AIDS in the Workplace: Termination, Discrimination and the Right to Refuse

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I. Introduction

"I heard one politician say in support of strict quarantine that the AIDS virus has no civil rights. Perhaps not, but the human being infected with that virus does."

Not since the days of leprosy has there been a disease so feared and so fatal as AIDS (Acquired Immunodeficiency Syndrome). The lack of knowledge about the disease has merely compounded the problem, so that not only AIDS victims themselves, but also members of perceived "high-risk" groups, face increasing discrimination in all facets of their lives. This paper will focus on only one of these contexts: the workplace. After a review of the current medical knowledge, two principal questions will be examined:

(i) What protection does the law give AIDS victims, or members of high-risk groups, against discrimination in employment?
(ii) What protection does the law give other employees when working with an AIDS victim or members of a high-risk group?

These broad issues will be examined by reference to four different areas of the law, including:

(i) The common law regulating individual contracts of employment;
(ii) Arbitration decisions under collective agreements;
(iii) Human rights legislation; and
(iv) Occupational health and safety legislation.

The principal focus in this paper will be the respective rights of victims, high-risk groups, employers, and fellow employees under the human rights legislation, the common law, arbitration jurisprudence, and occupational health and safety legislation being merely illustrative of the uncertain and inconsistent legal position these individuals face absent strong amendments to human rights codes. Indeed, it will be shown that many of these individuals, particularly those in a non-unionized environment, can simply be terminated with notice and have no legal redress. This calls for change.

II. Medical Facts

1. General

AIDS is a clinical syndrome first reported in Canada in February 1982, eight months after it was described in the United States. It is characterized by a loss or reduction of immune function due to infection by a fluid-borne virus. The immune dysfunction results in the development of opportunistic infections or malignancies, frequently resulting in death.²

Homosexual or bisexual males continue to constitute the largest group of cases (76 per cent),³ although drug abusers who share needles, recipients of blood or blood products, heterosexual partners (including prostitutes) and persons of African or Haitian extraction have also been reported.⁴ Overall, the cumulative incidence of AIDS in Canada as of March 1986 was 19 per million population.⁵ Ontario, Quebec and British Columbia have reported 92 per cent of all cases.⁶

The major risk activities for exposure to the AIDS virus include receptive anal intercourse in homosexual males, needle sharing among intravenous drug abusers and heterosexual intercourse with an infected person.⁷ Other modes of transmission include the transfusion of contaminated blood or blood products and perinatal transmission by an infected mother to her infant.⁸

Transmission of the infection has not been seen in casual (non-sexual) contact situations, as would occur in the workplace, school, or household.⁹ There is no evidence of transmission in food or water, or by airborne routes.¹⁰ Studies of family members of infected persons indicate that the AIDS virus has a very low potential for transmission in non-sexual settings.¹¹ Epidemiologic studies indicate that oral exposure to this virus presents a low risk in comparison to rectal exposure, but data indicating that there is no risk of infection are, as yet, incomplete.¹² All such evidence indicates that fears of contracting AIDS on the job are unfounded.

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3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
Although the incubation period for AIDS may be very long, current estimates suggest that up to 10 per cent of infected persons are likely to develop AIDS. Between 20 and 25 per cent of patients infected with the AIDS virus are symptomatic but do not meet the case definition for AIDS. These individuals are seen to be suffering from AIDS-related complex.

Treatment of this disease can be divided into three broad approaches: (i) treatment of the specific malignancies and infections associated with AIDS, (ii) attempts at immune stimulation and reconstitution, and (iii) antiviral therapy. With or without treatment, however, AIDS remains a fatal disease in most cases. The overall case-fatality rate at any given time is approximately 50 per cent and few patients survive longer than three years from the time of diagnosis.

Because of this high mortality rate, much emphasis has been placed on the control of the spread of the infection. Suggested measures include:

(i) The prevention of sexual transmissions (by limiting the number of partners and encouraging the use of condoms for high-risk sexual exposures);
(ii) The elimination of virus from blood, blood products, organs and tissues used for donation (by screening, and non-acceptance of donors form all high-risk categories);
(iii) The prevention of perinatal infection (see (i) above); and
(iv) The avoidance of blood exposure through needle sharing among drug abusers.

Commercial testing kits for AIDS are becoming available in Canada. These utilize enzyme-linked immunosorbent assay (ELISA) technology for detecting antibody to the virus. Although still being evaluated, four ELISA kits and an immunofluorescent assay (IFA) kit have been released for sale in Canada on a trial basis. The number of assay kits is expected to increase with the introduction of second generation kits and new diagnostic products.

The existence of such technology ensures that some employers, at least, will attempt to screen workers for AIDS before and during the employment relationship. While this paper proceeds on the assumption

13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
that discrimination will take place on the basis of medical diagnosis, or the perception that an employee has AIDS, medical screening does pose a problem. It is the author's submission that this issue is best dealt with by an examination of the law relating to drug testing, as the issues are analogous.21

2. The Workplace

The fear of AIDS found in the general public and fuelled by sensational media coverage has invaded the workplace, causing extraordinary tension and stress. Consider the following example:

A manager observes company cafeteria workers whispering in the hallway. When she asks what the trouble is, they angrily reply that they are afraid a co-worker has AIDS. The manager tries to reassure them, but in the following days rumours spread. Suddenly, absenteeism among the workers soars, and other company employees boycott the cafeteria. Near-hysterical family members call the office of the company president and demand answers.22

The result of such a situation is likely to be termination of the suspected victim. Absent any education of the real risk of contracting AIDS, such scenarios are likely to be played over and over again.

But who are the individuals likely to face such actions?

Leonard23 notes that persons infected with the AIDS virus do not present a uniform profile in terms of their physical condition and suitability for employment. Rather, based on current descriptions of the disease, he has identified four categories of such individuals:

(i) Those who have been exposed to the virus but display no physical symptoms;
(ii) Those who display symptoms characterized as "warning" symptoms that AIDS may develop;
(iii) Those who have contracted an opportunistic infection indicating development of the syndrome but who do not require hospitalization and are physically able to work;
(iv) Those who have contracted multiple infections or require extended hospitalization, or who have been so weakened by such infections and the syndrome that they are relatively immobile.24

21. It is possible, however, that if terminating or refusing to hire an AIDS victim because he/she has AIDS is found to be discrimination against the handicapped, AIDS testing will constitute prima facie discrimination.
24. Id., at 687. Reference to "AIDS victims" in this paper will refer to all of these groups.
Discrimination in the workplace is most likely to be confined to members of the first three groups,\textsuperscript{25} and those in high-risk groups in general. It is not likely that an individual in the fourth category would be capable of performing continued work, and would probably be receiving payments under a health-care plan or some other form of income protection.

III. \textit{The Common Law Position}

Any discussion of AIDS and AIDS hysteria in the workplace must have reference to the common law regulating individual contracts of employment. Two questions are of paramount importance here:

(i) To what extent can an employer be justified in terminating an employee who has AIDS? and

(ii) To what extent can other employees rely on the common law to provide them with a "safe" working environment — \textit{i.e.}, one without an AIDS carrier present?

Each will be dealt with in turn.

With reference to the first issue, the case law shows that, for indefinite contracts of employment, an employee who suffers a permanent disabling illness can be terminated without notice because the contract has been frustrated.\textsuperscript{26} Permanent illness destroys the consideration that the employee offered in exchange for the employer's promise to pay wages, as the employee will never again be able to perform his duties for the employer. Temporary illness, on the other hand, will not frustrate the contract of employment. This is based on the idea that illness is an Act of God which cannot be foreseen or guarded against and so must be forgiven on grounds of common humanity.\textsuperscript{27}

But how long must an employee be off sick before the illness is no longer considered temporary? There is little case law on this question in Canada, but the leading English case, \textit{Marshall v. Harland and Wolff Ltd.} held 18 months not to be long enough.\textsuperscript{28} The court went on to list five

\begin{itemize}
\item \textsuperscript{25} Especially the first group if AIDS testing in the workplace is initiated on a wide scale.
\item \textsuperscript{26} \textit{Dartmouth Ferry Commission v. Marks} (1903-4), 34 S.C.R. 366.
\item \textsuperscript{27} But note \textit{Heinburger v. Kingel} (1931), 2 W.W.R. 539 (Sask. Dist. Ct.) which drew a distinction between Acts of God which are extraordinary and cannot be foreseen or guarded against and perils which arise in the ordinary scope of the employee's occupation or business. The former can be excused on common humanity, the latter, not, and an employee injured in the latter category will not be paid while ill. What about health-care workers who contract AIDS on the job?
\item \textsuperscript{28} (1972), I.C.R. 101 (Industrial Court). This was because the employer had not been paying wages, sick pay or pension contributions, so there was no serious reason to treat the contract as frustrated. Also, it had not been the company's policy to terminate employment on grounds of sickness and there was no evidence that the employee was permanently incapacitated.
\end{itemize}
factors which, by their presence or absence, would increase or decrease the likelihood of frustration:

(a) the presence of a relatively short notice period;
(b) the fact that an entitlement to sick pay has expired (not conclusive as a factor);
(c) a short expected duration for the employment in the absence of sickness;
(d) the fact that the employee occupies a key post in which he must be replaced on a permanent basis;
(e) the fact that the period of past employment is relatively short (i.e., seniority brings about an increasing elasticity in the relationship between the employer and employee so that longer period of absence due to sickness may be deemed acceptable).

Considering these factors, the court must then ask:

Was the employee's incapacity, looked at before the purported dismissal, of such a nature, or did it appear likely to continue for such a period, that further performances of his obligations in the future would be impossible or would be a thing radically different from that undertaken by him and accepted by him under the agreed terms of his employment?

However, where the employment contract is made for a specific purpose, or for a fixed term, the tests is not that above, but whether the illness prevents performance of the task, or of a significant part of the term.

Finally, it must be pointed out that the concept of seniority found under the collective-bargaining regime does not exist at common law. Hence, although an employee off work due to temporary illness has the right to return to work unless he is dismissed, he can definitely be dismissed with due notice and has no right to replace another employee who has been hired to replace him during his illness. The totality of the job security an ill employee has at common law lies in the fact that illness does not constitute just cause for summary dismissal.

But what relevance does all of this have for employees with AIDS? The issue here is not so much whether he can continue to do the job, or whether he is still useful to the employer, but whether the other employees can safely work with him. Following the above precedents literally would mean that an employee with AIDS could remain on the

29. Id., at 105.
30. Id., at 106.
33. See: Low v. Toronto (1947), 2 D.L.R. (2d) 718 (Ont. C.A.). The reasoning of the court implied that an employee had no right at common law to return to work after illness regardless of how long the employee had worked for the employer concerned.
job when not so ill as to require time off, and, so long as he is not dismissed with notice, return to his job after a short bout of illness (infection). The only argument that the employer may have for summary dismissal is that AIDS is usually a fatal illness that, at present, has no cure. Thus, while he can definitely fire the employee when the illness has progressed to the stage where further performance of his contractual obligations in the future would be impossible, or radically altered, he may also be able to do so because an employee with AIDS will be permanently incapacitated in the future.34

But what of contagion? Although present medical knowledge indicates that the disease cannot be passed through casual contact35, there is much that is still to be learned. In light of this, do fellow workers have any common-law rights that protect them from working with AIDS carriers?

The answer to this question is both yes and no. Christie36 writes that, at common law:

The employer is obliged to provide his employees with safe tools and equipment, a safe system of work and fellow employees who do not foreseeably endanger them.37 [Emphasis added]

This duty may arise either in tort or as an implied term of the employment contract38, and would seem to cover infectious fellow employees with AIDS.

It must be pointed out, however, that in most employment relationships this implied duty of care is no longer relevant. Injured employees now recover from no-fault worker's compensation funds, under legislation that takes away their right to sue their employer.39 Thus, fellow employees, even in health care, could not sue their employer, in contract or in negligence, for keeping an AIDS victim on the payroll and requiring them to work with him.

Yet, there is one area where the employer's common-law duty with regard to safety continues to be relevant to every employee, whether covered by Worker's Compensation legislation or not. Christie writes:

Any employee may refuse to work in an unsafe situation and in doing so, he does not give just cause for discipline or discharge. One way of stating this legal result is to say that the employer's breach of his obligation, with

34. This question has not definitely been answered, but would seem to fit the doctrine of anticipatory breach.
35. Supra, note 2.
39. See, eg., the Workers' Compensation Act, R.S.N.S. 1967, c. 343, s. 49. Note, however, that domestic servants and agricultural workers are not covered by this legislation so the common law duty of care may be relevant.
regard to safety, releases the employee from his obligation to work and to follow the reasonable orders of his employer . . . [But] if it is subsequently established that the work situation was in fact safe, the refusal to work may well be held to have been unjustified.40 [Emphasis added]

The problem here is that present medical knowledge consistently finds no risk of infection by casual contact with an AIDS victim. Unless it is later discovered that there is indeed such a danger, such refusal to work would constitute just cause for dismissal. This would apply equally to health-care workers, so long as the employer was not ordering them to expose themselves to infected bodily fluids without proper precautions.

But unless precluded by Worker's Compensation Legislation, none of the above limits the right of an employee, or customer, who has contracted AIDS from another on the job to sue the other employee. For example:

United States law supports liability where a person negligently exposes another to a contagious or infectious disease and . . . there have been successful actions in negligence cases of the transmission of herpes. Such litigation in the AIDS context could well develop here.41

Vicarious liability of the employer may be a possibility here as well, especially in the health-care industry, if AIDS were communicated in the course of employment and the employer was not following recommended safety procedures.

Thus, to sum up, it would appear that under the common law as it now stands the employee with AIDS has just as much protection as any other sick employee. Barring application of the doctrine of anticipatory breach, the employer cannot summarily dismiss him until the illness progresses to the point that further performance of his contractual obligations becomes impossible. Moreover, on the medical knowledge as it now stands, other employees cannot refuse to work with him (but may be able to pursue an action in negligence if they actually contract the disease).

But, in reality, this all begs the question of whether the employer simply will not discharge the AIDS victim with proper notice. As already pointed out42, this option is always open in a non-unionized workplace. It is expected that different employers will take different actions here, depending on their own knowledge and personal reaction, the strength of

40. Supra, note 36, at 241.
42. Supra.
reaction by fellow employees (and customers, if relevant), and the economic situation that the victim will face upon discharge.

If discharge is the chosen course, it must be pointed out that, as well as any separation package he may receive, there are likely a number of income-maintenance schemes available to the victim that will soften the blow\textsuperscript{43}, making the decision easier. The availability of such schemes, if coupled with an adverse personal staff and customer reaction, could result in dismissal of the AIDS victim without any common-law recourse on his part. If, however, the employer feels that the danger is minimal, and it is best for the victim to remain on the job as long as possible\textsuperscript{44}, under the present state of medical knowledge, at least, nobody can legally stop him.

IV. \textit{Arbitration Jurisprudence}

Nearly all collective agreements provide seniority and just cause provisions giving the sick employee rights which differ from those existing at common law. This is especially true in the area of job security. However, in the area of refusal to work, arbitrators have also gone further than the common law, upholding refusal to work where an employee honestly and reasonably thought it was unsafe\textsuperscript{45}. The purpose of this section is to examine to what further extent, if any, AIDS victims and/or their co-workers are protected under the collective-bargaining regime, if they file a grievance. However, it must be pointed out that, unlike the common law, these precedents are not strictly binding, and arbitrators may use their increased discretion to formulate entirely different results in the AIDS context.


\textsuperscript{44} In the U.S., for example, “a number of corporations, including Pacific Bell and Cigna Insurance Company, are now allowing AIDS sufferers to stay on the job as long as their failing health permits. Three years ago, when two Bank America employees in San Francisco flatly refused to work with an AIDS victim, the company let the objectors resign and kept the disease victim in his post. Says Nancy L. Menitt, a Bank America vice-president: ‘We recognize the therapeutic value of employees being allowed to work as long as they can.’ At the San Francisco headquarters of Levi Strauss, the blue jeans manufacturer, an AIDS victim who was allowed to stay on the job as superior declares, ‘I do not get the feeling here that I am a leper.’ Companies that decide to live with AIDS have generally succeeded in defusing the worries of other employees by educating them on the difficulty of being infected by the disease on the job. When two workers at the daily Portland Oregonian came down with AIDS last spring, Personnel Director Frank Lesage called small meetings among 350 company employees to discuss the issue and handed out literature on the disease. Says Lesage: ‘They were not happy with the news, but they were glad we were up front about our policy.’” Time, August 25, 1986, page 50.

\textsuperscript{45} Brown and Beatty, \textit{Canadian Labour Arbitration} (2d), 1984, para 7: 3621.
To begin with, in arbitration decisions there is a distinction drawn between just cause for dismissal in cases of discipline, and just cause for dismissal in cases of illness. Depending on the reason behind the dismissal, different factors are to be taken into consideration.\textsuperscript{46} In addition, different considerations are brought to bear depending on whether the illness results in excessive intermittent\textsuperscript{47}, long term\textsuperscript{48}, or permanent\textsuperscript{49} absenteeism. Each of these will be considered in turn.

The case of \textit{Re United Automobile Workers and Massey-Ferguson Ltd.}\textsuperscript{50} states that innocent absenteeism due to illness is not a ground for discipline and hence cannot constitute just cause for dismissal under the collective agreement. Yet, excessive intermittent absenteeism may be just cause in a non-punitive sense, as with an employee who is frequently absent and is not performing his part of the employment contract.

In order to demonstrate this excessive absenteeism, the employer must prove:

(i) undue absenteeism in the employee's past record\textsuperscript{51}, and

(ii) the fact that the employee is incapable of regular attendance in the future.

If there is no probability that there will be a change in the employee's absenteeism in the forseeable future, there is just cause for termination. If, on the other hand, there is chance of change the employee may be reinstated on a provisional basis.\textsuperscript{52} Brown and Beatty note that:

In such cases, arbitrators have generally required that there be some culminating or final incident justifying a response by the employer, as a condition precedent to terminating or altering their employment status.\textsuperscript{53}

Once this has been found:

Arbitrators will then test the propriety of [the employer's] response by examining the past absenteeism record of the grievor and assessing the capability of the employee to report for work on a regular basis in the future. By focussing on such criteria as the past employment record of the grievor, the nature of and causes for the absences in the past, the

\textsuperscript{46} \textit{Canadian General Electric Co. Ltd. v. Oil Chemical and Atomic Workers} (1975), 11 N.S.R. (2d) 552 (N.S.S.C.,A.D.).

\textsuperscript{47} \textit{Supra}, note 43.

\textsuperscript{48} \textit{Supra}, note 43.

\textsuperscript{49} \textit{Supra}, note 43.

\textsuperscript{50} (1969), 20 L.A.C. 370.

\textsuperscript{51} \textit{See: United Automobile Workers, Local 195 and Admiral Steel Products Ltd.} (1967), 18 L.A.C. 417, where it was held that the arbitrator can consider absences due to causes other than illness along with illness absences.

\textsuperscript{52} \textit{See: Re United Automobile Workers, Local 458 and Massey-Ferguson Industries Ltd.} (1972), 24 L.A.C. 344.

\textsuperscript{53} \textit{Supra}, note 45.
persistence of the attendance problem, the effect of earlier company attempts to rectify it, the frequency and duration of the absences, as well as any medical prognostication as to the likelihood of the grievor's ability to report on a regular basis, the arbitrator attempts to make a reasoned judgement as to the grievor's ability to fully discharge his employment obligations in the future.\textsuperscript{54}

Where the employee suffers a long-term illness, in contrast to the more intermittent kind discussed above, Risley\textsuperscript{55} states that this:

\ldots can also constitute just cause for dismissal but here the just cause is established by looking at factors other than the employer's need for an employee to do the job. Arbitrators instead consider such factors as:

(a) the length of time for which an employee can collect money under a sick pay plan;

(b) the ability of the employee to attend regularly in the future; and

(c) seniority provisions.\textsuperscript{56}

Thirdly, when the illness is neither intermittent nor long term but clearly permanent, the employee may be dismissed.\textsuperscript{57} This is much the same as the common-law position regarding frustration in cases of permanent illness. However, unlike the common law, it is possible that a seniority clause can protect an employee who may be permanently disabled for some work, but able to perform other work available at the workplace.\textsuperscript{58}

In all of the above situations, most arbitrators have required the employer to bear the onus of establishing the reasonableness of its prognosis for the employee's future attendance.\textsuperscript{59} In order to provide such proof the employer is legally empowered to require the employee to submit to a medical examination.\textsuperscript{60} Indeed, in Re Martindale Sash and Door Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 802,\textsuperscript{61} Chairman Fox stated that:

\begin{itemize}
  \item \textsuperscript{54} Supra, note 45. See also: \textit{Canada Post Corp.} (982), 6 L.A.C. (3d) 238, where it was held that where there is clear evidence that the cause (or causes) of an employee's illness has been or is in the process of being removed or cured, his past record notwithstanding, his prospects for future attendance are sufficiently positive to warrant his continued employment.
  \item \textsuperscript{55} Della Risley, "An Introduction to the Position of the Sick Employee in Nova Scotia," (1979) 5 Dal L.J. 418.
  \item \textsuperscript{56} \textit{Id.}, at 426.
  \item \textsuperscript{57} \textit{Re United Electrical Workers Local 523, and Page-Hersey Tubes Ltd.} (1962), 13 L.A.C. 289.
  \item \textsuperscript{58} \textit{Re United Automobile Workers Local 399, and Anaconda American Brass Ltd.} (1966), 17 L.A.C. 289.
  \item \textsuperscript{59} \textit{General Tire Canada Ltd.} (1982), 7 L.A.C. (3d) 238.
  \item \textsuperscript{60} \textit{Atomic Energy of Canada Ltd.} (Chalk River Nuclear Laboratories) 1982, 5 L.A.C. (3d) 248.
  \item \textsuperscript{61} (1973), 1 L.A.C. (2d) 324.
\end{itemize}
an employer now seems to have a limited right and duty to demand that an employee undergo a medical examination if he has reasonable and probable grounds for suspecting that the employee:

(i) is a source of danger to himself, other employees or company property, or
(ii) is unfit to perform his duties.

If an employee refuses to submit to a medical examination or refuses to produce a medical certificate . . . then the employer has just cause to dismiss the employee.62 [Emphasis added]

If such evidence demonstrates that the employee will probably be incapable of regular attendance in the future, the termination will not likely be disturbed. However, the result might be different where the medical opinion shows the employer's prognosis to be unsupported, in error, or not bona fide.63

Finally, Brown and Beatty note that, in addition:

... not only must undue absenteeism in the grievor's past record and an incapacity for regular attendance in the future be shown, but arbitrators may also require that the employer prove that it has acted fairly and without discrimination towards the grievor by demonstrating that, as against other employees in the plant or in comparison to others as described in the reported awards, he has been treated equitably. Although not obliged to prove that the grievor's attendance record is the worst in the plant on some precise mathematical formula, it has nevertheless been held that an employer has a positive obligation to show that, as against some reasonable standard, the grievor's record warranted the action taken.64

Thus, arbitrators prefer not to sustain the termination of employees who, while having a considerable absenteeism record, have a bona fide one as well. Something more is needed, for example, an element of fault or volition, putting the absenteeism, at least, partly in the employee's control.65

But what of AIDS? One interpretation of the above jurisprudence would hold that an employee with AIDS who was absent from work intermittently, through no fault of his own, could remain on the job — so long as these absences were not undue. At the point that his condition rendered him incapable of regular attendance in the future, the culminating event required for terminating or altering his employment status would be reached.66

62. Id. Quare whether this means that an employee with AIDS could be terminated as a source of danger to other employees. Further, would it result in high risk groups being terminated because they refused to submit to a medical examination.
64. Supra, note 45.
66. However, an important question to ask here is how far in the future must this condition of incapacity be for there to be just cause for termination?
More likely the first stage will be bypassed completely and the employee's AIDS infection characterized as long term, or, in light of present medical knowledge, permanent. Seniority provisions may protect the employee for a time, in that he may be reassigned to other work he is capable of in the workplace, but, if the medical evidence indicates that he is incapable of attending regularly in the future, and he is somehow able to collect sick pay for a reasonably long period, it is likely that he will be seen as having been terminated with just cause.

The only argument a physically capable AIDS victim may have in such a situation is that, as against other employees in the plant, or in comparison to others described in the reported awards, he has been treated inequitably. He may argue that not his record, but infection, which medical evidence shows cannot be passed by casual contact, was the sole motivation of the employer. Thus, against these reasonable standards, the employer's action was unwarranted. It is, as yet, too soon to tell how much credence will be given to such an argument.

Turning now to the second issue, viz., to what extent arbitration jurisprudence protects fellow employees from working with AIDS victims, it is perhaps true to say that fear for one's personal health and safety is the most common reason that employees refuse to obey a superior's orders. It has been held that an employee may not be disciplined or discharged for refusing to do work that he honestly and reasonably thought to be unsafe. The test used in cases of this sort focuses on four issues:

First, did he honestly believe his health or well-being was endangered? Secondly, did he communicate this belief to his supervisor in a reasonable and adequate manner? Thirdly, was his belief reasonable in the circumstances? Fourthly, was the danger sufficiently serious to justify the particular action he took?

Most cases that go to arbitration center on the third issue: the reasonableness of the employee's belief that the assignment was unsafe. This never depends on whether the assignment was, in fact, safe or not. On the contrary, an objective standard is used:

Whether the average employee at the workplace, having regard to his general training and experience, would, exercising normal and honest judgement, have reason to believe that the circumstances presented an unacceptable degree of hazard.

67. Supra, note 45, para 7: 3621. However, if the belief is later found to be unreasonable on the standard given, the employee will be liable to discipline or discharge.
68. Steel Co. of Canada Ltd. (1973), 4 L.A.C. (2d) 315.
Various factors are looked at in particular cases to apply this or analogous standards; e.g., whether other employees have been willing to perform the work; whether the belief was founded on a medical condition peculiar to himself; the character of the particular job in the context of the specific work environment, repugnancy and unpleasantness including more subtle forms of sexual harassment, or fear of minor injury; an employee's inexperience on the particular job; or an employee's personal psychological fear. In all of these circumstances, the employee takes the chance that an arbitrator will determine his belief to be unreasonable, the refusal improper, and the discipline justified.

Following these examples, perhaps employees who refuse to work with another because he has, or is suspected of having AIDS, could justify this in situations where other employees refuse as well, where they have a medical condition or status rendering them particularly susceptible to AIDS (such as some members of high-risk groups) or where they have a personal psychological fear (such as hypochondria). Three things must be pointed out however.

First, employers and arbitrators will have to be ever vigilant to prevent the possibility that any of these claims, perfectly reasonable on their face, are not used as a smokescreen by dishonest employees who simply do not want to work with an AIDS victim or member of a high-risk group.

Secondly, the first of these possibilities, the reasonableness of the refusal to work being supported by the concurrent actions of other employees, may be possible when arbitration decisions are looked at in isolation, but, when occupational health and safety legislation is considered, which covers many more employees besides those covered by collective agreements, the same result is not forthcoming.

Thirdly, since it is commonly accepted by arbitrators that inability to get along with a fellow employee is grounds for discipline, refusal to work with an AIDS victim, or a member of a high-risk group, may well justify disciplinary action.

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73. Steel Co. of Canada. (1975), 8 L.A.C. (2d) 375.
74. CUPE (1982), 4 L.A.C. (3d) 385. These were held not to constitute unsafe or hazardous conditions, and such circumstances do not justify a refusal to perform work.
75. Id.
76. Supra, note 73.
77. Id.
78. Liquid Carbonic Canada Ltd. (1975), 9 L.A.C. (2d) 52.
79. Infra.
80. Supra, note 45 at para. 3580.
Thus, it seems that, absent new developments, arbitration jurisprudence affords ever so slightly more protection than the common law, both with regard to the employee suffering AIDS or AIDS discrimination in termination, and to those fellow employees wishing to avoid contact with them. Seniority provisions may protect an AIDS victim's job a little longer than the common law (under which he could be simply dismissed with due notice), he could be reassigned until his illness incapacitates him completely, and, if terminated, he may be able to argue that he was treated inequitably relative to the other employees.

High-risk groups, in addition, may be able to shelter under the decisions allowing discipline for the inability of others to get along with them. As for the fellow employees, they may be able to refuse to work with an AIDS victim on certain narrowly prescribed grounds, but these provide fertile ground for deception, and, in the end, may be overridden by occupational health and safety legislation.

V. Human Rights Legislation

Human rights legislation is perhaps the area of law that affords the most hope for AIDS victims facing discrimination in employment. Three issues must be dealt with in this context:

(i) Whether human rights codes offer protection against discrimination to people who, while not AIDS victims themselves, are perceived as being in high-risk groups;
(ii) Whether the prohibition of discriminating against the handicapped in human rights legislation protects AIDS victims in the employment setting; and
(iii) Whether discrimination under (i) and/or (ii) above is likely to be saved because the employer's or fellow employee's actions relate to a bona fide occupational qualification.

Dealing with the first issue, it has become clear that three groups have a particularly high risk of AIDS: individuals of Haitian or African origin, intravenous drug abusers, and homosexuals. Haitians and individuals of African origin may well face a new round of racial discrimination due to AIDS. As for drug abusers, it may be argued that part of the increasing popularity of employee drug testing may actually be motivated, if only in part, by the fear of AIDS. Lastly, with reference to homosexuals, it has been noted that in 1985 in the State of New York, work-related AIDS discrimination complaints went up 500 per cent; this was characterized by gay rights activists as "de facto discrimination against homosexuals."81

What can Canadian human rights legislation do for the individuals in these groups? Gandz and Rush\textsuperscript{82} note that:

With very few exceptions, it can be generally stated that discrimination on the basis of race, ethnic origin, colour, religion, age, sex, marital status, and physical handicap, is prohibited in all eleven jurisdictions. Some jurisdictions also prohibit discrimination on the basis of a record of criminal offences (Federal, B.C., Ont.) or political beliefs (B.C., Man., Que., P.E.I.). Ontario prohibits discrimination on the basis of citizenship, and Quebec prohibits discrimination on the basis of language and social condition.\textsuperscript{83}

Discrimination on these prohibited grounds is illegal at all stages of the employment relationship: advertising the position, application forms, interviews, hiring, promotion and dismissal.\textsuperscript{84} In addition, the B.C. Human Rights Code\textsuperscript{85} and s. 15 of the \textit{Canadian Charter of Rights and Freedoms}\textsuperscript{86}, have open-ended definitions of discrimination that could well encompass new areas.

Thus, with reference to the first group, Haitians or individuals of African origin, it would appear that refusal to hire, termination, or anything in-between, would \textit{prima facie} be covered by the prohibition of discrimination on the basis of race, ethnic origin, citizenship (Ontario), and/or colour. They need only apply to the human rights commission in their local jurisdiction and make their case.\textsuperscript{87}

The second group, intravenous drug abusers, is not so lucky. None of the standard listed provisions apply. The only argument that they could make, if coming under Ontario, B.C., or federal jurisdiction, is that they have been discriminated against because of a record of past criminal offenses; of course, none of this would matter if "not having AIDS" were to be a \textit{bona fide} occupational requirement, which will be discussed later.\textsuperscript{88}

\textsuperscript{83} Id., at 71-2. It must also be pointed out that Quebec and Ontario have added sexual orientation to the list of prohibited grounds (S.Q. 1977, c. 6., s. 1; S.O. 1986, c. 64, s. 18).
\textsuperscript{84} Supra, note 8, at 72. This affords a wider scope than the common law and arbitrations, which deal primarily with discipline and discharge.
\textsuperscript{85} R.S.B.C. 1979, c. 186., s. 3.
\textsuperscript{86} \textit{Canadian Charter of Rights and Freedoms}, \textit{Constitution Act} 1982, s. 15(1).
\textsuperscript{87} Although the employer may wish to argue that it was none of these factors, but rather, fear of AIDS that prompted discrimination, it is not likely that such arguments will carry much weight, since effect, not discriminatory intention, is looked at primarily by the Boards. \textit{Ontario Human Rights Commission and O'Malley. v. Simpsons Sears Ltd.} (1986), 7 C.H.R.R. D/3102 (S.C.C.)
\textsuperscript{88} Infra.
But the real focus here must be on homosexuals. At present, they are not protected from discrimination in any jurisdictions save Quebec and Ontario.\textsuperscript{89} Interesting questions arise, however, as to whether the prohibition of discrimination on the basis of sex, the open-ended provision in B.C., or the \textit{Canadian Charter of Rights and Freedoms} will offer them any protection.

The issue of whether or not human rights legislation, prohibiting discrimination on the basis of sex, applies to homosexuals appears to have been already decided. In \textit{Re Board of Governors of the University of Saskatchewan et al. and Saskatchewan Human Rights Commission}\textsuperscript{90} it was stated that the word "sex" in its normal meaning refers to the gender of a person, not to his sexual activities or propensities unless it appears in a context which would suggest another meaning. Since it was used in its normal meaning in the legislation\textsuperscript{91}, the prohibition of discrimination in employment on the basis of sex was held not to apply when an employer refuses to employ a person in a certain position because of that person's homosexuality and his publishing of that fact.

Secondly, as to whether open-ended prohibitions of discrimination, such as found in the B.C. Human Rights Code, will protect homosexuals, this point appears to have been already decided in \textit{Gay Alliance Towards Equality v. Vancouver Sun}.\textsuperscript{92} There, a homosexual organization was not permitted to place an advertisement in the \textit{Vancouver Sun} due to the editorial policy of the newspaper. It complained to the human rights tribunal, arguing that this was contrary to s. 3 of the code which reads:

\begin{verbatim}
3 (1) No person shall:
(a) deny to a person or class of persons any accommodation, service, or facility customarily available to the public; or
(b) discriminate against a person or class of persons with respect to any accommodation, service, or facility customarily available to the public, unless reasonable cause exists for the denial of discrimination.

(2) For the purposes of subsection (1),
(a) the race, religion, colour, ancestry or place of origin of a person or class of persons shall not constitute reasonable cause; and
(b) the sex of a person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance.\textsuperscript{93}
\end{verbatim}

\textsuperscript{89} S.Q. 1975, c. 6, s. 10 as am. by S.Q. 1977, c. 6., s. 1; S.O. 1986, c. 64, s. 18.
\textsuperscript{90} (1976), 66 D.L.R. (3d) 561. (Sask. Q.B.).
\textsuperscript{91} \textit{The Fair Employment Practices Act}, R.S.S. 1965, c. 293, as am. by SS. 1972, c. 43, s 4.
\textsuperscript{92} (1979), 2 S.C.R. 435.
\textsuperscript{93} Supra, note 85.
Although the human rights tribunal initially found in their favor, this decision was eventually overturned after going all the way to the Supreme Court of Canada. There, it was stated that the refusal to publish was not based on a personal characteristic of the appellant, but upon the content of the advertisement itself, which the newspaper had the right to control under the concept of a free press.

It must be pointed out, however, that this case did not categorically decide that homosexuals have no rights under the B.C. legislation. J.E. Jefferson\(^9\) takes the view that it was largely decided on freedom of the press, and points to the dissenting judgement of Dickson J. (as he then was) where it was stated:

The British Columbia Code is silent as to sexual orientation, but it is precisely because the British Columbia Code goes well beyond it’s counterparts in other provinces that the present case got before the board of inquiry. *The absence of sexual orientation from the list of specifically proscribed forms of discrimination may indicate a lesser-degree of protection in the weighing of reasonable cause, but it must be emphasized that there is no necessary limitation on “reasonable cause” to be read into the statute by the mere absence of reference to sexual orientation.*\(^9\) [Emphasis added]

Such arguments are used by Jefferson to favour an interpretation of s. 15(1) of the *Charter* that would strike down laws or application of laws that discriminate in the basis of sexual orientation.\(^9\) However, no cases have been reported on this issue, as yet.

Finally, it is important to note that the Canadian Bar Association, in an AIDS report that was adopted by the national body by resolution\(^9\), has stated that:

... discrimination against those infected or perceived infected could take place with impunity under the guise of discrimination against homosexuals. Currently, there is no remedy under federal or Ontario human rights legislation.

We are not unaware of the sensitive and controversial nature of the issue, but we do note that the federally commissioned report, *Equality Now*, has recommended that discrimination on grounds of sexual

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95. *Supra*, note 92 at 461.
96. *Supra*, note 94. It must be pointed out however, that both the B.C. Human Rights Code and the *Charter* would have very little impact on employment discrimination against homosexuals, even if favorable interpretations were made. S. 3 of the Code refers to “any accommodation, service or facility customarily available to the public,” which would seem to exclude employment, while the application of the *Charter* is probably limited to laws or applications of laws that discriminate. Although some controversy exists on this issue, up till now private discrimination has not been covered by the *Charter*.
97. *Report of the AIDS Committee*, Canadian Bar Association (Ont.), Apr. 25, 1986. Note that this was written before the amendment to the *Ontario Human Rights Code*. 
orientation be prohibited at the federal level. *In light of the serious risk that discrimination against homosexuals has and which will escalate as a direct result of public fears about AIDS* we recommend that sexual orientation be added to the list of prohibited grounds of discrimination in both federal and provincial human rights legislation. 98 [Emphasis added]

Thus, subject to common-law notice requirements and just cause protection under collective agreements, it would appear that, except for persons of Haitian or African origin, and homosexuals residing in Quebec and Ontario, members of AIDS high-risk groups will have a difficult time, at the very least, in proving discrimination under human rights legislation. Homosexuals, being the largest group, have the most to lose from the present state of the law, and unless this is changed per the recommendations of the AIDS committee, can be discriminated against by employers at will.

Turning now to a discussion of AIDS victims themselves, the primary question to be asked is whether such workers are protected from discrimination on the basis of handicap or physical disability. This issue first arose in the U.S. case of *Arlene v. The School Board of Nassau County* 99, and has remained persistent ever since. In that case, a teacher with AIDS, who was fired from her job because of her susceptibility to tuberculosis, brought action alleging that her dismissal violated the 1973 Rehabilitation Act. Section 504 of that act provided that:

\[
\text{. . . No otherwise qualified handicapped individual shall, solely, by reason of his handicap, be excluded from participation and, be denied benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.}^{100}
\]

The court held that, looking at the overall statutory language, it was clear that persons with contagious diseases fit into the definition of handicapped individual therein. First, the court stated:

As the record of this case makes clear, a person with tuberculosis is, when afflicted with the disease, one who "has a physical or mental impairment which substantially limits . . . major life activities," 29 U.S.C.* 706 (7) (B); 45 C.F.R.* 84.3 (j)(2)(i)(A), since the disease can significantly impair respiratory functions as well as other major body systems. Even when not directly affected by tuberculosis, Arline falls within the coverage of section 504 because she "has a record of such impairment", 45 U.S.C.* 84.4 (j) (2) (iv), by her employer. 101

Secondly, it must be pointed out that "physical or mental impairment"

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98. Id.
101. Supra, note 99 at 764.
had been defined in regulations promulgated by the Department of Health and Human Services:

(1) Physical or mental impairment means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.102 [Emphasis added]

This definition, reviewed by the court in Arline, is equally applicable to persons with AIDS. Physical disability in such cases could be seen as a physiological condition affecting the hemic and lymphatic system itself, or, on the above reasoning concerning tuberculosis, as any disease caught by the AIDS victim as a result of his reduced immune function.

Finally, the court noted that:

Congress failure to exclude contagious disease from coverage when it specifically excluded alcoholism and drug abuse implies that it harbored no similar disapproval about them.103

Thus, the court concluded that Miss Arline had been discriminated against on the ground of physical disability contrary to s. 504 of the Rehabilitation Act.104

The relevance of this case for Canadian employees with AIDS would appear to depend, largely, on the similarity in statutory language here. Again, summarizing the U.S. position, Leonard notes:

The most common terminology is contained in the federal law and repeated, with minor variations, in pertinent laws or regulations in thirteen jurisdictions, defining a “handicapped” person as one who “has a physical or mental impairment which substantially limits one or more of such person’s major life activities.” The Rehabilitation Act, and ten of the thirteen jurisdictions, also expressly extend coverage to those not presently disabled but who have a “record of such impairment”. Some jurisdictions go on to define “major life activities” in terms of physical actions typical of a normal, healthy existence, emphasizing use of the senses, locomotion, and rational thought; but these “list” functions (which do not mention immune function as a major life activity) are, from their context, clearly

102. 45 C.F.R.* 84.3 (j)(2)(ii)(A).
103. Supra, note 99 at 764. This would leave a major high-risk group for AIDS without protection under U.S. law.
104. Id. However, since the district court had made no finding as to whether the risks of infection precluded Miss Arline from being “otherwise qualified” for her job, and if so whether it was possible to make some reasonable accommodation for her in that teaching position, in another position teaching less susceptible individuals, or in some other kind of position in the school system, the case was remanded for further findings.
not meant to be exhaustive or exclusive. Some of the laws further define "impairment" in terms of various organs and body systems, and such definitions usually include reference to the hemic (blood) and lymphatic systems, i.e. — the central organs of the immune function.\textsuperscript{105} [Emphasis added]

In Canada, human rights legislation in each jurisdiction say that every person has the right not to be discriminated against in employment with respect to handicap.\textsuperscript{106} The statutory definition of "handicap" is essentially uniform across the country\textsuperscript{107}, stated as:

\textit{any degree of physical disability, infirmity, malformation or disfigurement that is caused by} bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a dog guide or on a wheelchair or other remedial appliance or device\textsuperscript{108}. [Emphasis added]

Despite the differences in statutory language between Canada and the U.S., this definition is very broad, and it is very possible that “any degree of physical disability ... that is caused by ... illness” could be interpreted to extend protection to AIDS victims. Unlike the U.S. provisions, there is no listing of major normal life activities, but rather, their converse: characteristics of handicapped individuals. Yet in neither case are these lists meant to be more than illustrative, and the words “without limiting the generality of the foregoing” clearly indicate that the courts will be open to new submissions as to what constitutes a handicap. Also, although the Canadian definition contains no reference to the hemic or lymphatic systems, the rationale of the decision in \textit{Arline} and the generality of the statutory language here certainly leaves plenty of room for argument. Thus, it can be safely stated that there is nothing in the Canadian human rights legislation that would prevent a wide interpretation of handicap from being made, thereby offering protection to persons with communicable diseases and AIDS.

\textsuperscript{107} See, e.g., the Ontario Human Rights Code, R.S.O. 1980, c. 340, as am. by R.S.O. 1951, c-53 s 9(b)(i); the Canadian Human Rights Act, S.C. 1976-77, c. 33, as am. by 1980-81-82-83, c. 143 s. 65.1(3); the Nova Scotia Human Rights Act, S.N.S. 1969, c. 11 as am. by S.N.S. 1974, c 46 s. 11B(2).
\textsuperscript{108} Id. Note also that the Ontario legislation expressly extends protection not only to those with an existing or past handicap but also to those who are “believed to have or have had an existing or past handicap”. Will this help high-risk groups?
However, there may be problems brewing at the interpretive source, as it were. Recently, the U.S. Justice Department ruled that some employers may legally fire AIDS victims if their motive is to protect other workers. In a 49 page opinion, which the executive branch is bound to follow in dealing with complaints of discrimination, Assistant Attorney General Charles J. Cooper wrote that discrimination based on the physical disability caused by AIDS might be a violation of the law, but the *Rehabilitation Act* does not restrict measures taken to prevent the spread of the disease.

The result is an anomaly of sorts: an AIDS victim whose abilities are impaired may have protection against dismissal, but a fully functioning AIDS carrier may not — as long as dismissal is based on a fear of contagion. The ruling suggested an AIDS carrier wouldn't qualify as handicapped, and hence would have no legal basis for challenging discriminatory acts under the 1973 statute.

It is too soon to tell whether the diminution or absence of immune function found in AIDS victims will be interpreted to be a handicap under the Canadian human rights legislation, the above comments notwithstanding. It is a possibility, considering the reasoning of the *Arline* case, the wide statutory language involved, and, also, present medical evidence on contagion. It will not be a probability, however, if the fear of AIDS prompts more rulings like that of the U.S. Justice Department.

Yet, even if AIDS victims or high-risk groups manage to establish that they have been discriminated against under human rights legislation, employers and other employees may still be able to justify it on the standard of a "bona fide" occupational qualification. Thus, this possibility must be examined.

Gandz and Rush discuss this exception as follows:

In its simplest form, an employer may discriminate on a prohibited ground when it is necessary to do so. In the legislation, this exception is usually expressed as a "bona fide occupational qualification." This exception has both subjective and objective aspects. There must be no intention to arbitrarily discriminate and, as well, the requirement for employment must have a rational, reasonable basis. In other words, the decision must be based on valid measurements of those personal characteristics or attributes which can be demonstrated to be related to effective job performance. So, for example, most jurisdictions would allow discrimination against

110. Id. This could result in many people being terminated if testing for AIDS antibodies becomes common.
111. Id. Note also the California LaRouche proposal to give state official broad powers to contain the disease, including quarantine. This was submitted to voters in the November, 1986 Congressional elections, but defeated.
women if the vacancy was for a dancer in a male strip show or an application for a vacant post for a rabbi could be restricted to Jews.\textsuperscript{112}

Recent cases on bona fide occupational qualifications do not bode well for AIDS victims or members of high-risk groups. First, in Bhinder and Canadian Human Rights Commission v. C.N.R.\textsuperscript{113}, a case where a Sikh refusing to wear a hard hat because of his religion was let go, McIntyre J. stated:

The words of the statute speak of an "occupational requirement." This must refer to a requirement for the occupation, not a requirement limited to an individual. It must apply to all members of the employee group concerned because it is a requirement of general application concerning the safety of employees. The employee must meet the requirement in order to hold the employment. It is, by its nature not susceptible to individual application...

... A condition of employment does not list its character as a bona fide occupational requirement because it may be discriminatory. Rather, if a working condition is established as a bona fide occupational requirement, the consequential discrimination, if any, is permitted.\textsuperscript{114} [Emphasis added]

The court went on to hold that there is no duty to accommodate where there is a \textit{bona fide} occupational requirement.\textsuperscript{115}

These words of McIntyre J. could cause considerable difficulty for an AIDS victim trying to show discrimination by the employer at any stage of the employment relationship. It would appear that a company policy not to hire or retain persons with infectious diseases, or even those suspected of having infectious diseases, could also be characterized as a "requirement of general application concerning the safety of employee", not something confined to the individual in question.

Even if this argument could be mitigated by reference to the very low chances of contracting AIDS by casual contact, moreover, the case of Canada Safeway Ltd. v. Steel et al.\textsuperscript{116} may cause problems. There, the Manitoba Court of Queen's Bench ruled that a supermarket was not guilty of illegal discrimination of imposing a "no beards" policy on its male employees. According to the court, the evidence presented before it demonstrated that customers preferred the "no beards" policy and would shop elsewhere if the policy were removed. Because of this the court ruled that the "no beards" policy was a reasonable occupational qualification.

\textsuperscript{112} Supra, note 82, at 72.
\textsuperscript{114} Id., at 24719.
\textsuperscript{115} Id., at 24722.
\textsuperscript{116} 84 C.L.L.C, para. 17021 (Man. Q.B.)
Thus, if employers are able to plead customer preference as a *bona fide* occupational qualification on something as harmless as beards, and succeed, what will stop them, along with fellow employees, from doing so when the panic of AIDS is involved?

But, of course, this case is not the final word on this matter, and may eventually be cast in doubt by the contrary decisions of other courts outside of Manitoba. Indeed, arguments based on non-acceptance of different races or sexes by customers and fellow employees have already been rejected in U.S. discrimination cases. U.S. courts and tribunals have ruled that the "uninformed prejudices of the market place" should not be allowed to defeat law designed to eliminate racial and sexual discrimination in employment.\textsuperscript{117} In addition, *Canada Safeway v. Steel* only deals with sex discrimination: *bona fide* occupational qualifications for handicapped individuals may be another thing completely. It is just too early to tell what will happen on this front.

Thus, in concluding, it can be safely stated that, under Canadian human rights legislation as it now stands, AIDS victims and the majority of individuals in high-risk groups can be positive of very little protection. Not only will they frequently face uncertain chances of establishing discrimination, but quite apart from any discussion of customer preference, the *Bhinder* case may leave it open for a *bona fide* occupational qualification to be found unless medical evidence comes to the rescue.

VI. *Occupational Health and Safety Legislation*

In contrast to human rights legislation, this legislation will likely be held up by employers, fellow employees and the proponents of quarantine as the salvation of healthy employees. But, before any such rash claims can be substantiated, two issues must be addressed:

(i) Whether fellow employees can invoke the statutory right to refuse unsafe work just because they are told to work with an AIDS victim or member of a high risk group; and

(ii) Whether an employee who contracts AIDS on the job is eligible to receive worker's compensation.

With reference to the employee’s right to refuse work of a dangerous nature, Nash\textsuperscript{118} notes that every province in Canada as well as the federal jurisdiction has legislation of this nature. Three main issues are involved:

(i) Whose health or safety is at stake?
(ii) What type of danger must the worker believe to be present?
(iii) What kind of belief is required?\textsuperscript{119}

In response to the first question, every worker who can exercise the statutory right to refuse work may do so when his or her own health and safety is at stake.\textsuperscript{120} When “another employee’s” health and safety is at stake,\textsuperscript{121} When “another employee’s” health or safety is endangered, Nova Scotia, Alberta, Ontario and the federal jurisdiction permit refusal\textsuperscript{122}, while Saskatchewan allows this when the health or safety of any person in the workplace, employee or not, is at stake.\textsuperscript{123} British Columbia, Newfoundland, and Quebec, finally, go so far as allowing a refusal when the health or safety of any person may be endangered.\textsuperscript{124}

As for the second question, different jurisdictions have differing requirements as to what type of danger the worker must believe to be present. The federal jurisdiction and Alberta require that a person refusing to work believes that there is an “immanent” danger.\textsuperscript{125} Saskatchewan, New Brunswick, Quebec and the mining statutes of B.C., and Manitoba utilize the concept of “unusual” danger in their right to refuse sections, but do not couple it with the idea of immanence.\textsuperscript{126} British Columbia’s Industrial Health and Safety Regulations, covering most of the province’s workers other than miners, require that an employee refuse work which he or she believes to present an “undue” hazard to the health or safety of any person.\textsuperscript{127} Newfoundland and Manitoba base the right to refuse on the belief by the worker that the work is dangerous,\textsuperscript{128} while Ontario and Nova Scotia base it on whether it is “likely to endanger.”

Finally, the type of belief required of the worker in refusing hazardous work is usually based on an objective standard. Nash notes:

\textsuperscript{119} \textit{Id.}, para. 2305.
\textsuperscript{120} \textit{Id.}, para. 2310.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.}, para. 2320.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} B.C. Reg. 585/77, s. 8.24(1).
\textsuperscript{127} \textit{Supra}, note 118, para. 2335.
\textsuperscript{128} Occupational Health and Safety Act, S.N.S. 1985, c. 3. s. 22(1).
With only two exceptions, all jurisdictions which confer the right to refuse unsafe work do so in situations where a worker has “reasonable cause to believe,” or simply “reason to believe” that a hazard . . . exists. The two exceptions concern the duty to refuse work found in the statutes of Newfoundland and Alberta. In these two cases, the belief of the worker is irrelevant; if the hazard is objectively immanent then the worker must refuse to do the work. 

Although B.C. and the federal jurisdiction have incorporated some aspects of the worker's own subjective belief in the determination of the right to refuse, 

In reality, the difference is probably more an accident resulting from the types of cases which have been addressed than a disagreement about substance. . . . Looking at the fact situations, the language used in the three cases, and the accepted purpose of the statutory right to refuse, the consensus of opinion is probably this: 
An employee will be regarded as having had reasonable grounds to believe a situation is unsafe if objectively such reasonable grounds exist, and provided that there is no reason to believe that the employee was acting out of ulterior motives. If the reasonable grounds are not objectively demonstrable, then the employee may show from his or her own subjective point of view why he or she personally had reasonable grounds. 

With regard to AIDS, on the present medical knowledge it cannot be objectively stated that working with an AIDS victim exposes one to “immanent”, “unusual”, “undue”, or “likely” danger. Indeed, the Ontario Labour Relations Board has already considered at least one case of whether the statutory right to refuse can be invoked by health care workers who don’t want to care for AIDS patients. Tracey Tremayne-Lloyd, chairman of the AIDS Committee set up by the Canadian Bar Association in Ontario is quoted as saying:

The board, I understand, held that the Act was of no benefit to the employee in question in that case because there was, in fact, no danger to the worker in the treatment of the patient in question, and therefore, the refusal to work was unjustifiable . . . 

. . . The Occupational Health and Safety Act expressly allows workers to refuse work where there health and safety is in danger. But, it does not permit refusal to work if that could place the life or health of another person or the public at large in immanent jeopardy . . . 
Withdrawal of services would not be found a reasonable exercise of individual rights because the current state of medical knowledge suggests that AIDS cannot be transmitted through casual contact, and that the risk to health-care workers is low . . .

129. Supra, note 118, para. 2335.
130. Id., para. 2350.
131. Id.
(This is) a reminder to health-care workers that all of them — regardless of their rank or position or place of employment — have taken an oath in the commitment to care. Along with this commitment to care surely goes the acceptance of some risk. The acceptance of risk, while it may be unspoken, is, in my submission, one that flows quite naturally from the basic principle of the profession. [Emphasis added]

A similar decision has also been made in the U.S. A recent California case involved a complaint against a hospital which disciplined nurses for refusing to provide routine care to AIDS patients without wearing masks and gloves. The nurses complained that the hospital’s actions violated the relevant health and safety laws. This complaint was heard by the California Labour Commission, which ruled that the hospital, by following the recommendations established by the U.S. Center for Disease Control, was within its rights in insisting that the nurses provide care without masks and gloves.133

Thus, it appears that the current state of medical knowledge is used to imbue the objective standard, “reasonable cause to believe,” with a meaning that overrides the subjective fear of fellow workers in the AIDS context. Moreover, because these cases deal directly with health-care workers, who would appear to have the highest rate of exposure, fellow workers in other occupations would not have a legal leg to stand on, if they refused to work with an AIDS victim or the member of a high-risk group. The only hopes they can have, are, that the case law in the area is “still evolving”, and that other jurisdictions, notably federal and B.C., are more receptive to subjective belief arguments.134

Turning, now, to the last issue, viz., whether a worker (most probably a health-care worker) who contracted AIDS on the job can successfully claim for workers compensation, Nash notes that in all provincial legislation:

To be eligible for compensation payments and rehabilitation, the injured worker must have suffered an accident or industrial disease that:
— arose out of and in the course of employment,
— disabled the worker beyond the day of the accident, and
— was not caused by the worker’s own wilful misconduct unless a serious disablement or fatality resulted . . . 135

Also,

134. Supra, note 118, para. 2350.
135. Id., para. 3805. AIDS will, as far as the second issue is concerned, definitely disable the worker beyond the day of the accident.
In order for compensation to be paid, it must first be determined:
— that there was an “accident” as defined in the worker’s compensation statute,
— that the injury and disability were caused “by reason of” the accident.
— that the “accident” arose out of and in the course of employment, and
— that the accident is not excluded because of where it happened.\textsuperscript{136}

As for the first issue, whether acquiring AIDS on the job constitutes an “accident”, most workers’ compensation statutes define an accident as including:
(i) a wilful and intentional act, not being the act of the employee,
(ii) a chance event occasioned by a physical or natural cause, and,
(iii) a disablement arising out of and in the course of employment.\textsuperscript{137}

An AIDS victim should have no difficulty showing that an accident occurred if he can point to a specific event (e.g., spilling infected body fluids on open wounds). In addition, various occupational diseases may become easier to catch because of AIDS, so as to fit the definition. Thus, although it may be difficult to point to a specific event in every instance of contracting AIDS itself, it is likely that the concomitant industrial diseases will get the victim over this legal hurdle in any event.

However, the second issue, as to whether the injury and disability of AIDS was caused “by reason of” the accident, may be more problematic. Due to an unknown incubation period for the disease, it may not be possible to say that it is a medical condition which existed prior to the accident. Of such problems Nash writes:

Where the pre-existing condition itself causes no disability, but does react with some occupational factor to produce a disability, the W.C.B.’s will generally award compensation for the entire disability . . . However, when the pre-existing condition does cause a disability prior to the accident, the Boards are entitled to reduce the compensation for permanent disability proportionately.\textsuperscript{138}

Thus, depending on whether or not AIDS has resulted in some disability prior to the “accident”, the victim may find his compensation reduced. The problem is that he may not know this until he has contracted some industrial disease,\textsuperscript{139} in fact, it may not come up at all\textsuperscript{140}. Hence, what is really at issue here is whether occupational diseases made easier to catch because of AIDS should result in a proportional reduction

\textsuperscript{136} \textit{Id.}, para. 3810.
\textsuperscript{137} \textit{Id.}, para. 3815.
\textsuperscript{138} \textit{Id.}, para. 3820.
\textsuperscript{139} That is, unless some form of testing program is in place, or his doctor has informed him of his condition.
\textsuperscript{140} Even if the claimant knew he had AIDS, it would be to the advantage of his claim if he could conceal it and pursue the claim for the debilitating industrial disease alone.
of the compensation awarded. This will depend on whether there has been a diagnosis or positive AIDS test presented to the board, and whether the term "pre-existing disability" is interpreted as including a partial or total disablement of the immune system.\textsuperscript{141}

The third issue, as to whether the accident "arose out of and in the course of employment", presents perhaps the most difficult problem for claimants — at least so long as they are making a claim for AIDS contracted on the job. Considering that the most frequent ways of contracting the disease involve sexual intercourse, intravenous drug use and blood transfusions, it is not likely that these are activities usually carried on during working hours in the course of an employee's duties. Indeed, they may well amount to wilful misconduct disqualifying the employee from entitlement to compensation. Health-care workers may have a better case because they can be required to handle infected body fluids in their course of employment, but nobody else.

As for occupational diseases that AIDS sufferers contract on the job, however, again so long as the "accident" happens while the employee is on the job or properly on the job site, it is covered under this heading.

The fourth requirement, where the accident happened, is jurisdictional in nature and should pose no problem if the victim is properly advised as to which board to consult.\textsuperscript{142}

Finally, some mention must be made of the ubiquitous schedules of industrial diseases found in provincial workers' compensation statutes. Generally,

\begin{itemize}
  \item When a worker suffers from one of the listed diseases while having worked in the appropriate listed occupation, it is presumed that the employee's injury arose out of the employment. In the few cases where no occupation is listed with a particular disease any employee suffering that disease will be presumed to have contracted it as a result of employment . . .
  \item If a worker has contracted a disease not mentioned in the Schedule then the Board may have to decide the case on an individual basis. Ordinarily, such a process would require the claimant to prove a disability, that the disability resulted from an industrial disease, and that harmful exposure at work caused the industrial disease. In an effort to make adjudication of these complex cases somewhat simpler, the W.C.B.'s have developed their own internal guidelines for recognizing a limited number of industrial diseases . . .
\end{itemize}

\textit{All other cases not dealt with in a schedule or guideline must be decided on the available evidence and without the benefit of presumption. In most cases . . .}

\textsuperscript{141} Which, logically, it should, as what other disease so neatly fits the term "pre-existing condition causing disability prior to the accident", when the worker in question probably would not have got the industrial disease without the disability caused by AIDS?

\textsuperscript{142} Supra, note 118, para. 3830.
provinces, the onus is on the employee to prove that the disease is an industrial disease and that it arose out of the employment. This means that it is up to the worker to find and present the evidence necessary for the Board to make a favorable conclusion... Without the benefit of a board guideline or a schedule entry which applies to a claimant's case, the odds are statistically against a successful claim. Ontario has the highest rate of recognizing industrial diseases on the North American continent and yet Ontario's rate is only 40 per cent of Sweden's despite the fact that industrial conditions are very similar in the two jurisdictions.143 [Emphasis added]

With comments like these, unless AIDS is eventually recognized as an industrial disease, it appears highly unlikely that persons who contract AIDS on the job will ever receive workers' compensation on that basis. It is ironic, however, that the industrial diseases made so much easier to catch because of the AIDS infection will be compensable, at least, in part.

Thus, it can be concluded that occupational health and safety legislation offers AIDS victims, high-risk groups, and fellow workers a mixed bag when it comes to results. Absent the termination of employees with AIDS it appears that fellow employees cannot refuse to work with them. This potentially sets up a situation of direct confrontation with the employer and high-risk groups caught in the centre of an emotional storm. As for workers' compensation, it appears that AIDS itself is not likely to be seen as compensable, but the industrial diseases that it facilitates will.

VII. Conclusion

AIDS is a disease that presents many challenges to employers, employees, and the law itself. This paper has been a survey of what the current law can do, both for AIDS victims and members of high-risk groups, as well as the fellow employees who are afraid to work with them.

The AIDS victims themselves face uncertain but developing legal protections in the face of employment discrimination. While the common law and arbitration jurisprudence offers, at most, either reliance on an employer's good will or reassignment to another job, the possibility of termination is always there. They cannot even hide their illness. Human rights legislation, on the other hand, shows much room for development. If the Canadian definition of handicapped is interpreted in the same way as the much more detailed provisions in the U.S., AIDS victims may have recourse to human rights tribunals and courts.

143. Id., para. 3840-3845.
But, unfortunately, it is not quite that simple. Just as likely as a favorable interpretation of “handicapped” is a wide definition of “bona fide occupational qualification” that would make clean health a prerequisite to holding a job. If this is the case, AIDS victims will have a very difficult time indeed under the human rights legislation.

However, the story is not completely one-sided. Fellow workers who fear for their safety might be able to refuse work under the collective agreement in certain narrowly defined circumstances. But, because of the objective standard used under occupational health and safety legislation and the common law, the present state of medical knowledge will work against any such refusal being found reasonable, with discipline as the likely result. This situation is made worse by the fact that, if they contract AIDS on the job, workers' compensation is probably out of the question. High-risk groups may become embroiled in discriminatory actions as well, and, with the exception of a minority, (e.g., Haitians), most will have no protection against actions ranging from harassment to termination.

Where the situation arises that an employer, in his discretion, wishes to keep an AIDS victim on the job, the lack of any right to refuse in the fellow employees may lead to tension and interpersonal problems. Although dismissal of the other employees is legally allowed, the author feels that education of the other employees to the real risks of contracting AIDS is the answer.

Where, however, an AIDS victim or a member of a high-risk group is terminated, there is likely very little he can legally do. It is thus recommended that both homosexuality and AIDS be included in the human rights legislation of all Canadian jurisdictions to at least give those people a fighting chance.