N'Daba, "HIV/AIDS and Discrimination in the Workplace: The ILO Perspective" in *The Role of the Organized Sector in Reproductive Health and AIDS Prevention*, *supra* note 258 at 31.

[264] *Supra* note 257.

[265] Stephen Lewis, UN Special Envoy on HIV/AIDS in Africa; The Code was also described by Juan Somavia, Director-General, ILO as "*the most wide-ranging and comprehensive blueprint for workplace policy on HIV/AIDS ever developed and addresses this present situation as well as its future consequences for the world of work. The code is not just about policy and guidelines. It is about respecting the dignity of others and learning to live with the reality of HIV/AIDS."*: ILO to Launch New Code of Practice on HIV/AIDS and the World of Work, (June 2001), Press Release, ILO/01/24, International Labour Office, Geneva, Online: <http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_007851/index.htm> (Accessed Wednesday, May 26, 2010).

[266] Part 1, ILO Code of Practice; The Code also promotes the development of national legislation that will help address the HIV/AIDS epidemic. It states that in order to eliminate workplace discrimination and ensure workplace prevention and social protection, governments, in consultation with the social partners and experts in the field of HIV/AIDS, should provide the relevant regulatory framework and, where necessary, revise labour laws and other legislation:

world, the Code has been used to formulate and implement appropriate workplace policies, programs and strategies.[267] In order to protect people living with HIV/AIDS from discrimination, the Code provides that HIV/AIDS should be treated like any other serious illness/condition in the workplace, and in the spirit of decent work[268] and respect for human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination or stigmatization against workers based on real or perceived HIV status.[269]

The Code is built around ten key principles[270] and has express directives on the need for reasonable accommodation measures to be made in favor of workers infected or affected by HIV or AIDS. Employers in consultation with worker(s) and their representatives are required to take measures to reasonably accommodate worker(s) with AIDS-related illnesses.[271] The Code also enumerates several forms of accommodations that could be made including rearrangement of working time, special equipment, opportunities for rest breaks,

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Part 5.1(i), ILO Code of Practice; Marie-Claude Chartier, "Legal initiatives that can help fight HIV/AIDS in the world of work" 2004, International Labour Organization, Geneva, at 6.

[267] Canadian Nurses Association, "Blood-Borne Pathogens: Registered Nurses and Their Ethical Obligations" (2006), *CNA Position Statement*, CNA Ottawa.

[268] The ILO is concerned with decent work and access to jobs of acceptable quality. Decent Work here refers to opportunities for women and men to obtain work in conditions of freedom, equity, security and human dignity. The provision of reasonable accommodation is one of the many factors used to measure if a job is in consonance with the ILO decent work agenda: The ILO Decent Work Agenda, 2008, Report on the EU contribution to the promotion of decent work in the world, SEC 2184, Brussels; Decent Work, Report of the Director-General, International labour Conference, 87th Session, Geneva, 1999.

[269] Part 4.1 & 4.2, ILO Code of Practice; This principle is reinforced by Parts 4.6 and 4.8 which protect employment, and by 4.7 which protects confidentiality: HIV/AIDS and the World of Work, Report IV(1), International Labour Conference, 98th Session, 2009, International Labour Office, Geneva, at 30.

[270] These principles are: recognition of HIV/AIDS as a workplace issue, Non-discrimination based on real or perceived HIV status, Gender equality, Healthy work environment, Social dialogue, No HIV testing for purposes of exclusion, of employment, Confidentiality of HIV-related data, Continuation of employment relationship and adaptation of work, Prevention, and Care and support: Marie-Claude Chartier *supra* note 267 at 6; Veronica McKay, *Consolidated Report on HIV/AIDS Interventions in the Informal Sector*, (International Labour Office: Geneva, 2003).

[271] Part 5.2 (j), ILO Code of Practice.

time off for medical appointments, flexible sick leave, part-time work and return-to-work arrangements.[272] These accommodation measures are however not exhaustive, leaving room for employers to model workplace arrangements that would meet the special needs of the individual infected or affected by HIV or AIDS. The ILO duty to provide accommodation is also limited by the reasonability rule. Whether an arrangement is reasonable depends largely on whether or not making the arrangement would impose undue hardship on the enterprise, in view of costs and degree of disruption, compared with the size and type of the business, its financial strength, and structure of operations.[273]

One of the most important offshoots of the ILO Code of Practice and the several other ILO Declarations is that they aid in the development of practical conventions and recommendations, the former being binding instruments under international law (subject to their ratification by member states), and the latter being guidelines for the socio-legal policy of the state.[274] Some of these Conventions have been particularly relevant in promoting respect for human rights of people with HIV/AIDS. They also contribute to the achievement of reasonable accommodation standards.[275] The *Discrimination (Employment and*

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[272] *Ibid.*; See also the Code's definition of Reasonable Accommodation as "*any modification or adjustment to a job or to the workplace that is reasonably practicable and will enable a person living with HIV or AIDS to have access to or participate or advance in employment*."

[273] Louis N'Daba, s*upra* note 258 at 32.

[274] Karl Nandrup Dahl, "The Role of ILO Standards in the Global Integration Process" (1968) 5:4 Journal of Peace Research 309 – 351 at 310.

[275] The ILO Conventions relevant for the promotion of human rights in the HIV/AIDS context are: *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111); *Occupational Safety and Health Convention*, 1981 (No. 155); *Occupational Health Services Convention*, 1985 (No. 161); *Termination of Employment Convention*, 1982 (No. 158); *Vocational Rehabilitation and Employment (Disabled Persons) Convention*, 1983 (No. 159); *Social Security (Minimum Standards) Convention*, 1952 (No. 102); *Labour Inspection Convention*, 1947 (No. 81), and *Labour Inspection (Agriculture) Convention*, 1969 (No. 129); *Maritime Labour Convention*, 2006 (the only ILO instrument to contain explicit references to HIV/AIDS as a question of safety and health); and *Work in Fishing Convention*, 2007 (No. 188). 29.

Occupation) Convention, 1958 (No. 111) is one such Convention.[276] It is the main ILO Convention concerning discrimination. Article 5(1) approves special measures of protection or assistance provided for in the Convention and all other Conventions or Recommendations adopted by the International Labour Conference (ILC). Two interesting attractions of Convention No. 111 are that it permits ratifying States to add after consulting representative workers' and employers' organizations, additional grounds of discrimination,[277] and, it does not exclude from its application any kind of employment or occupation.[278] It thus aims at equal opportunity and treatment in both public and private employment.[279] This has great potentials of injecting some form of uniformity to the way adopting States apply and enforce reasonable accommodation measures.

The *Vocational Rehabilitation and Employment (Disabled Persons) Convention,* 1983 (No.159)[280] is more detailed as to the need for adopting States to implement accommodation measures that would better integrate and benefit persons with disabilities in the workplace. Articles 7 and 9 of the Convention have far-reaching directives concerning vocational evaluation, training,

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[276] Adopted 25 June 1958 by the General Conference of the International Labour Organization at its 42nd Session and came into force on 15 June 1960. Ratified by Canada on the 26th of November 1964.

[277] Article 1 (1)(b). The Committee of Experts on the Application of Conventions and Recommendations has recommended, and the Governing Body has been discussing, an additional protocol to Convention No. 111 to include, among other new grounds, "disability.": *Equality in Employment and Occupation*, 1996, Special Survey of the Committee of Experts, Para. 297, 83rd session, International labour Conference, Geneva.

[278] *Equality in Employment and Occupation*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, 1988, ILC, 75th Session, International Labour Office, Geneva, p.3, para. 2.

[279] Ratification of Convention 111 obliges the State to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation: Article 2; Henrik Karl Nielsen, "The Concept of Discrimination in ILO Convention No. 111" (1994) 43:4 The International and Corporate Law Quarterly, 827 – 856, at 829.

[280] Adopted 20 June 1983 by the General Conference of the International Labour Organization at its 69th Session and came into force on 20 June 1985.

placement, employment and other services for the employment and retaining of persons with disabilities in the workplace. In particular, it admonishes Members to carry out *adaptation* measures where the same would be necessary for the proper integration of workers in the workplace. A form of accommodation envisaged by Convention No. 159 is the removal of barriers which prevent persons with disabilities from enjoying equality of opportunity in vocational training and employment.[281] The concept of reasonable accommodation thus takes on a broadened definition which seeks to integrate such measures into the administrative and recruitment policies of work establishments. Thus far, Convention No. 159 has been ratified by about 80 countries.[282] If ratified by Canada, Convention No. 159 would be beneficial not only in defining the ambit of the duty to reasonably accommodate persons with disabilities, but also in ensuring that a holistic approach to the definition of the duty is adopted.[283] In particular, it would better help persons with disabilities secure, retain and advance suitable

[281] Jeanne Mager Stellman (ed.), *Encyclopaedia of occupational health and safety*, 4th Ed (International Labour Office: Geneva, 1998), Vol. 5 at 17.14.

[282] ILO, "ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159) and Recommendation (No. 168): United Nations Convention on the Rights of Persons with Disabilities International" (2008), International Labour Office, Geneva, at 5.

[283] See *Comments to the Draft Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities* (2006-2016), 2006, Permanent Council of the Organization of American States: Committee on Judicial and Political Affairs, CAJP/GT/DDD-19/06; When a country ratifies an ILO convention, it is bound to observe the obligations contained in that convention. ILO instruments are generally drafted with a fair degree of flexibility. When ratified, an ILO convention becomes part of that nation's law, and depending on the county's legal structure, either through direct incorporation or through an obligation by the state to pass implementing legislation: Robert Montgomery & Gregory Maggio, "Fostering Labor Rights in Developing Countries: An Investors' Approach to Managing Labor Issues" (2009) 87 Journal of Business Ethics, Supplement 1: Globalization and the Good Corporation, pp. 199-219 at 202.

employment and thereby further such persons' integration or reintegration into society.[284]

Under the ILO Constitution, it is clear that ratification is a purely voluntary matter and Member States have the discretion to place a newly created convention before the relevant domestic authority for possible, voluntary, ratification.[285] The incorporation of international agreements into domestic law is properly the role of the Federal Parliament or the provincial legislatures under Canada's federal system of government.[286] However, only the federal government has the authority to ratify ILO Conventions. Though the ratification process can be lengthy and very challenging,[287] the ratification of these ILO Conventions are important as they are usually the product of lengthy and informed deliberations by experts in the various fields that they cover. They also embody very high global human rights standards in line with best practices. Countries are thus admonished to ratify as many ILO Conventions as they possibly can. Another means of incorporating ILO Conventions into the legal framework of a country is though the promulgation of localized laws that deal with the same subject matter as the conventions or to interpret existing laws in the same light as the conventions. The

[284] Article 1(2), Convention No. 159.

[285] Article 19(5)(e); The only obligation of State parties is to report periodically on its practice respecting un-ratified conventions (Article 19); Brian A. Langille, *supra* note 260 at 279.

[286] However, Canada's international obligations can assist courts charged with interpreting the *Charter*: *Health Services and Support-Facilities Subsector Bargaining Ass'n v. British Columbia* [2007] 2. S.C.R. 391 [*BC Health*]; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 46 [*Suresh*].

[287] Canadian Ratification of ILO Conventions, Human Resources and Skills Development Canada, Online: <http://www.hrsdc.gc.ca/eng/lp/ila/Representing_Canada/Canada_ratification_ILO.shtml> (Accessed Tuesday, June 01, 2010)

former is a method adopted by the United States via the *Americans with Disabilities Act*.[288]

In summary, the UN and its several agencies have taken numerous strides in the protection of persons with disabilities, including those with HIV/AIDS, since its inception in 1945. Notable among these are the development of conventions, recommendations, policies, guidelines and codes, all geared towards ensuring that the best possible standards are adopted and enforced by member States via domesticated laws, regulations or other methods consistent with their national conditions and practices. Though Canada has so far shown great commitments towards the adoption of various UN standards, it needs to take further steps at ratifying certain key instruments and enhancing its present laws dealing with persons living with HIV/AIDS in order to ensure that no one is left unprotected or insufficiently protected. In particular, the legal framework dealing with the duty to provide reasonable accommodation needs to be brought in line with the standards enumerated in the ILO *Code of Practice on HIV/AIDS and the World of Work* and adapted to fit the present and foreseeable future needs of the Canadian society. This is an important step in ensuring that HIV and AIDS issues are effectively managed and catered for in the work environment.

4.2 The Americans with Disabilities Act

When Congressed passed the *Americans with Disabilities Act* (ADA)[289] in 1990, it was welcomed as a historic new civil rights Act and tagged to be the

[288] ADA 1990, *supra* note 242.

[289] The ADA was signed into law on July 26, 1990, by President George H. W. Bush, and later amended with changes effective January 1, 2009. Its long title is "An Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability." Congress's purposes in enacting the ADA were "to provide a clear and comprehensive national mandate

world's first comprehensive declaration of equality for people with disabilities and the most far-reaching legislation ever enacted against discrimination of people with disabilities.[290] Twenty years down the road, though the Act has attracted some criticisms, it remains a powerful tool used to defend and uphold the rights of persons with disabilities. The ADA is broader in scope than any existing US federal law and applies to all states and local governments, their departments and agencies, and any other instrumentalities or special-purpose districts of state or local government. It prohibits discrimination not just in employment and public programs, but also in public accommodations.[291] The Act also protects disabled individuals against discrimination by insurers, employers, and health care providers and covers private employers and service providers, not just public and publicly funded ones.[292] Of the five sections (referred to in the Act as "Titles"),[293] Title 1 speaks to the needs of this paper as it is the section which guarantees the right to equal access to job and career opportunities.[294]

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for the elimination of discrimination against individuals with disabilities" and to "bring persons with disabilities into the economic and social mainstream of American Life": 42 U.S.C. § 12101(b)(1)(1994); Matthew Stowe, "Interpreting 'Place of Public Accommodation' under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications" (2000) 50:1 *Duke Law Journal, Thirtieth Annual Administrative Law Issue, 297-329 at 297.*

[290] President George H. W. Bush, quoted in National Council on Disability, "Righting the ADA" (2004), National Council on Disability, Washington, DC at 30, Online: <http://www.ncd.gov/newsroom/publications/2002/rightingtheada.htm> (Accessed Tuesday, July 01, 2010); U.S. Congress, Office of Technology Assessment, *Psychiatric Disabilities, Employment, and the Americans with Disabilities Act* (Washington, DC: U.S. Government Printing Office, 1994).

[291] Scott Burris & Kathryn Moss, "The Employment Discrimination Provisions of the Americans with Disabilities Act: implementation and Impact" (2007-08) 25 Hofstra Lab. & Emp. L. J. 1 at 2.

[292] *Ibid.*; Paul Miller, "Genetic Discrimination in the Workplace" (1998) 26 J.L. Med. & Ethics 189 at 190.

[293] Daron Acemoglu & Joshua Angrist, "Consequences of Employment Protection? The Case of the Americans with Disabilities Act" (2001) 109 J. Pol. Econ. 915, 918 & n.1

[294] Title I prohibits employment discrimination only against "qualified individuals with disabilities". A qualified individual with a disability is one who meets the skill, experience, education, and other job-related requirements of a position. He can perform the essential

The ADA prohibits discrimination against persons with disabilities, that is, persons who have impairments which substantially limit one or more major life activities.[295] A *covered entity* is not to discriminate against *a qualified individual with a disability*.[296] This applies to job application procedures, hiring, advancement, discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[297] In order to understand the effects of the ADA, it is important to note the definition of "disability" under the Act. In general, people are deemed disabled for the purposes of the ADA if they satisfy at least one of three criteria: they must have a physical or mental impairment that substantially limits one or more of the major life activities; a record of such impairment; or are regarded as having such impairment.[298] The definition of disability was further stretched by the *ADA Amendments Act* of 2008

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functions of the job under the same conditions as any other worker or with what is known as a "reasonable accommodation" to the disability: 42 U.S.C. § 12112(a); Scott Burris & Kathryn Moss, *supra* note 292 at 5; Robert Burgdorf, "The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute" (1991) 26 HARv. C.R.-C.L. L. REV. 413, 457-58; James Slack, "The Americans with Disabilities Act and the Workplace: Management's Responsibilities in AIDS -Related Situations" (1995) 55:4 Public Administration Review, 365-370 at 365.

[295] People with HIV, *whether or not the disease is symptomatic*, are considered to have physical impairments which substantially limit life activities and are, as such, protected under the ADA. More would be said on this below.

[296] 42 U.S.C. § 12112(a); Covered entities include private organizations and public agencies that employ at least 15 full-time workers. The ADA does not cover federal employees, Native American tribes, and private membership clubs (except for labor organizations). Federal employees in the HIV spectrum, however, are protected from workplace discrimination and are due reasonable accommodations under the Vocational Rehabilitation Act: *School Board of Nassau County v. Arline*, *supra* note 73; *Alexander v. Choate*, 469 U.S. 287 [1985]; and *Chalk v. United States District Court, Central District of California*, *supra* note 73: James Slack, *supra* note 295 at 365.

[297] 42 U.S.C. § 12112(a)

[298] 42 U.S.C. § 12102(2); The definition of disability as used in the ADA was borrowed by Congress from the *Rehabilitation Act* (Public Law 93-112 93rd Congress, H.R. 8070 September 26, 1973); James Slack, *supra* note 295 at 366; Scott Burris & Kathryn Moss, *supra* note 299 at 5.

(ADAAA)[299] which was passed to undo the effects of two controversial court decisions which impose a stricter standard for determining disability under the ADA.[300] The ADAAA provides that the term "disability" be construed in favor of broad coverage of individuals under the Act, to the maximum extent permitted by the terms of the Act.[301] By this provision, the ADAAA broadened the class of persons protected under the ADA and other disability nondiscrimination laws at the Federal level of the United States.[302]

Thus, large pools of individuals are now able to benefit from the disability provisions of the ADA including those infected with HIV/AIDS.[303] More so, these individuals are able to rely on the ADA's extensive provisions dealing with the duty to provide reasonable accommodation, the lack of which is seen as a form of discrimination. Reasonable accommodation is key to the ADA and it is a form of

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[299] Public Law 110-325, ADAAA, Passed on September 17, 2008, signed into law on September 25, 2008, and became effective on January 1, 2009, Online: <http://www.access-board.gov/about/laws/ada-amendments.htm> (Accessed Friday, May 14, 2010); The ADAAA was a response to two Supreme Court decisions that had interpreted the original text of the ADA. Because members of the U.S. Congress viewed these decisions as limiting the rights of persons with disabilities, the ADAAA explicitly reversed them. It also rejected portions of the regulations published by the Equal Employment Opportunity Commission (EEOC) that interpret Title I of the ADA.

[300] See *Sutton v. United Air Lines Inc*., 130 F.3d 893 [10th Cir. 1997] & *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 224 F.3d 840 [6th Cir. 2002]; Through these rulings, the courts created a situation in which physical or mental impairments that previously constituted disabilities no longer qualified for protection. These included individuals with impairments such as HIV/AIDS: Fact Sheet Comparing People Covered Under 504 and the ADA, Online: <http://www.law.georgetown.edu/archiveada/documents/Appendix_A_000.pdf> (Accessed, Friday, May 14, 2010).

[301] Section 4(4)(A) ADAAA; In addition, the courts have held that there is no "laundry list" of *per se* disabilities. See *EEOC v. Sara Lee Corp.*, 237 F.3d 349 [4th Cir. 2001]; *Ennis v. National Ass'n of Business & Educ. Radio*, 53 F.3d 55, 60 [4th Cir. 1995]; Peter Petesch, (*Chap. Ed.*), "The Americans with Disabilities Act and other Disability Discrimination Laws" Labor and Employment Law SourceBook, (Ford & Harrison, 2010) Chap. 19, at 557.

[302] The ADAAA retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that the statutory terms such as "substantially limits" and "major life activities" among other terms and emphasizes that the definition of "disability" should be interpreted broadly: See sections 4 & 5, ADAAA.

[303] James Slack, *supra* note 295 at 365.

discrimination against a qualified individual with a disability not to have his/her known physical or mental limitations reasonably accommodated.[304] The ADA is also clear as to the type of alterations to the work environment or processes it deems reasonable. These include changes which enhance the enjoyment of equal employment opportunities and making facilities used by employees readily accessible to and usable by individuals with disabilities. Other forms of accommodations are job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, and the provision of qualified readers or interpreters.[305]

In addition, the U.S. Equal Employment Opportunity Commission (EEOC), which is the Commission saddled with the responsibility of promoting equality of opportunity in the workplace and the enforcement of federal laws prohibiting employment discrimination, has guidelines dealing with disabilities and the provision of reasonable accommodation.[306] These guidelines are

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[304] 42 U.S.C. § 12112(b)(5)(A); Michael Galo, " The Americas with Disabilities Act – The Reasonable Accommodation Process" (April 2001), at 1, Online: <http://usm.maine.edu/servicelearning/pdf/ADA%20reasonable%20Accom.pdf> (Accessed Thursday, May 13, 2010). This duty is however limited to situations where the provision of such accommodations would not cost the employer undue hardship [42 U.S.C. § 12112(b)(5)(A)] and where the absence of HIV or AIDS is a bona fide occupational requirement related and consistent with business necessity [42 U.S.C. § 12113(a)]; See 42 U.S.C. § 12111(10) on when an sought accommodation would be deemed to impose undue hardship.

[305] 42 U.S.C. § 12111(9)(A)(B); Michael Ashley Stein, "The Law and Economics of Disability Accommodations" (2003) 53:1 *Duke Law Journal*, at 79-191 at 91.

[306] *The EEOC* is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. The enforcement of the ADA differs from Title to Title. Under Title I, individuals who believe they have been subject to employment discrimination due to a disability may file an administrative charge with the EEOC or an equivalent state or local human rights agency. Later, they may file a lawsuit, but only after receiving a "right-to-sue letter" from one of the aforementioned agencies: Kathryn Moss *et al.*, "Unfunded Mandate: An Empirical Study of the

significant to people living with HIV/AIDS as the EEOC has recognized AIDS as a ground for disability protection under the ADA.[307] In particular, the EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities[308] has very elaborate provisions on the duty to provide reasonable accommodation under the ADA such as the format for requesting for reasonable accommodation[309] and the time to request for such accommodation.[310] The EEOC Enforcement Guidance also provides for specific forms of reasonable accommodation such as permitting the use of accrued paid leave or providing additional unpaid leave for treatment or recovery related to a disability, physical changes to the workplace or equipment, modified workplace policies, adjusting supervisory methods, providing a job coach, and reassignment to a different position.

The above list of accommodation measures is by no means exhaustive as persons with HIV/AIDS require diverse forms of workplace restructuring. The

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Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission" (2001) 50 U. KAN. L. REv. 1, 29 n.147; Scott Burris & Kathryn Moss, *supra* note 292 at 6.

307 Equal Employment Opportunity Commission, Interim Enforcement Guidance to the Application of the ADA to Disability Based Discrimination in Employer Provided Health Insurance, 8 June 1993, pp. 7-8

308 *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*, issued 25th March, 2007, online: <http://www.eeoc.gov/policy/docs/psych.html> (Accessed Friday, May 14, 2010). Others include: *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (17th October, 2002); *Enforcement Guidance on Disability Related Inquiries and Medical Examinations of Employees Under the Americas with Disabilities Act* (26th July, 2000); *Instructions for Field Offices Analyzing ADA Charges After Supreme Court Decisions Addressing "Disability" and "Qualified"* (26th July, 1999), et cetera.

309 When an individual decides to request accommodation, the individual or his/her representative must let the employer know that s/he needs an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation." *Schmidt v. Safeway, Inc*., 864 F. Supp. 991, 3 AD Cas. (BNA) 1141 (D. Or. 1994) (an employee's request for reasonable accommodation need not use "magic words" and can be in plain English).

310 An individual with a disability is not required to request a reasonable accommodation at the beginning of employment. S/he may request a reasonable accommodation at any time during employment.

provisions however provide better legislative guidance than that present in the Canadian legal framework.[311] Despite the few negative attention that the ADA has received such as the narrow interpretations given by the Supreme Court[312] and its inability to eliminate deep structural barriers to employment which people with disabilities face,[313] the ADA has still been of immense benefit to people within the HIV spectrum, from individuals who just tested positive for the retrovirus to people who have AIDS.[314] While the Act does not classify any particular disease or condition as a disability, the weight of judicial authority,[315] the ADA's legislative history,[316] and rules issued by the Department of Justice and EEOC[317]

[311] *Contra*. Michael Ashley Stein, *supra* note 306 at 81; Pamela S. Karlan & George Rutherglen, "Disabilities, Discrimination, and Reasonable Accommodation" (1996) 46 Duke L.J. 1, at 8.

[312] See Samuel Bagenstos, "The Americans with Disabilities Act as Welfare Reform" (2003) 44 Wm. & Mary L. Rev. 921, 930 – 52; *Sutton* & *Toyota* (*supra* note 300) (restrictive readings of the statute's definition of "disability); *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555 [1999], and *Chevron U.S.A.A v. Echazabal*, 536 U.A. 73 [2002] (expansive reading of employers' defenses).

[313] Samuel Bagenstos, "The Future of Disability Law" (2004) 114:1 *The Yale Law Journal*, 1-83 at 4. According to Samuel Bagenstos, though the ADA can prevent an employer from refusing to hire a qualified person with a disability or from providing required accommodations, it does not require the employer to "provide in-home personal-assistance services or transportation to enable an individual with a disability to get to work, nor do they require the employer to provide the individual with health insurance coverage that is as adequate."

[314] James Slack, *supra* note 295 at 365; Jeffrey A. Mello, "Ethics in Employment Law: The Americans with Disabilities Act and the Employee with HIV" (1999) 20:1 *Journal of Business Ethics*, 67-83 at 67; David Studdert & Troyen Brennan, "HIV Infection and the Americans with Disabilities Act: An Evolving Interaction" (1997) 549 *Annals of the American Academy of Political and Social Science*, The Americans with Disabilities Act: Social Contract or Special Privilege, 84-100 at 84.

[315] See for example, *Bragdon v. Abbott*, 524 U.S. 624 [1998], *Chalk v. U.S. Dist. Court*, *supra* note 73, *Cruz Carrillo v. AMR Eagle, Inc*., 148 F. Supp. 2d 142, 146 [DPR 2001], *Martinez v. School Bd. of Hillsborough County*, 861 F.2d 1502 [11th Cir. 1988].

[316] The U.S., Congress, House, H. Rept. 485, 101st Cong., 2d sess., 1990, pp. 51-52, reprinted in 1990 U.S.C.C.A.N. 267, 333 (outlining some diseases intended to be covered, and including HIV and AIDS-related diseases among them; discussing procreation as a major life activity limited by HIV status); U.S., Congress, Senate, S. Rept. 116, 101st Cong., 1st sess., 1989, p. 22 (noting that "disability" includes persons infected with HIV).

[317] See Equal Employment Opportunity Commission (EEOC), Interim Enforcement Guidance to the Application of the ADA to Disability Based Discrimination in Employer Provided Health Insurance, 8 June 1993, pp. 7-8

all support the position that both HIV and AIDS are considered to be disabilities under the ADA.[318]

The case of *Bragdon v. Abbott* (1998)[319] is an authority for the position that HIV/AIDS is a disability under the ADA. In that case, the respondent who had asymptomatic HIV infection brought an action against the petitioner alleging discrimination based on her disability. The petitioner, a dentist, was accused of refusing to fill her cavity because of his policy against filling cavities of HIV-infected patients. Both the Court of Appeals[320] and the Supreme Court held that the respondent's HIV infection constituted a disability under the ADA. In reaching its decision, the court applied the three standards for determining disability under section 12102(2) of the ADA, i.e., whether the respondent's HIV status is a physical impairment, whether the activity on which the respondent relies constitutes a major life activity under the ADA, and whether the impairment substantially limits that major activity.[321] As is the case with most disability legislations, the ADA also allows an employer to defend a charge of disability discrimination by proving that the hiring or retention of a disabled employee poses a substantial risk of serious injury to others,[322] such hiring would breach a bona fide occupational requirement,[323] and accommodating such a person would

[318] David Studdert & Troyen Brennan, *supra* note 315 at 87 & 88.
[319] *Supra* note 316.
[320] 107 F. 3d 934, 939-943 [CA1 1997].
[321] The same test was applied in the case of *Cruz Carrillo, supra* note 316.
[322] *Waddell v. Valley Forge Dental Associates, Inc*, 276 F.3d 1275 [2001]; *Estate of Mauro by & Through Mauro v. Borgess Med. Ctr.*, 137 F.3d 398 [6th Cir. 1998].
[323] 42 U.S.C. § 12113(a).

bring about undue hardship.[324] Be that as it may, the courts seldom uphold such defenses in HIV and AIDS cases.[325]

What is evident from the above examination of UN instruments and the ADA is that reasonable efforts have been made at tackling some of the challenges posed by HIV and AIDS to the workplace. While international instruments are only enforceable in countries when ratified and signed into law, they nonetheless could serve as a persuasive voice or standard by which countries ought to judge their individual efforts and responsibilities, whether or not they have been ratified.[326] Through the ADA, the US has succeeded in laying down practical ways of meeting the reasonable accommodation needs of persons with HIV/AIDS in the workplace. Though the waters still remain murky in some areas, some significant strides have been made, namely, a decipherable legislative delimitation of the expectations of the law and clear enumerated particulars of the obligations of the State and employers. There is also some form of unity in the jurisprudential approach of the Courts. Thus, the duty has lost some of its ambiguity. If similar steps were taken by Canada, they would go a long way in ensuring that persons living with HIV/AIDS are better protected in the workplace. They would also help in defining some aspects of the duty to provide reasonable accommodation, thus leading to a more effective system.

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[324] 42 U.S.C. § 12112(b)(5)(A); 42 U.S.C. § 12111(10).

[325] *Holiday v. City of Chattanooga*, 206 F.3d [6th Cir. 2000]; *Doe v. Attorney General of U.S.* 410 U.S. 179 [1973]; Peter Petesch, *supra* note 302 at 571.

[326] Though unratified conventions have no force of law, States are however encouraged to give effect to any of the provisions of the convention by legislation, administrative action, collective agreement or otherwise. See Article 19(e), Constitution of the International Labour Organization, ILO, Online: <http://www.ilo.org/ilolex/english/constq.htm> (Accessed Thursday, July 22, 2010)

PART V

CONCLUSION

Several complex relationships could be forged between the HIV/AIDS pandemic and the world of work. These relationships take center stage in the workplace because the effects of the virus are more intensely experienced here than in any other sector of the society. The preceding chapters have examined the relationship between HIV/AIDS and the workplace, the several efforts made at incorporating people living with HIV/AIDS in workplace systems and the importance of reasonable accommodation in ensuring that their rights are acknowledged and respected. In recent years, the need to ensure that work environments are made suitable for people living with HIV/AIDS has received greater support as a result of a number of factors. Paramount among these factors are the increase in knowledge about the virus, the realization that majority of infected individuals make up a significant portion of the workforce of any country and the advent of highly active antiretroviral therapy (HAART) and several other drug combination therapies which ensure that people living with the virus are able to function effectively and productively. In addition, policy makers now have access to studies on how HIV/AIDS can be managed in the workplace without compromising the business and production of an organization.

Notable as these strides are, they become relevant only when implemented alongside reasonable accommodation measures. The provision of reasonable accommodation is a significant way of ensuring a successful integration of people living with HIV/AIDS in the workplace. Without efforts which ensure that the workplace is flexible enough to accommodate the care and working needs of HIV

infected workers, all other efforts made at recruiting and integrating them in the workplace would amount to very little. This is so because without these accommodation measures, workers living with the virus would not be properly integrated into the workplace or compete effectively with the rest of the workforce. Lack of reasonable accommodation or where the provision of same is inadequate also create communication barriers and goes contrary to health, safety and decent work standards.

Various efforts have been made in Canada in order to ensure that a holistic approach is adopted in enforcing equality rights of incapacitated persons or persons who have historically been exposed to prejudice or discrimination. Since the duty to accommodate persons with disabilities made its debut in the Canadian legal landscape in the 1985 case of *Simpson-Sears*[327] to protect religious observation rights, it has grown to cover other grounds of discrimination, including HIV/AIDS. Thus, people living with HIV/AIDS in Canada now have rights to reasonable accommodation in the workplace under various federal and provincial human rights statues, so long as the provision of same would not unduly burden the employer. Despite these admirable strides, we are not yet close to a state of utopia as the duty to provide reasonable accommodation in Canada is still characterized by uncertainties and discrepancies in its application. The major challenge posed by the present legal framework is that it is impossible for arbitrators, tribunals and the judiciary to define the exact boundaries of the duty leading to a complex system of duties and obligations.[328] Another worry is the

[327] *Simpsons-Sears*, supra note 82.
[328] Kathryn Meehan, *supra* note 146 at 419.

fact that not all the provinces have a uniform definition of what amounts to a disability. Consequently, HIV infection, AIDS or full-blown AIDS is a disability, depending on the province being considered.[329]

The above difficulties are not exclusive to Canada as no system in the world today can boast of having a clear and workable definition of what the duty to provide reasonable accommodation entails. The resultant effect of this is that to greater or lesser degrees, discrimination remains a part of the daily life of people living with HIV almost everywhere in the world.[330] One-third of all countries have virtually no laws protecting their rights.[331] The remaining countries have developed several ways of ensuring that people infected with the virus are not exposed to discrimination. One notable step taken in this regard is the development of statutes which expressly define the duty to provide reasonable accommodation and make attempts at ensuring that it is not applied in a discriminatory manner. A good illustration of such a step is that taken by the US congress when it passed the *Americans with Disabilities Act* in 1990.[332] The ADA places a lot of emphasis on the need to provide reasonable accommodation and gives detailed examples of the type of measures that would amount to reasonable accommodation. The ADA Amendment Act also ensures that no limitation is placed on the group of persons that would be able to benefit from the provisions of the Act.

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[329] While AIDS has been held to be a disability in British Columbia, Alberta has only accepted full-blown AIDS as a disability: *Biggs*, *supra* note 210; *Bertelsen*, *supra* note 203

[330] Ban Ki-Moon, "The stigma factor: biggest hurdle to combat HIV/AIDS", The Washington Times (6 August 2008), Online: The Washington Times <http://www.washingtontimes.com/news/2008/aug/06/the-stigma-factor/> (Accessed Monday, June 21, 2010). Ban Ki-Moon is the present U.N. Secretary General.

[331] *Ibid.*

[332] The *Americans with Disabilities Act*, *supra* note 242.

There is however a great deal of work that remains to be done and every country has the duty to ensure that it protects the rights of the various classes of its citizens to the best of its abilities. In Canada, a lot more effort needs to be channeled towards ensuring that the nature and coverage of the duty is defined and some form of uniformity is injected into the application of existing laws governing the duty. There is also a need to develop specific forms of accommodations that should be provided for persons with HIV/AIDS. This would serve as a guide for employers and could be achieved in various ways. While each country has the autonomy to choose the approach that best suits its legal system, such approaches are only effective when they are well defined and free from ambiguity. Based on the discussions in the preceding chapters, I hereby put forward the following four suggestions:

(i) The concept of reasonable accommodation as it affects people living with HIV/AIDS should give rise to more debates and discussions among stakeholders and lawmakers than is currently the case;

(ii) A HIV/AIDS-specific anti-discrimination law should be considered;

(iii) Moves should be made at ratifying certain key international disability conventions, and

(iv) Emphasis should be placed on individual workplace HIV/AIDS policies.

On the first point, it is my firm opinion that an essential step towards recording any success in HIV/AIDS protection rights is a change in the current attitude towards the virus. The attention received by HIV and AIDS is not commensurate to the threat it poses to the society as it is largely seen as a Sub-Sahara African disease or a disease which affects only a certain class of

individuals.[333] This view is however misdirecting as the virus is daily gripping communities that were little troubled by the epidemic in times past. Already, recent data shows a 14% increase in the number of persons infected with the virus in Canada[334] with an estimate of one person in the country becoming infected with the virus every two (2) hours.[335] Most of these people belong to the working age group and are now able to live normal productive lives. Necessary frameworks need to be put in place to cater for the needs of this group of people, whose numbers have the potential of becoming significant in future years. Attention should be given to other aspects of the disease that are fast gaining relevance as opposed to general efforts made at prohibiting discrimination and developing HIV/AIDS immigration and foreign policies,[336] as important as these might be. The HIV/AIDS debate should be broadened to cover social assimilation of people living with the virus and the improvement of workplace standards and care. In particular, more research should be put into the development of reasonable accommodation measures as a tool for workplace integration.

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[333] In a survey carried out by the Public Health Agency of Canada in which 2004 Canadians over the age of 15 from 10 Provinces were interviewed, close to two-thirds believe that the government should spend more on HIV/AIDS now than it did ten years ago. Of this number, about 58% feel that the government should focus more on national programs and funding as opposed to international programs. The survey was updated in 2006. See, Public Health Agency of Canada, "HIV/AIDS – An Attitudinal Survey Final Report" Online: <http://www.phac-aspc.gc.ca/aids-sida/publication/por/attitud/7_invo-eng.php> (Assessed, Thursday, July 22, 2010)

[334] Comparison between 2008 figures with the preceding three (3) years: "Estimates of HIV Prevalence and Incidence in Canada, 2008," (2009) *Surveillance and Risk Assessment Division, Centre for Communicable Diseases and Infection Control, Public Health Agency of Canada.*

[335] "The Global Epidemic," *supra* note 19.

[336] Canada's recent *Immigration and Refugee Protection Act*, which became law on 28 June 2002 and the *Refugee Protection Regulations*, allows people to immigrate into Canada on a permanent basis only if they are not likely to be a danger to public health or safety and if they would not cause excessive demand on health or social services. See section 38(1), Immigration and Refugee Protection Act, S.C. (2001), c. 27.

Generally speaking, prevention of discrimination for people living with HIV/AIDS via national legislation comes in two ways. The first method is the use of general anti-discrimination laws which prohibit discrimination against classes of persons based on factors such as race, gender, religion and disability (physical or mental).[337] The term disability is often interpreted to include HIV, AIDS, full-blown AIDS, opportunistic infections or other health conditions related to HIV infection.[338] It is sometimes based on whether or not a person is unable to perform certain life activities such as work.[339] In some instances, existing laws are interpreted in ways that offer protection to new forms of disabilities as they emerge. This is the method adopted by Canada and the US in protecting people living with HI/AIDS from discrimination.[340] As has been shown, this form of legislation does not adequately protect persons with HIV/AIDS as it could be subject to narrow interpretations[341] and lead to certain uncertainties as to the nature of the duty owed to the different classes of persons the legislation is meant to cover. It is for these reasons that a push is made for HIV/AIDS-specific legislations that have express provisions defining the group of persons covered and the nature of the duty owed to those persons.

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[337] Richard Elliot, Leah Utyasheva & Elisse Zack, "HIV, Disability and Discrimination: Making the Links in International and Domestic Human Rights Law" (2009), 12:29 Journal of International AIDS Society; *HIV, Disability and Human Rights: Opportunities offered by the United Nations Convention on the Rights of Persons with Disabilities*, A Discussion Paper, 2008, Canadian HIV/AIDS Legal Network at 11.

[338] *Ibid.*

[339] See ADA, 42 U.S.C. § 12102(2); *Bragdon v. Abbott*, *supra* note 316.

[340] The same approach is adopted by several other countries such as Australia (*Commonwealth Disability Discrimination Act* 1992 (Cth.), Acts of the Parliament of the Commonwealth of Australia 1992); New Zealand (*New Zealand's Human Rights Act* 1993, Public Act 1993 No. 82); and Ireland (*Irish Employment Equality Act*, No. 21, 1998).

[341] See US cases of *Sutton* & *Toyota*, *supra* note 30.

The second and preferred way of dealing with discrimination related to HIV/AIDS via legislation is through the promulgation of HIV/AIDS-specific laws which often address a wide range of HIV-related legal issues, and usually include provisions that prohibit discrimination based on HIV status and/or AIDS diagnosis.[342] HIV/AIDS-specific laws have been shown to be very effective in addressing discrimination based on HIV status or AIDS.[343] Though a HIV/AIDS-specific law alone cannot tackle HIV/AIDS-related discrimination, it would avail legislators and policy makers the opportunity to deal elaborately with a vast majority of HIV/AIDS issues. This would be especially useful in setting reasonable accommodation standards, as those needed by people living with HIV/AIDS cannot be adequately dealt with under general legislations. As the statistics show, HIV and AIDS is becoming a growing concern in Canada as it is all over the world, the growth of which deserves a closer attention than is presently the case.

A look at ILO's NATLEX database shows that about 50 countries have specific HIV/AIDS national legislations dealing with many issues.[344] It is hoped that Canada would soon embrace the idea of having HIV/AIDS-specific anti-

[342] Richard Elliot, Leah Utyasheva & Elisse Zack, *supra* note 338.

[343] United Nations Commission on Human Rights, *Sub-Commission on Prevention of Discrimination and Protection of Minorities*, "HIV/AIDS and Disability" (August 1996) Statement by the UNAIDS, 48 Session; Similarly, The World Bank, "*Legal Aspects of HIV/AIDS: A Guide for Policy and Law reform"* states, that the most comprehensive laws extend protection to "actual, perceived, or suspected HIV status to cover those who are discriminated against dues to actual or perception that they are infected because of proximity to others perceived to be infected or association with groups stereotypically linked with HIV infection."

[344] Countries with specific HIV/AIDS national legislations are: Angola, Argentina, Austria, Bolivia, Burkina Faso, Chad, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Ghana, Guatemala, Guinea, Guinea-Bissau, Honduras, Hungary, Indonesia, Italy, Kazakhstan, Kenya, Kyrgyzstan, Madagascar, Mali, Mauritania, Mauritius, Mexico, Mongolia, Mozambique, Nicaragua, Niger, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Romania, Russian Federation, Sierra Leone, Tajikistan, Tanzania, Togo, Turkmenistan, Ukraine, Uzbekistan, Venezuela, Viet Nam and Zimbabwe.

discrimination legislations, both at the federal and provincial levels. These laws should be applicable to a broad range of public and private sector employers and service providers and should mandate employers to provide reasonable accommodations to aid already qualified persons to perform their jobs. The laws should also address the full spectrum of people infected with the HIV virus, from people with asymptomatic infection to those with full-blown AIDS, and also include people merely perceived to be having HIV or AIDS. This would ensure that no body within the HIV/AIDS spectrum is left unprotected.[345]

Another way of incorporating these anti-HIV/AIDS discrimination provisions into the legal framework of the country is by ratifying relevant UN conventions on disability protection. It is therefore suggested here that Canada ratifies certain key conventions which cover areas not presently covered by Canadian statutes. For instance, the *Vocational Rehabilitation and Employment Convention*, 1983 (No. 159)[346] which is an egalitarian convention, deals extensively with the need to provide reasonable accommodation and is one of the most relevant conventions on the matter.[347] Ratification of this convention would facilitate the integration of persons with HIV/AIDS in the Canadian workforce and aid the removal of barriers which prevent them from enjoying equality of

[345] HIV/AIDS and Disability, *supra* note 15; In terms of actual prohibition of discrimination, reference could be made to model legislative provisions on HIV-related discrimination proposed by the Canadian HIV/AIDS Legal Network. They propose that one of two options could be selected in drafting a specific law to prohibit HIV/AIDS-related discrimination: an outright prohibition on discrimination relating to HIV/AIDS status or an extension of the meaning of the term "disability" in existing anti-discrimination legislations: Canadian HIV/AIDS Legal Network. *Legislating for Health and Human Rights: Model law on Drug Use and HIV/AIDS*. Module 7: Stigma and Discrimination, 2006.

[346] Adopted 20 June 1983 by the General Conference of the International Labour Organization at its 69th Session and came into force on 20 June 1985.

[347] Louis N'Daba, s*upra* note 258 at 31.

opportunity in employment.[348] It would also help in ensuring that the duty to provide reasonable accommodation is approached in a holistic manner.[349] Another convention that ought to be ratified by Canada is the *Convention on the Rights of Persons with Disabilities* which was signed by Canada in 2007 with an indication that ratification would follow. If ratified, it would serve as a strong judicial authority for the position that lack of reasonable accommodation is a form of disability discrimination.

Finally, aside legal reforms, emphasis should also be placed on individual workplace HIV/AIDS policies as they have been shown to be effective ways by which workers infected with HIV/AIDS are shielded from workplace discrimination. They also aid in informing co-workers about the virus, thus eliminating on-the-job discrimination and stigmatization. Every organization, both public and private, has a duty to come up with individual HIV/AIDS workplace policies which comply with best practices, the Canadian Human Rights Act, and any other provincial legislation governing human rights, disabilities and workplace standards. A HIV/AIDS policy sends a clear message to the employees on the organization's commitment to equality among workers[350] and helps in preventing lawsuits and other legal complications. The HIV/AIDS workplace policy should be comprehensive and cover all the basic HIV/AIDS workplace

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[348] Jeanne Mager Stellman (ed.), *Encyclopaedia of Occupational Health and Safety*, 4th Edition (International Labour Office: Geneva, 1998), Vol. 5 at 17.14.

[349] See *Comments to the Draft Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities* (2006-2016), 2006, Permanent Council of the Organization of American States: Committee on Judicial and Political Affairs, CAJP/GT/DDD-19/06.

[350] Canadian Human Rights Commission, "Policy on HIV/AIDS" (2007) Online: CHRC <http://www.chrc-ccdp.ca/legislation_policies/aids-en.asp> (Accessed Tuesday, June 29, 2010).

issue**s.**[351] However, for such policies to be effective, they must shy away from earlier policy formats which concentrate only on discrimination and education of workers on the risks of HIV transmission to one which also takes into account the provision of reasonable accommodation. The sections on reasonable accommodation should also be detailed and contain guidelines on a number of issues including how to request for accommodation, the obligation of the employer and employees, limits to the duty and various forms of accommodation that could be made.

In conclusion, it is evident that the HIV pandemic is still largely ahead of us. But while a cure for the virus continues to evade the world, there is still a lot that can be done to support the vast number of persons among us who have to live with it daily. The above suggestions would significantly tackle some of the challenges faced by these people and would also serve as a model for future legal regimes. However, in order for these suggestions to be effective, all stakeholders must be concerned about the challenges posed by the HIV/AIDS pandemic and the effects it has on the ever-changing world of work. Only then can HIV and AIDS be effectively managed in the workplace.

[351] For instance, the *ILO Code of Practice on HIV/AIDS and the World of Work* sets out ten key principles and basic elements for a national HIV/AIDS workplace policy which are: the Recognition of HIV/AIDS as a Workplace Issue, Non-Discrimination, Gender Equality, Healthy Work Environment, Social Dialogue, Screening for Purposes of Exclusion from Employment or Work Processes, Confidentiality, Continuation of Employment Relationship, Prevention and Care and Support.

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