

Immigration and HIV/AIDS

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1. Introduction

Jeanne came to Canada from Haiti as a visitor. After her arrival two significant things happened. The first was that she met a man and had a child. The second was that she was diagnosed as being HIV positive. The man disappeared, and Jeanne was left the single

parent of her Canadian-born son. Because of the medications she was taking, she was able to lead a relatively “normal” life, in spite of her HIV status. Unfortunately, these medications were not available in Jeanne’s native Haiti. She realized that were she to return there, her health would quickly and irrevocably deteriorate.

Jeanne pleaded with the Canadian government to allow her to stay in Canada. Finally, after a long struggle, she was permitted to remain on “**humanitarian and compassionate**” (“**H & C**”) grounds”. However, because of Jeanne’s HIV status, she was deemed to be inadmissible to Canada on health grounds. Instead of being granted permanent residency in Canada, she was given a temporary status, by being issued a **temporary resident permit** (formerly known as a **Minister’s Permit**).

To her dismay, Jeanne discovered that having a temporary resident permit allowed her to remain in Canada, but the immigration code on her permit made her ineligible for Ontario health insurance. She was being allowed to stay here because her HIV status denied her access to adequate health care in Haiti. That same condition, however, caused her to be medically inadmissible to Canada. As a consequence, she was being denied access to publicly funded health coverage in this country.

Jeanne’s story is not uncommon. It illustrates the type of contradictory and sometimes frustrating treatment that persons living with HIV and AIDS confront when they come up against Canada’s immigration system. The purpose of this chapter is to explore the way that system works, specifically how our immigration laws and practices affect those who are living with HIV/AIDS. What rights do those laws grant? What obligations do they impose? What opportunities do they present, and what barriers do they erect for such persons? In some cases, immigration policy has a unique relevance to persons living with HIV/AIDS, for example, the question of mandatory HIV testing for all potential

immigrants to Canada. However, other more general immigration provisions, such as those pertaining to medical inadmissibility or family sponsorship, can also affect persons living with HIV/AIDS in a particular, and significant, way.

In June 2002, Canada passed new legislation, the ***Immigration and Refugee Protection Act*** (“**IRPA**”). There are some fundamental differences between this Act and the one it replaces, the ***Immigration Act***. Some of the changes are positive. However, when it comes to PHAs, the new law perpetuates a number of obstacles to a successful, secure, establishment in Canada.

2. Some Important Terms (Definitions)

Admissibility hearing: a hearing in Canada before a member of the Immigration Division of the Immigration and Refugee Board to determine whether a person has the right to enter or remain in Canada or should be removed from Canada.

Canadian citizen: a person acquires Canadian citizenship by being born in Canada (regardless of the status of his/her parents). Alternatively, permanent residents may become Canadian citizens by fulfilling the requirements for citizenship under the *Citizenship Act*.

Common-law partner: a person of the same or opposite sex who is living with a Canadian citizen or permanent resident in a conjugal relationship for a period of at least one year.

Conjugal partner: a person of the same or opposite sex living *outside* of Canada who has been in a conjugal relationship with a Canadian citizen or permanent resident for at least one year.

Family class: a class of persons who may become permanent residents by being sponsored by a Canadian citizen or a permanent resident. Members of the family class include

the sponsor's spouse, common-law partner, conjugal partner, dependent child (including adopted children and those under guardianship), parent, and orphaned sibling under the age of 18.

Foreign national: a person who is not a Canadian citizen or permanent resident, and includes a stateless person.

Humanitarian and compassionate (“H & C”) grounds: factors that, if taken into consideration, would allow a foreign national who is inadmissible or who does not meet the requirements of Act to acquire permanent resident status or an exemption from any applicable criteria or obligation of the Act. H & C grounds can include such factors as family dependency on a Canadian citizen or permanent resident, the inability to access health care in the home country, risk faced in the home country, and the best interests of a child.

Immigration officer: an employee of Citizenship and Immigration Canada, working in Canada. Immigration officers have a variety of powers under the *Immigration and Refugee Protection Act*. They can decide whether to grant admission to foreign nationals or permanent residents, issue removal orders in some circumstances, arrest and detain people, seize documents, and refer people to an admissibility hearing.

Inadmissible classes: people that the Canadian government considers to be unwelcome in Canada for reasons of criminality, health, national security, or the maintenance of the Immigration system. Included in this group are people who have been convicted of, or have committed, serious criminal offences, members of terrorist groups or criminal organizations, and persons who are responsible for committing human rights violations. Also included in the inadmissible classes are those who have made material misrepresentations to Citizenship and Immigration Canada, those likely to require

social assistance in Canada, as well as persons with a serious medical condition.

Inland sponsorship: an application to have the sponsorship of a foreign national processed within Canada, when both the spouses or common-law partners are living in Canada.

Interim Federal Health (“IFH”) Benefits: health benefits provided to persons who have been determined eligible to make a claim for protection as either a Convention refugee or a person in need of protection if such persons are unable to pay for their health care services and if they are not covered by a private or public health care plan. The IFH benefits cover essential health services for the treatment and prevention of serious medical/dental conditions (including immunizations); essential prescription medications; contraception, prenatal and obstetrical care; and the immigration medical examination.

Landed immigrant: same as “permanent resident”.

Minister's Permit: a permit issued under the former legislation, the *Immigration Act*, which granted a person who was otherwise inadmissible the right to remain in Canada for a temporary period. Under the *Immigration and Refugee Protection Act*, this has been replaced by the “temporary resident permit”.

Permanent resident: a person granted permanent resident status has the right to enter Canada and remain here indefinitely, subject to certain limitations. Permanent residents may lose their status, for example, if they are convicted of a serious crime, or remain outside Canada too long. Like Canadian citizens, permanent residents also have the right to sponsor their close relatives (members of the family class) to Canada.

Permanent resident card: a wallet-sized plastic card (also known as the Maple Leaf Card or the PR Card) issued to permanent residents under

the *Immigration and Refugee Protection Act*. The card is proof that a person has permanent resident status in Canada.

Permanent resident visa: a visa issued to a person intending to come to Canada as a permanent resident.

Port of entry: a Canadian airport, port, or border crossing.

Pre-Removal Risk Assessment: an assessment made by an Immigration officer, conducted at the point when persons, such as failed refugee claimants, are “removal ready”, meaning that documents and arrangements have been made to remove the person from Canada. The assessment is made to determine whether such persons would be at risk to their life, or of persecution, torture, or cruel and unusual treatment or punishment if returned to their country of nationality or habitual residence.

Protected persons: a term that applies to Convention refugees and persons in need of protection who are eligible to apply for permanent resident status.

Record of landing: an 11" x 14" paper document issued under the former *Immigration Act* indicating the status of a permanent resident (landed immigrant).

Removal order: an order issued either by an immigration officer or a member of the Immigration Division of the IRB. There are three types of removal orders: a) deportation orders, which require the person concerned to leave the country and never return unless written authorization of the Minister of Citizenship and Immigration is obtained; b) exclusion orders, which deny entry or require the removal of persons trying to enter Canada. Under an exclusion order a person is forbidden from re-entering Canada for one year, unless the written authorization of the Minister is obtained; and c) departure orders, which require

the person concerned to leave Canada within thirty days, or the order automatically becomes a deportation order. Persons who leave as required under a departure order, are not forbidden from returning to Canada in the future.

Temporary resident permit: a document that replaces the former Minister's Permit issued by an Immigration officer to someone who is otherwise inadmissible to Canada. Holders of temporary resident permits are permitted to remain in Canada during the validity of the permit. Where the reason for their inadmissibility is excessive demand on health or social services, a permit holder who has continuously lived for three years will be eligible to apply for permanent resident status.

Temporary resident status: the status given to foreign nationals, such as tourists, students and holders of work permits, who will be in Canada for a temporary period.

Temporary resident visa: a visa issued to a person intending to come to Canada for a temporary period.

Visa office: Canadian embassies, high commissions, or consulates located outside of Canada.

Visa officer: a person working in a visa office (located outside of Canada) who decides whether to issue a temporary visa or a permanent visa to an applicant.

3. The Immigration Process (Some Background)

To understand the topic of “HIV/AIDS and Immigration” a basic knowledge of Canada’s immigration laws is required. This section is a brief primer on how our immigration system works.

3.1 The Immigration and Refugee Protection Act

The *Immigration and Refugee Protection Act* and its accompanying Regulations (the *Immigration and Refugee Protection Regulations*) govern all immigration-related matters. The legislation sets out who is admissible to Canada, and who is not. It establishes the rules regarding how one gets into the country, as well as the procedure and grounds for removing people once they are here. When looking for answers regarding “Immigration and HIV/AIDS”, the IRPA and its Regulations are our primary sources of information. Another comprehensive and accessible source of information, including the Act and the regulations, is the Citizenship and Immigration Canada [website](http://www.cic.gc.ca) at www.cic.gc.ca.

3.2 Visa Offices, Visas and Inland Applications (Where to Apply)

Most applications by persons seeking to come to Canada (on either a permanent or temporary basis) are filed at a Canadian **visa office**. Visa offices are Canadian embassies, high commissions, or consulates located outside of Canada. Persons wanting to come to Canada permanently apply to a **visa officer** for a **permanent resident visa**. Those wishing to come to Canada temporarily apply for a **temporary resident visa**.

Being issued a visa does not ensure one’s entry to Canada. All entrants to Canada are subject to an examination by an **immigration officer** at the **port of entry**. The officer may admit the person, or, where he or she believes the person falls within one of the **inadmissible classes**, issue a **removal order**, or refer the matter to an **admissibility hearing** before a member of the **Immigration Division** of the **Immigration and Refugee Board (“IRB”)**. Serious allegations of inadmissibility, such as cases involving criminal and security concerns, will be referred to the Immigration Division of the IRB

for an admissibility hearing.

Not all persons seeking permanent resident status need apply at the visa office. Some, like refugees, can make their claims upon or after their arrival in Canada. Also, it is possible to make a claim based on humanitarian and compassionate grounds from within Canada and, in some circumstances, to sponsor a spouse or common-law partner who is in Canada. These, however, are exceptions to the general rule that applications to come to Canada must be made outside the country.

Where you apply will also determine where your medical testing is done. All individuals seeking permanent residence or refugee protection in Canada are required to undergo a medical examination. If the application is being made outside of Canada, the applicant will be referred to a Citizenship and Immigration Canada-approved Designated Medical Practitioner (DMP). These are physicians who have been approved by CIC to conduct the CIC immigration medical. For individuals who have to have their medical done inside Canada (or repeat a medical in Canada), you must also visit a local DMP in order to have the medical done as part of your application. CIC maintains an up to date [list of DMPs](#) in Canada and around the world on their [website](#).

3.3 Immigration Status (The “Ladder”)

Everyone in Canada has an immigration “status”. Each status carries with it certain rights and obligations. What rights you have under the IRPA depends on your immigration status. The Act creates a hierarchy. The higher up on the immigration status ladder you are, the more rights you have.

At the top of the heap are **Canadian citizens**. They have the most rights under the IRPA. Citizens can come and go from Canada as they please. They can apply to sponsor their close relatives to come to Canada to live here

permanently. Finally, they can stay in Canada forever, no matter how badly they act, no matter what crimes they commit. The only exception is if your crime relates to the fraudulent gaining of citizenship.

Just below Canadian citizens on the ladder are **permanent residents**, commonly referred to as “landed immigrants”. Permanent residents have many of the same rights as Canadian citizens, including the right to enter Canada and to apply to sponsor their close relatives. As the name implies, permanent residents have the right to live their entire lives in Canada. However, for them, this right is not absolute. It can be taken away, for example, if a permanent resident commits a serious crime in Canada, or if he or she stays outside the country too long. One final benefit of having permanent resident status is that it is a stepping stone to citizenship. To acquire Canadian citizenship, a person either has to be born in Canada, or apply after having been a permanent resident for a required period of time. To qualify for Canadian citizenship, a permanent resident must have accumulated at least three years of residence in Canada in the four year period immediately preceding the date of application.

Below Canadian citizens and permanent residents in the IRPA hierarchy are a large group, collectively referred to in the legislation as **foreign nationals**. Included in this group are tourists and other temporary visitors to Canada, such as foreign students and workers. Persons who have been found to be **Convention refugees** and **persons in need of protection** and those who have applied for such status (“**claimants**”) are also considered to be foreign nationals under the Act. Many in this group have the *potential* to acquire permanent resident status, but unless and until that happens, none have the right to remain in Canada permanently. Foreign nationals can lose their right to be in Canada, for example, by working or studying without authorization.

Finally, at the bottom of the immigration heap

are persons without any status. This group includes people who entered and remain in Canada illegally. It also includes those who came here as visitors or students, allowed their status to expire, but still remain in Canada. Persons in this category do not have a right to be in Canada.

3.4 Permanent Resident Status

In general, there are three ways to acquire the status of a permanent resident: through family, through skills and work experience, or on humanitarian grounds.

Many people acquire permanent resident status through some sort of family relationship. Either they are sponsored by a Canadian citizen or permanent resident who lives here, or they are the spouse or child of someone who is immigrating to Canada. In the latter case, they are entitled to permanent resident status because they are the dependents of the principal applicant being granted that status.

People who are selected on the basis of their employability, often known as “**economic immigrants**” include entrepreneurs, skilled workers, self-employed people, live-in caregivers, and investors in Canadian businesses.

Among those who acquire permanent resident status in Canada for humanitarian reasons are Convention refugees and “persons in need of protection”. It is also possible to apply for permanent resident status strictly on the basis of humanitarian and compassionate grounds, for example, where there is a family dependency on a Canadian citizen or permanent resident living in Canada but where family class sponsorship is not an option.

3.5 Sponsored Immigrants/Members of the “Family Class”

Canadian citizens and permanent residents of Canada have the right to sponsor close members of their family, referred to in the IRPA as members of the “**family class**”. Included in the family class are the **spouse**, **dependent children** and parents of the **sponsor**. One positive change made in the IRPA from previous legislation is the inclusion in the family class of “**common-law partners**” and “**conjugal partners**”. A common-law partner is someone who is “cohabiting with [the sponsor] in a conjugal relationship, having so cohabited for a period of at least one year.” Citizenship and Immigration Canada currently recognizes same-sex marriages in Ontario (after June 10, 2003), British Columbia (after July 9, 2003), Quebec (after March 19, 2004) and the Yukon (after July 14, 2004) as being spousal relationships and the marriage certificates issued for these unions are considered valid as proof of marriage.

Of course, where partners are living in different countries (the actual situation in many sponsorships) it is impossible for the couple to “co-habit”. For this reason, a separate category has been created under the IRPA, that of “**conjugal partner**”. A conjugal partner is someone who is living *outside* Canada, who has been in a conjugal relationship with his or her partner for at least one year.

The definitions of common-law partner and conjugal partner include persons of the same sex. Taking into consideration the fact that in some countries it is not possible for same-sex partners to live together, an exception is made to the cohabitation requirement in the IRPA for persons who are unable to do so (that is, live together) “due to persecution or any form of penal control”.

In general, a sponsorship is started in Canada by the Canadian citizen or permanent resident sponsor. Once **Citizenship and Immigration**

Canada (“CIC”) accepts that the person is eligible to sponsor, application forms are sent to the sponsor, who then must forward them to the person or persons being sponsored for completion. The completed forms of the sponsored person are then submitted to the Canadian visa office abroad for consideration by a visa officer. It is the visa officer who decides whether to issue the applicant a permanent resident visa, or to reject the application.

In the case of spouses and common-law partners, when both parties are residing in Canada, it is also possible to have the sponsorship application processed *within* Canada. This is referred to as an **inland sponsorship**, and the final decision is made by an immigration officer. This kind of immigration is called the “Spouse or Common-Law Partner In-Canada Class”. Under the former Act, such sponsorships, though common, were treated as *exceptions* to the regular procedure. Applicants had to seek permission on humanitarian and compassionate grounds to have the sponsorship processed in Canada. Under the IRPA, a new category has been created, the “spouse or common-law partner in Canada class”, which treats the sponsorship of spouses and common-law partners as regular, and not exceptional cases. Foreign nationals may be sponsored as a member of this class only if they have “**temporary resident status**” - for example, if they are here as visitors, foreign workers or students. Where a Canadian citizen or permanent resident wants to sponsor a foreign national in Canada who does *not* have temporary resident status (for example, a refugee claimant), the process is different. In such cases, an application for permanent residence based on H & C grounds must be made by the person being sponsored.

In most cases where a family class sponsorship has been refused, the sponsor has a right to appeal the decision to the **Immigration Appeal Division (“IAD”)** of the Immigration and Refugee Board. In such cases, a

preliminary issue for the Board is whether the person being sponsored really is a member of the family class. For example, whether the applicant truly is the sponsor's spouse or child. Where the Appeal Division finds that the applicant *is* a member of the family class, it may then take into account humanitarian and compassionate grounds in deciding the appeal. This is extremely important, since appeals based on H & C grounds allow decision-makers to consider a wide variety of factors and have a much greater chance of succeeding than those where the appellant must show that an error of law or fact has been made.

3.6 Economic Immigrants

The IRPA allows for the granting of permanent resident status to persons who are considered likely to bring some economic benefit to Canada. This group includes skilled workers, entrepreneurs, self-employed persons and investors. "Skilled worker" applications are judged on the basis of a point system. A successful applicant must acquire a certain number of points in order to qualify for a permanent resident visa. Points are given based on factors such as: the applicant's age; education; knowledge of English or French; work experience; arranged employment in Canada; and adaptability.

An "entrepreneur" is someone with business experience and a net worth of at least \$300,000 who intends to own a portion of a Canadian business, provide active and ongoing management of the business, and, through the business, create employment for at least one Canadian citizen or permanent resident of Canada, other than a member of the entrepreneur's family.

Under the IRPA, an "investor" is someone with business experience, a net worth of at least \$800,000, who invests \$400,000 in a provincially-controlled corporation called a "fund".

"Self-employed persons" are those who have the intention and ability to be self-employed and to "make a significant contribution to cultural activities, athletics or the purchase and management of a farm".

A final category of independent applicant are "live-in caregivers" who may apply for permanent resident status in Canada after having worked for two years providing care for a child, senior or disabled person while living in the home of their employer.

3.7 Refugees and Protected Persons

Under the IRPA, persons determined to be Convention refugees or "persons in need of protection" (collectively referred to as "protected persons") are eligible to apply for permanent resident status. Convention refugees are persons outside their country of nationality who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion, are unable, or by reason of that fear, unwilling to return to their country. "Persons in need of protection" is a new term introduced by the IRPA. It refers to people who would face a risk of torture or cruel and unusual treatment or punishment if returned to their country. For persons living with HIV/AIDS, it is worth noting that the legislation *excludes* from the definition of "persons in need of protection" those whose risk is caused by the inability of their country to provide adequate medical or health care.

Persons at risk who are outside Canada may apply to a visa office for a permanent resident visa. Alternatively, those who manage to get to Canada may initiate a claim which will be determined inside the country. The two processes are slightly different.

Refugees and persons in similar circumstances who are *outside* the country have two criteria to meet before they will be issued a permanent

resident visa. First, they must show that they would be at risk in their country of origin. Secondly, they must show that they can become “successfully established” in Canada. This is a criterion that does not apply to those who claim to be Convention refugees or persons in need of protection within Canada.

In determining an applicant’s ability to become “successfully established” in Canada, a visa officer will consider the person’s resourcefulness, the presence of relatives in Canada, the individual’s potential for employment given his/her education, work experience and skills, and, finally, the person’s ability in English or French.

It is possible for refugees and other persons at risk who are applying from *outside* Canada to be sponsored. This type of sponsorship may be made by either: (a) a group of five or more Canadian citizens or permanent residents, each of whom is over 18 years of age; (b) one or more of such individuals in conjunction with a corporation; or (c) by a corporation, unincorporated organization or association acting on its own, such as a church or other non-governmental organization. More information about this process can be found at www.cic.gc.ca/english/refugees/resettle-4.html.

For those applying for “protected person” status from *within* Canada, the first step in the process is to decide whether such persons are *eligible* to have their claim heard by the **Refugee Protection Division (RPD)** of the IRB. The IRPA requires that immigration officers are to make eligibility decisions within three working days of a claim being submitted. Once a claim has been referred to the RPD, claimants who are unable to afford health care services, and who are not otherwise covered by a private or public health plan, become eligible for **Interim Federal Health (IFH)** coverage.

Those who are *not* eligible to have their claim referred to the RPD include persons whose claim has been refused in the past, those with

protection in other countries, and persons who are inadmissible to Canada by reason of serious criminality, security concerns, human rights violations, or association with organized crime. At the time of writing, Canada is working on an agreement with the United States that would expand the class of “ineligible” refugee claimants to include the majority of those who seek to enter Canada from the United States, on the grounds that it is safe for them to make a claim there. The draft agreement between Canada and the United States would still allow some refugee claimants coming from the U.S. to have their claims determined in Canada. Among those are claimants with close family members residing in Canada and unaccompanied minors

Those who *are* determined to be eligible will be given a hearing before a member of the RPD. That is their opportunity to explain in detail why they fear persecution in their country or are in need of protection. At the hearing, claimants have the right to be represented by counsel, at their own expense. They also have the right to an interpreter, provided by the Board. In Ontario, legal aid funding is available to refugee claimants who meet eligibility criteria. Claimants should contact a [Legal Aid Ontario office or their local community legal clinic](#). You can also call 1-800-668-8258 to find out about legal clinics and area offices near you.

3.7.1 Appealing a Negative Refugee Decision

Under the IRPA, there were provisions for those whose claims are refused by the Board can appeal the negative decision to the **Refugee Appeal Division (“RAD”)** of the IRB. The RAD was designed to be a significant improvement over the review procedures available under the *Immigration Act*, which allows for a judicial review of a negative decision by the Federal Court. Unfortunately, in April 2002, the Minister of Citizenship and Immigration announced a suspension of the

RAD's implementation. To date, the provisions for the RAD have not been put into place. The following paragraphs briefly outline how the RAD will operate, when and if it is proclaimed in force.

The RAD appeal is a "paper appeal" and most people will require some legal assistance in preparing the application. Both the claimant and the Minister of Citizenship and Immigration ("the Minister") can file appeals. The RAD will be able to re-examine the evidence that was before the RPD, and reach a different conclusion. It may reject the appeal, substitute its decision for that of the RPD, or refer the matter back to the RPD for re-determination.

With the RAD provisions not in effect, the only review of a negative RPD decision will be by the Federal Court. A judicial review is a much more limited "appeal" than that envisaged by the RAD. The Federal Court *cannot* reconsider the evidence and make its own finding that someone is a Convention refugee or person in need of protection. It can overturn a decision *only* where there has been an error of law made by the Refugee Protection Division. If such an error is found, the case will be sent back to be re-heard by a different member of the RPD.

3.8 Pre-Removal Risk Assessment (PRRA)

Persons who are about to be removed from Canada, including those whose claims for protection were turned down by the RPD and the RAD, may apply one last time to remain in Canada. The process is called a **Pre-Removal Risk Assessment**, or "PRRA".

An application cannot be made to the PRRA until just before the person concerned is about to be removed from Canada - when the individual, according to CIC, is "removal ready". The application is considered by an immigration officer, not the IRB, although the

criteria for acceptance, in most cases, are the same as used by the RPD. That is, is the person a Convention refugee or a person in need of protection?

Successful PRRA applications may occur where country conditions have changed significantly since the time of the person's hearing before the RPD, such that the person would now be at risk if returned home. For example, there may have been a change in government since the time of the RPD decision, or a civil war may have broken out. Persons whose PRRA applications have been accepted will be allowed to apply for permanent resident status in Canada.

Different criteria for the PRRA are used for persons who are found inadmissible to Canada by reason of serious criminality, security concerns, human rights violations, or association with organized crime. These same, more restrictive criteria, also apply to those who were "excluded" from refugee protection by reason of Article 1 (F) of the Refugee Convention, for example, because they have committed war crimes or crimes against humanity. In these cases, the PRRA officer weighs the risk to the applicant if returned to his or her country against the risk to the security of Canada, or the danger to the Canadian public if the person remains. Even if such applicants are successful in the PRRA applications, they will not be permitted to apply for permanent resident status. Rather, a stay (suspension) on their removal from Canada will be granted.

3.9 Humanitarian and Compassionate Cases

Under the IRPA, it is possible to seek entry into Canada, or remain in Canada, on the basis of humanitarian and compassionate grounds. The Act authorizes the Minister, in such cases, to grant permanent resident status even to persons who otherwise are inadmissible to Canada. Applications to remain in Canada on H & C

grounds are often made by failed refugee claimants, or others in Canada who are either afraid to return to their country, or who believe that to return home would cause them great hardship. In many cases, the applications are based on some sort of family dependency, for example, where the applicant has married a Canadian citizen or permanent resident and seeks to remain in Canada for that reason. Applicants have also made H & C applications based on their health condition, stating that the inadequate level of health care in their country would put their lives at risk if they had to return there.

H & C applications are complicated and it is strongly advised to seek professional legal advice if this option is being considered. See [Section 9](#) for information on where to get legal advice.

3.10 Temporary Admissions

Among those who come to Canada for a temporary period are tourists, students, and foreign workers. In general, such persons are required to apply for a temporary resident visa before entering Canada. In the case of tourists, however, people coming from some countries (for example, most European countries) are exempt from the visa requirement.

An additional category of temporary resident in Canada are persons who have been issued a “temporary resident permit”. An immigration officer may issue a temporary resident permit to someone who otherwise is inadmissible to Canada if the officer believes that to do so would be “justified in the circumstances”. Essentially, this is a discretion given to officers which allows them to take humanitarian factors into account. Under the old legislation, Minister’s Permits were frequently issued to persons who were inadmissible to Canada for medical reasons.

The temporary resident permit does not grant

permanent status to the recipient. However, after being in Canada on a temporary resident permit for either three or five years consecutively, depending on the circumstances, an individual may have the right to be granted permanent resident status in Canada. See [section 5](#) on temporary resident permits for more information.

3.11 Inadmissibility

Not everyone who applies to come to Canada will be allowed in. Also, those who are already *in* Canada, with the exception of Canadian citizens, may be required to leave the country if they are found to belong to an inadmissible class. This includes permanent residents, regardless of the amount of time they have spent in Canada. If someone other than a Canadian citizen is a member of one of the “inadmissible classes”, he or she will not be allowed into Canada, or will be ordered to leave the country.

The inadmissible classes describe those people that Canada does not want in the country - those that the government considers to be undesirable or even dangerous. Included in this group are people who have been convicted of, or have committed, serious criminal offences, members of terrorist groups or criminal organizations, and persons who are responsible for committing human rights violations. Also included in the inadmissible classes are those who are likely to require social assistance in Canada, applicants who have made material misrepresentations to Citizenship and Immigration Canada, as well as persons with a serious medical condition. A misrepresentation occurs when an applicant for status in Canada has not been truthful in his/her application to CIC, with respect to a “material fact” (section 40 (1) of the IRPA), for example, when one fails to disclose the existence of a child, or a previous marriage. Another example would be where an applicant lies about a child’s age, so that the child would appear to meet the age

requirements for dependent children under the Regulations.

4. Immigration Issues For Persons Living With HIV/AIDS

4.1 Medical Inadmissibility

Every person applying for permanent status in Canada and certain others, such as foreign nationals seeking to work in occupations where the protection of public health is essential, must undergo a medical examination. The purpose of the examination is to determine whether applicants are inadmissible to Canada on “health grounds”. Under section 38 of the IRPA, with some exceptions discussed later on, foreign nationals are inadmissible to Canada if their health condition:

- is likely to be a danger to public health;
- is likely to be a danger to public safety; or
- might reasonably be expected to cause excessive demand on health or social services.

The provision raises a number of questions related to persons living with HIV/AIDS.

4.1.1 Disclosure of HIV Status

If a person applying to immigrate to Canada is HIV positive or living with AIDS, must this information be disclosed to Citizenship and Immigration Canada?

In practice, for anyone seeking to come to Canada on a permanent basis, it would be hard *not* to reveal that he or she is HIV positive or living with AIDS. The medical form, to be completed by a doctor, requires all applicants to answer (yes or no) whether they are suffering from any serious illness. Failure to disclose that information could lead to an applicant being found inadmissible to Canada, on the basis that

he or she made a material misrepresentation to Citizenship and Immigration Canada. Persons who are admitted to Canada, and later it is discovered that they did not reveal a serious ailment on their medical form, could be ordered to leave Canada for the same reason.

Secondly, during the medical exam, applicants are asked whether they have ever tested positive for HIV. Again, immigrants discovered not to have been truthful in their applications for permanent resident status may be found inadmissible to Canada.

Finally, physicians may order HIV tests when, in their opinion, HIV is “clinically indicated”. Physicians have been instructed that “clinical indications” must be based on medical criteria and not based solely on factors such as the person’s nationality, gender or sexual orientation. The medical criteria include where the applicant has a history of unscreened blood transfusions, or has suffered significant, unexplained weight loss, or whose mother was HIV-positive at the time of his or her birth. Whether such instructions are always adhered to is difficult to monitor, although there is some indication that doctors have ordered HIV tests even where no medical indicators are present.

4.1.2 Is testing for HIV mandatory?

In August 2000, Health Canada recommended to the Minister of Citizenship and Immigration that there be mandatory HIV testing of all prospective immigrants. The proposal immediately became the subject of serious debate.

Health Canada’s rationale for mandatory HIV testing has been that this would be the best way to protect public health, “as there can be no spread from persons who are excluded.” The logic, however, is questionable, and a number of arguments against mandatory HIV testing have been raised. A good summary of arguments against mandatory testing for HIV can be found

in *HIV/AIDS and Immigration: Final Report* published by the Canadian HIV/AIDS Legal Network.

In spite of these concerns, on January 15, 2002, HIV testing became routine for persons 15 years or older who are coming to Canada for longer than six months. HIV testing is also mandatory for children who have received blood or blood products, who have a known HIV parent, or who are potential adoptees.

4.1.3 Can persons coming to Canada for less than six months be tested for HIV?

Most people who plan on staying in Canada less than six months do not have to take a medical examination and are not subject to mandatory HIV testing. However, where an immigration officer believes that such a person's medical condition could pose a danger to public health or safety, or cause an excessive demand on health or social services, he or she may order the person to undergo such an exam. That examination could include an HIV test.

4.1.4 Multiple Medical Examinations

It may be necessary for an applicant to have to undergo more than one medical examination. Normally, the results of a medical examination are valid for 12 months. If an application has not been processed within that period, which is frequently the case where persons are seeking permanent resident status in Canada, the applicant will be required to undergo another medical exam.

4.1.5 Responding to a Preliminary Finding of Medical Inadmissibility

Procedural fairness requires that officers give applicants an opportunity to respond to concerns about their inadmissibility before a

final decision is taken. A minimum of 60 days is allowed for applicants to provide additional information or evidence to show that they should not be considered inadmissible for medical reasons. This new information can include, for example, updated medical reports or evidence on the cost of treatment.

Normally, an applicant will be informed by letter that there is likely to be a finding of medical inadmissibility and some description of the reasons for that finding. The letter will also indicate that time limit within which additional information or evidence must be provided to immigration before they make a final decision.

4.1.6 HIV/AIDS as a Threat to Public Health or Safety

Since 1991, persons living with HIV/AIDS have not been refused admission to Canada solely on the basis that their condition is likely to be a danger to public health or safety. In August 1994, Immigration Minister Sergio Marchi stated in a letter to the Canadian AIDS Society that "persons with HIV/AIDS do not generally represent a danger to the public under section 19 of the *Immigration Act*." Each applicant, and his or her condition, must be examined individually and a decision related to public health or safety based on his or her particular circumstances. As Immigration Canada itself pointed out: "A person who is infected with the HIV virus is capable of infecting others and so such a person is *potentially* a threat to public health. The real question [as set out in the legislation, however] is whether the person is *likely* to do so."

4.1.7 What is "Excessive Demand"?

The primary problem for people with HIV/AIDS wanting to immigrate to Canada has been the "excessive demand" part of the medical inadmissibility provision. Under the former *Immigration Act* and *Regulations*, there was

no clear definition of “excessive demand”. The courts were not very effective either in defining the term, offering such unhelpful concepts as “more than what is normal or necessary.”

Canadian courts have ruled that “excessive demand” determinations were to be based on the individual’s particular circumstances, and not simply on the person’s condition. In other words, officers were not supposed to automatically exclude persons on the basis of a particular diagnosis, such as HIV/AIDS. One hopes that this notion will continue under the IRPA, even though it makes persons inadmissible on health grounds only if their “*condition*” might reasonably be expected to cause excessive demand on health or social services.

Under the IRPA Regulations, “excessive demand” has been defined in two ways. First, there is a calculation of the “anticipated cost” of health and social services should the person in question be admitted to Canada. A demand would be considered “excessive” if the anticipated costs would exceed the “average Canadian per capita” costs for health and social services over a specified period of time. In most cases, that period will be the five consecutive years immediately following the medical examination. However, if there is “evidence that significant costs are likely to be incurred beyond that [five year] period”, then the relevant period of time could be up to ten consecutive years.

As well, an “excessive demand” on health and social services will be found to exist where admitting the person in question would add to existing waiting lists, thereby increasing the rate of mortality and morbidity in Canada because Canadian citizens and permanent residents would have to wait longer for the provision of those services.

Appendix A of this chapter includes a copy of CIC’s analysis of the anticipated health care costs of PHAs.

4.1.8 HIV/AIDS and Excessive Demand

As the courts have said, the notion that something is “excessive” suggests that there is a norm, or normal standard (the “average Canadian per capita” costs), that has been exceeded. In addition to the great *practical* difficulty of figuring out what “more than normal” means, there is a troubling implication of a test designed to weed out those whose demands on the system are “more than normal”. The underlying premise of such a test is that those who make “normal” demands on the health care system are welcome to Canada whereas those making excessive demands on the public purse are not.

In spite of judicial admonitions that the circumstances of each individual must be examined before a finding is made that an applicant is medically inadmissible due to “excessive demand”, in practice, persons with HIV/AIDS are generally found to be inadmissible on this ground. The IRPA Regulations definition of “excessive demand” offers little hope that this will change.

As was the case under the old Act, the IRPA definition of “excessive demand” considers only the *cost* to society of admitting a person living with HIV/AIDS or others with a serious health condition. Nowhere in the legislation is there a provision calling for the authorities to consider as well the *benefits* that the person’s admission might bring. The Act’s great shortcoming is that it fails to look at the individual’s ability to *contribute* to Canada and whether his or her health status is likely to interfere with this contribution. The legislation calls on Immigration officials to examine only the negative, and ignore the positive. Moreover, when one is required to examine the negative costs over a period of up to ten years where longer-term expenses are likely to occur (anticipated to be the case with HIV/AIDS), without taking financial and social contributions into account, the picture becomes especially gloomy. In all likelihood, with the exception of

those who fall within a narrow category of exemption (to be examined below), persons living with HIV/AIDS will continue to be regarded as imposing an excessive or “abnormal” burden on Canadian society, and denied admission for that reason.

4.1.9 Exceptions to the Excessive Demand Rule

Under the new legislation, certain classes of people *will* be exempt from the “excessive demand on health or social services” provision. Notably, in a family class sponsorship, the “excessive demand” clause does not apply to the spouse, common-law partner, conjugal partner and/or dependent child of the sponsor. This is a significant change, and will benefit those in Canada who are sponsoring a spouse, partner or child who is HIV positive or living with AIDS.

The exception applies *only* to a sponsorship situation. If the spouse, partner or child of an independent applicant (such as a skilled worker, entrepreneur, or live-in caregiver) is HIV positive, then *none* of the family members will be issued permanent resident visas.

Under the former Act, Convention refugees in Canada were exempt from all parts of the medical inadmissibility provision. Under the current legislation, “protected persons” (which includes Convention refugees) continue to be exempt from the “excessive demand” part of the health inadmissibility section. However, they will no longer be exempt from the “danger to public health or safety” part of the provision.

4.1.10 Medical Inadmissibility and Temporary Visitors with HIV/AIDS

Although section 38 of the IRPA is meant to apply to all foreign nationals, in practice, the vast majority of persons coming to Canada for a temporary period (those coming for less than

six months) are *not* required to undergo a medical examination. There are some specific exceptions to this rule. Individuals who are coming to Canada to work in certain occupations, like health care or work with children may be asked to undergo a medical examination. The same applies to permanent residents who return to Canada after having been outside the country. Without undergoing a medical exam, such people cannot be excluded from Canada for health reasons. Several years ago, it was suggested that *every* person coming to Canada be tested for HIV. In September 2000, then Minister of Citizenship and Immigration, Elinor Caplan, acknowledged the futility of such a measure.

However, some individuals who are coming to Canada on a temporary basis for less than six months will be subject to a medical examination. Individuals who are coming into Canada from a country found on CIC’s “designated country list”, or who have spent more than 6 out of the last 12 months in a country on the list will be required to have a medical prior to getting an entry visa.

4.1.11 Remedies for Decisions of Medical Inadmissibility

The remedy depends on the type of application being made, and when and where the refusal was made. It is complicated, and anyone who has been refused admission to Canada, or whose sponsorship application of a family class member has been refused, is urged to seek the advice of a lawyer immediately. Time is of the essence in such cases, as there is always a deadline for appealing or seeking to have the Federal Court judicially review a negative decision. An appeal to the Appeal Division of the IRB must be filed within *30 days* of notification of the negative decision. Applications to the Federal Court must be filed within *15 days* of receipt of a decision made by an officer in Canada, and within *60 days* for decisions made outside Canada.

Below is a summary of the possible remedies for persons refused admission to Canada for health reasons:

- Where the person applying to come to Canada is being sponsored as a member of the *family class*, then the *sponsor* usually has the *right to appeal* the refusal to the Immigration Appeal Division. The person being sponsored has no automatic right to appeal. Appeals to the IAD may be based on an error of law or fact made by the visa officer/immigration officer, or on the basis of humanitarian and compassionate grounds. This latter category is extremely important to persons living with HIV/AIDS. It means that the IAD can reverse a visa officer's decision, even if the decision is valid in law, where sufficient H & C grounds exist. Under the *Immigration Act*, which contained similar provisions, a number of applicants refused entry due to their HIV status were subsequently allowed to emigrate here for this reason. In cases of medical inadmissibility, sponsors have been much more successful challenging negative decisions on H & C grounds than trying to show that a person with HIV should not be considered medically inadmissible in the first place. (For a discussion of successful and unsuccessful sponsorship appeals where the refusal was based on the medical inadmissibility of persons living with HIV/AIDS, see Klein, *HIV/AIDS and Immigration: Final Report* published by the Canadian HIV/AIDS Legal Network, at pages 18-20)
- In circumstances *other than a family class sponsorship*, applicants, whose applications have been refused by a visa officer, may seek leave of the Federal Court to have the officer's decision made the subject of a judicial review. That review is limited to points of law only. Because the Federal Court cannot take H & C factors into consideration, a judicial review is much less

likely to succeed than an appeal before the IAD.

- Applicants who have been issued a permanent resident visa by a visa officer, but then are refused entry upon arrival in Canada, either by an immigration officer or after an admissibility hearing, may appeal the refusal to the Immigration Appeal Division. Such appeals may be based on an error of law or fact, or on H & C grounds.

4.1.12 Learning from Citizenship and Immigration Canada that you are HIV positive

Because certain classes of people are now exempt from the "excessive demand" provisions of the IRPA (spouses, common-law partners, and children) it is possible (and probable) that they will be issued permanent resident visas irrespective of their HIV status. Persons living with HIV/AIDS will be issued a letter by CIC entitled "Health Follow-up Handout: HIV Infection". It begins by stating, "Your immigration medical examination for entry to Canada has shown that you have evidence of being infected with the human immunodeficiency virus (HIV)."

The CIC handout advises immigrants of the risks of transmitting the HIV virus, and advises applicants to contact a health clinic specializing in HIV upon arrival in Canada. The concern is that this may be the first notification applicants receive that they are HIV positive.

Certainly, a letter from Citizenship and Immigration Canada is not the ideal way to be informed of one's HIV status. Learning that one is HIV positive can be a traumatic experience. For that reason, the Canadian Medical Association recommends that persons being tested for HIV/AIDS be counselled before the testing and, where the test is positive, afterwards as well. Where applicants to Canada

are informed in the manner described above, neither pre nor post-test counselling is ensured.

4.1.13 A caution about authorizations to disclose

The application for permanent residence includes a section entitled, “Authority to disclose personal information”. An applicant must choose amongst a number of options setting out to whom this information may be disclosed, including the applicant’s lawyer and his or her sponsor. Typically, applicants will authorize disclosure of their personal information to such persons and possibly, provincial public health or medical personnel. Many people immigrating to Canada use the services of immigration consultants. On April 13, 2004, new legislation was passed which requires that immigration consultants who are paid to provide you with advice or to represent you in immigration proceedings are required to be registered with the Canadian Society of Immigration Consultants. You can find out if your representative is a member of the CSIC by visiting their website at www.csic-scci.ca/indexE.html, or by calling 416-572-2800 or 1-866-308-CSIC (2742). The CSIC has established requirements for its members, including rules of professional conduct and mandatory liability insurance. The rules of professional conduct specifically address the need to maintain client confidentiality. There is also a formal complaints mechanism which can be used if you have concerns about the services provided to you by a consultant. It is important to note that immigration “agents” are not the same as immigration “consultants”, and are not necessarily covered by the rules.

The application form for permanent residence is filled in before the medical examination. In such cases, a sponsor might find out about the applicant’s HIV status from Citizenship and Immigration Canada.

Finally, where persons living with HIV/AIDS

are issued visas to come to Canada, provincial health authorities may be alerted to this fact by CIC. In all Canadian provinces and territories, public health authorities are to be notified of AIDS cases. Cases of HIV seropositivity must be reported in all provinces and territories, with the exception of Quebec and Yukon. This raises a concern about confidentiality, and its possible breach in relation to HIV/AIDS cases. This is a growing problem in Canada, due in part to the use of technology which makes confidential information easier to access and copy.

5. Temporary Resident Permits

As mentioned above, one type of temporary status in Canada comes from being in possession of a temporary resident’s permit, the equivalent of what was known under the former *Immigration Act* as a Minister’s Permit. The permit has both benefits and drawbacks for persons living with HIV/AIDS. Both aspects are explored in the following sections.

5.1 Medical Inadmissibility and Temporary Resident Permits

Canada’s immigration laws allow for some flexibility. Persons found to be inadmissible to Canada on health grounds are often issued temporary resident permits, which enable the recipient to enter Canada and remain here as long as the permit is valid.

Immigration officers are told that decisions to issue temporary resident permits to persons inadmissible on health grounds “should not be made lightly”. Before a permit is issued to someone who is medically inadmissible, there is both a needs and risk assessment done. Immigration officers are instructed that “an inadmissible person’s need to enter or remain in Canada must be compelling and sufficient to overcome the health or safety risks to Canadian society.”

In assessing an applicant's needs, officers look at such matters as: the person's reason for being in Canada; the number and closeness of family members in Canada and in the home country; the availability and/or cost of treatment back home; and the overall benefits of being in Canada for the applicant and his or her family.

In conducting the risk assessment, officers will consider such factors as the cost of any treatment or care required; how those costs will be covered; whether follow-up treatment will be required and if so, whether such treatment is available in the home country; and whether the person is likely to require social assistance. Those likely to need public assistance in the long-term are considered "high risk candidates" for a permit, and are unlikely to be issued one.

There is no set term of validity for a temporary resident permit. Most are valid for a period of one to three years, with a maximum validity of three years. Holders of permits valid for more than six months may be issued employment authorizations.

5.2 From Temporary Resident Permit to Permanent Resident Status

According to the Regulations, a person who has been on a temporary resident's permit for five consecutive years may have the right to become a permanent resident. Persons on a permit who are inadmissible on health grounds *due to excessive demand on health or social services* may be considered for landing after only three years. There are exceptions to this rule. For example, those who are inadmissible for reasons related to serious criminality, security, human rights violations or organized crime, are not eligible for landing in this way. Nor is anyone who, during the three or five year period, became inadmissible for any other reason.

Under the former Act, immigration officers would assess the need for the person to remain in Canada against the potential risks to

Canadian society of allowing the person to remain here before granting permanent resident status to a permit holder. This has changed under the IRPA. Now, the officer will determine whether the applicant has become inadmissible to Canada for any *other* ground (for example, due to a criminal conviction). If no other ground of inadmissibility has arisen since the person was issued the temporary resident permit, then he or she will be eligible for landing. Once the applicant has satisfied the residency requirement, the officer has no discretion but to grant permanent resident status to the permit holder.

5.3 Temporary Resident Permits and OHIP

Some temporary resident permit holders are eligible for health coverage, while others are not. For those granted permits because of a medical inadmissibility, however, the answer in most provinces, including Ontario, is "no".

How some temporary resident permit holders can be eligible for provincial health coverage, while others are not, can be explained in part by different health insurance plans in each province. It can also be explained by the different classification of permits by Citizenship and Immigration Canada.

Not all temporary resident permits are the same. Each permit has a "casetype code" based on the category of the case. Eligibility for OHIP will depend on the casetype code printed on the permit. Persons living with HIV or AIDS are inevitably issued "case type 90" permits. In Ontario, that makes them ineligible for OHIP, the provincial health coverage.

The exclusion of certain types of permit holders from health coverage in Ontario has been challenged unsuccessfully in court. The case involved, among other applicants, a young boy named Raja, who suffered from cerebral palsy. Although this condition made him medically

inadmissible to Canada, Raja was allowed into the country after being issued a case type 92 Minister's Permit. With that type of permit, however, he was not eligible for OHIP. The Ontario Court of Appeal found that the provisions of the Ontario *Health Insurance Act* and its Regulations did not violate the *Charter*. However, in writing the Court's decision, Mr. Justice Doherty commented on the inadequacy of the provincial and federal schemes that had denied Raja health coverage. "It seems inherently contradictory, if not cruel," he wrote, "to permit a young boy like Raja to enter Canada on compassionate grounds so that he might live with the rest of his family who have been allowed to settle in Canada, while at the same time not taking cognizance of Raja's need to access expensive medical services that can, to some degree, at least alleviate his severe physical disability. While I have found no constitutional violation, I would think that the federal and provincial authorities could work together to find some way to extend our country's compassion beyond permission to enter Canada to include access to the medical services available through OHIP to persons like Raja."

Unfortunately, no such "way" has been found. Those like Raja and Jeanne, the woman living with HIV referred to in the Introduction, continue to be only partial recipients of Canada's "compassion".

6. HIV/AIDS and Refugees/Protected Persons

Refugee claims and claims for protection involving persons living with HIV/AIDS arise in two main contexts. In one, the claim is based on the fact that the claimant is living with HIV/AIDS. In the other, the claimant's primary fear is for another reason, but is aggravated or affected by the fact that he/she is living with HIV or AIDS. In both instances, evidence related to the condition of the claimant, and the treatment of persons living with HIV/AIDS in the claimant's country, is

extremely relevant.

6.1 The importance of disclosing HIV/AIDS status

Claimants who are HIV positive may be reluctant to share this information with their lawyer or legal representative. Some worry that their condition will lessen their chances of remaining in Canada. Others are concerned that their lawyer will no longer represent them if made aware of their health status. Many PHAs have valid concerns that information about their status may get around and result in a breach of their confidentiality. While lawyers in good standing and immigration consultants who are members of the Canadian Society of Immigration Consultants (CSIC) have a professional obligation to keep your information confidential, individuals who are not members in good standing of these organizations do not. You can find out if your lawyer is in good standing with the law society by visiting their website at www.lsuc.on.ca, or by calling them at 416-947-3300 or 1-800-668-7380. CSIC can be contacted at www.csic-scci.ca/indexE.html or by calling them at 416-527-2800 or 1-866-308-CSIC (2742). Unregulated immigration advisors, or agents have no such obligation.

It is essential that health care providers and others involved with refugee claimants living with HIV/AIDS ensure that their clients be forthcoming with their lawyers about their condition, while recognizing why this can be an extremely stressful and difficult thing to do. For one thing, that status could be relevant to whether a well-founded fear of persecution exists in the person's country of nationality.

Secondly, failure to disclose that one is HIV positive could have serious, negative consequences where the condition affects the way a claimant testifies. How someone testifies will often determine how his or her credibility will be perceived by the IRB. Lack of

credibility is not only a major reason for negative decisions by the Board, but such findings are extremely difficult to challenge on judicial review. In one case, the claimant (C.D.G.) was diagnosed as being HIV positive just prior to his refugee hearing. By his own account, he was filled with shame and fear that he would be deported should this information be revealed. This reaction was based on his awareness of how people living with HIV/AIDS were treated in his native Nigeria. C.D.G. did not tell his lawyer of his condition. At his refugee hearing, the claimant's impaired mental state (brought on by worry about the news he had just received) affected his ability to testify clearly. The IRB found that he lacked credibility and rejected his claim. Later, C.D.G. disclosed everything, in an effort to have his claim re-opened. The Board dismissed his application, stating there was no valid reason why the claimant had not revealed his HIV status in the first place.

6.2 Successful Claims based on HIV Status

In a number of cases, asylum seekers have based refugee claims on their HIV status, arguing successfully that being HIV positive makes them "members of a particular social group". The critical issue in most claims is whether, because of their HIV or AIDS status, the claimants face "discrimination" or "persecution". To be accepted, claimants must fear more than "discrimination", they must have a well-founded fear of "persecution".

The Immigration and Refugee Board has held that, in some countries, the harassment of persons living with HIV is so severe that it amounts to persecution. A claimant from Poland, for example, testified that because of his HIV status, in addition to being ostracized and vilified by his community, he was fired from his job, was unable to secure alternative employment, and was denied adequate housing and medical/dental services. Violations of

these "economic, cultural and social" rights (right to employment, housing, medical care) are generally considered less serious than violations of "civil and political" rights, such as the rights to life, liberty and security of the person. However, where someone is denied these rights *on the basis of his/her health condition*, then that discriminatory practice can amount to persecution. As the IRB noted in the case involving the claimant from Poland: "While the standard of protection for some of these [economic, cultural and social] rights is less absolute than for others, *where a minority of the population, such as persons who are HIV-positive, is excluded from the enjoyment of lower level rights then we are no longer dealing with mere discrimination but with persecution.*" [Emphasis added]ⁱ

In a similar case involving a Mexican refugee claimant, the Board found that persons living with HIV face social ostracism and discrimination securing employment, housing and medical care. Although each act on its own may not amount to persecution, taken *cumulatively*, such discrimination can amount to persecution.ⁱⁱ

Where the discrimination faced by persons living with HIV/AIDS comes from private individuals, for example, in the areas of housing and employment, the Immigration and Refugee Board examines the government response to such discrimination. If *practical* remedies exist for the aggrieved person, such as legal action, or a government agency that effectively deals with complaints of discrimination, then the fear of persecution will not be "well-founded" and the refugee claim will fail. The IRB must consider the *actual* response of the government, and not just what is written in the country's laws or constitution. Even where governments have initiated programs to assist and protect persons living with HIV/AIDS, the Board must examine the extent to which such programs have been implemented, and how effective they are. Good intentions alone on the part of the government are not enough to overcome what in many countries is a "deeply-entrenched

legacy of societal prejudice against persons with HIV and AIDS”.ⁱⁱⁱ It is for these reasons that evidence of country conditions with respect to HIV/AIDS is crucial in refugee/protection hearings.

Often, a claim based on HIV status is combined with another basis for the claim, for example, the claimant’s sexual orientation. In one case, a claimant from Mexico maintained that being gay and HIV positive carried a double stigma in his country. The IRB accepted his claim on both grounds.^{iv}

Similarly, a claimant from Singapore established a well-founded fear of persecution on the grounds that he was a homosexual who was HIV positive with AIDS. Singaporeans with AIDS were housed in a special hospital commonly referred to as an “isolation ward”. The IRB referred to this facility as a “medical jail where no bail is permitted, [where] inmates are sentenced to confinement in bed away from the rest of society and fellow inmates”.^v Although there was no overt legislation that discriminated against people diagnosed with AIDS in Singapore, the Board found that the treatment meted out to persons living with AIDS in that country amounted to persecution.^{vi}

6.3 Refugee claims based on inadequate health care in his/her country

Sometimes a person’s claim is not based on the discriminatory treatment of persons living with HIV/AIDS, but rather on the fact that a country’s resources do not allow it to provide adequate health care to such individuals. In such cases, the Immigration and Refugee Board has consistently held that this is *not* the basis for a positive refugee determination. This is what happened in the case of a refugee claimant from Burkina Faso.^{vii} In that country, although medications for HIV were available, the cost was so high it made them inaccessible to most of the population. Still, Burkina Faso was doing

its best to make “available such medical resources as [could] possibly be achieved in a disadvantaged country.”^{viii} The Federal Court held that this situation does not amount to persecution and a claimant in such circumstances is not a Convention refugee. According to the Court: “To argue that refugee claimants having inadequate medical care in disadvantaged countries equals persecution would create an unmanageable situation.”^{ix}

Those seeking status as a “person in need of protection” will also be refused if the basis for the claim is the lack of adequate health or medical care in their country. The IRPA specifically excludes people in this situation from being granted “protected person” status.

Persons living with HIV/AIDS who cannot obtain adequate health care in their own country may find more success in raising this point as the basis for an H & C application.

6.4 Other Types of Refugee/Protection Claims related to HIV/AIDS

A person may be accepted as a Convention refugee or person in need of protection for advocating on behalf of persons living with HIV/AIDS. In one case, a claimant from Cuba was allowed to attend the international AIDS conference held in Vancouver in July 1996. During one session of the conference a film was shown that was critical of the treatment of HIV positive persons, especially their segregation in sanatoriums in Cuba. During a discussion that followed, a representative of the Cuban government attending the conference said the film was a lie, but the claimant publicly said it was true. The IRB found that because of his activism on behalf of persons living with HIV/AIDS as well as on behalf of the gay community in Cuba, the claimant was at risk of persecution in his country.^x

6.5 Can a PHA refugee claimant be sponsored?

As mentioned above, it is possible to sponsor Convention refugees, and persons in similar circumstances, provided they are *outside* of Canada. In such cases, a person's HIV/AIDS status would not make them inadmissible to Canada due to excessive demand on health and social services. Those who apply for permanent resident visas as Convention refugees or persons in similar circumstances are exempt from that inadmissible class.

It should be recalled, however, that Convention refugees and persons in similar circumstances applying from outside the country must meet a "successful establishment" test before being issued a visa. A visa officer may believe that someone living with HIV/AIDS will have difficulty becoming successfully established in Canada.

7. HIV/AIDS and Family Class Sponsorships

Under the IRPA, Canadian citizens and permanent residents of Canada have the right to sponsor close family members, referred to in the Act as members of the family class. However, the right to sponsor is not absolute. There are a number of reasons why family class sponsorship applications can be refused. Problems can arise when either the sponsor or the person applying for permanent resident status is living with HIV/AIDS.

7.1 Can a PHA be a sponsor for a member of the "family class"?

A sponsor's own health condition will not, in and of itself, be a bar to sponsorship.

However, if the sponsor is unable to work, and relies on government assistance, the sponsorship requirements may not be met.

Under the IRPA Regulations, persons on social assistance cannot sponsor, except where the social assistance is related to the person's "disability". This is the case even where the sponsorship includes a spouse, partner or dependent child. The positive news for PHAs who wish to sponsor relatives, where a sponsor who is unable to work receives government assistance because of a medical condition like their HIV, it will be possible for that person to sponsor a member of the family class. This means that the family class member being sponsored will be able to submit his/her application for a permanent resident visa to the visa officer.

Just because the visa officer considers the application, however, does not mean that it will necessarily be approved. The IRPA states that persons are inadmissible to Canada if their "arrangements for care and support" here "involve social assistance". Unless the person(s) being sponsored and the sponsor are able to get off social assistance, the application for permanent resident status (the sponsorship) may be refused. For what can be done in such a case, see sections 7.3 and 7.4, below.

7.2 Can a PHA obtain permanent resident status through a family class sponsorship?

As mentioned above, persons applying for permanent resident status in Canada who are living with HIV/AIDS will likely have their applications refused on health grounds, because their condition "might reasonably be expected to cause excessive demand on health or social services". The only exception to this rule will be if the person applying for status is the *sponsor's spouse, common-law partner, conjugal partner or child*. In those cases, the sponsorship will *not* be refused because the applicant is likely to cause excessive demand on the health or social services in Canada.

7.3 Appealing a refusal of a family class sponsorship

A sponsor may appeal a negative decision to the Immigration Appeal Division. On such an appeal, the IAD may consider whether in refusing the application for a permanent resident visa, the visa or immigration officer made a legal error, or acted unfairly, or, finally, whether “sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.” If the appeal is successful, the IAD may set aside the negative decision, and order that the person be issued a permanent resident visa, or that the application be reconsidered by the officer.

7.3.1 “Sufficient humanitarian and compassionate” grounds for PHA sponsorship appeals

It is hard to predict what a member of the Immigration Appeal Division will consider to be “sufficient humanitarian and compassionate” grounds to warrant the granting of “special relief” in an appeal involving a family class sponsorship. The term “humanitarian and compassionate considerations” is not defined in the IRPA. A passage from a 1970 Immigration Appeal Board decision explains that humanitarian and compassionate considerations are “those facts, established by the evidence, that would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another.”^{xi} Although this passage has been quoted countless times by the IAD, it is, in fact, a rather vague and unhelpful definition.

Of more use, for our purposes, is an examination of the factors that the IAD has taken into account in cases involving persons living with HIV/AIDS. These are cases where applicants for permanent resident status have been refused admission to Canada, either because their HIV/AIDS status is likely to

cause an “excessive demand” on health or social services, or because, once in Canada, they will be reliant on social assistance. In some of the cases, the sponsor is also living with HIV/AIDS. Where the sponsor/appellant has asked for special relief on the basis of H & C grounds, the following factors have been taken into account by the IAD:

- the seriousness of the applicant’s health condition, including a prognosis for the future;
- whether the applicant is asymptomatic;
- the availability of adequate medical care in the applicant’s country;
- the support available for the applicant in Canada, including the presence of supportive family members;
- whether the applicant can be of support to the sponsor (where the sponsor is also HIV positive);
- whether there is financial support available in Canada to help defray health costs (such as a drug plan);
- evidence of the applicant’s community involvement in Canada;
- evidence of any negative conduct by the applicant, such as criminal activity, either in Canada or abroad;
- prospects of employment in Canada for the applicant; and,
- where children are involved, the best interests of the children.

In considering whether sufficient H & C grounds exist to warrant the granting of “special relief”, the Immigration Appeal Division is *not* supposed to weigh the cost to our social and health services in treating a person with HIV/AIDS in Canada against the humanitarian factors. Nevertheless, in a number of cases, this is precisely what the IAD has done, and used this comparison as a reason for rejecting the appeal.

8. Tips for front-line workers

8.1 Identifying an individual's immigration status

As discussed at the beginning of this chapter, knowing what rights an individual has in Canada is dependent on knowing that person's immigration status. But "immigration status" is a legal concept, and often people do not know themselves what their legal status is in this country. How can one tell?

Generally, for every status that one can have under the *Immigration and Refugee Protection Act*, there is a corresponding document. It is important to keep in mind, however, that many things may have occurred after the issuance of immigration documents. It's important to use both documents and a thorough discussion with your client about what has happened with their immigration application as resource for determining where a client is within the immigration system

Common immigration documents are as follows:

- Canadian citizens have either a birth certificate showing a birthplace in Canada; a Canadian citizenship card; a Canadian citizenship certificate; and/or a Canadian passport;
- Permanent residents will have either a Record of Landing or a Permanent Resident Card. Persons granted permanent resident status under the *Immigration Act* were issued a Record of Landing, also known as an IMM 1000. The Record of Landing is a long (11" x 14"), paper document. Under the IRPA, the Record of Landing is being replaced by the Permanent Resident Card (also known as the Maple Leaf Card or the PR Card). This is a plastic, wallet-sized document. As of June 28, 2002, persons granted permanent resident status have

been issued PR Cards. People who obtained permanent status under the old Act, and who have Records of Landing, can apply for a new PR card (as of October 15, 2002). The card is required if someone is going to travel outside of the country and wishes to re-enter Canada. The card costs money and the process for applying and obtaining the card can be complicated. After December 31, 2003, a Record of Landing will no longer be proof of permanent resident status. In order to re-enter Canada, persons will have to show the PR Card.

- Once persons claiming protected person status have been found to be eligible to have their claim heard by the Immigration and Refugee Board, they are issued a "Determination of Eligibility" document. This acknowledges such eligibility and also shows that they are eligible for Interim Federal Health (IFH) benefits. As mentioned above, under the IRPA, eligibility determinations are to be made within three working days of receipt of the claim.
- Persons who are authorized to work or study in Canada will also be issued documents: a work permit and/or a study permit. Both documents will have expiry dates.
- Temporary Resident Permit holders will have a TRP document. It is similar to a record of landing document, but includes information about the type of permit it is (casetype code), as well as an expiry date.
- Anyone who has received a decision from the Immigration and Refugee Board or the Federal Court will have been issued such decision in writing. This includes any type of removal order that may have been made. Removal orders include deportation orders which require someone to leave the country

and not return without specific permission; exclusion orders which deny entry or require the removal of persons trying to enter Canada; and departure orders which require a person to leave Canada within thirty days, after which it automatically becomes a deportation order.

8.2 What Health Coverage is Available in Canada?

A person's immigration status will affect the type of health coverage that is available to him or her.

For the purposes of this discussion, access to health care in Ontario can be reduced to two primary issues: medical care and medications. Medical care is usually defined as coverage for visits to the doctor, diagnostic testing and coverage for stays in hospital. Medications are the medicine required to treat an individual. Ontario Health Insurance Plan ("OHIP") covers the cost of medical care, but not the cost of medications. Those costs are covered under either the provincially funded Trillium Drug Program or an individual's private plan. To be eligible for the Trillium Drug Program, however, a person must first be eligible for OHIP. The Trillium Drug Program helps people who have high drug costs in relation to their income. Persons may apply to the Program if: a) their private insurance does not cover 100% of their prescription drug costs; b) they have valid OHIP; and c) they are not otherwise eligible for drug coverage under the Ontario Drug Benefit (ODB) Program. The ODB Program applies to persons over the age of 65 who have been living in Ontario for at least one year.

Refugee claimants who have had their claims referred to the IRB are eligible for the Interim Federal Health Plan ("IFH"). The IFH covers the cost of essential medical treatment, including medications.

Persons receiving social assistance in Ontario (Ontario Works or the Ontario Disability Support Program) will receive a drug card. This covers most HIV medications.

Persons who are not eligible for OHIP or IFH may succeed in getting medical care through a local Community Health Centre. Local AIDS Service Organizations can also be helpful in finding medical help for such individuals. As well, Primary Care Physicians, Community Health Centres, AIDS Service Organizations and HIV Clinics within hospitals may have information about drug studies, for which persons living with HIV/AIDS may be eligible.

The chart in **Appendix B** gives basic information about what public health care and drug benefits are available to people, based on their immigration status.

8.2.1 The HMAP – HIV Medication Access Project

The Toronto area currently has a pilot project called the HIV Medication Access Project which works to help connect uninsured refugees and immigrants with HIV medications. The project is in its early and pilot stages, but may be a way for you or your clients to be able to access HIV medications. A case manager with the program will work to help facilitate the provision of medications from pharmaceutical companies to clients on a temporary, compassionate release program in order to ensure that there is a minimal risk of interruption of medication therapy while the person's immigration status is sorted out. For more information about the HMAP, speak to your primary care physician or call the Toronto People With AIDS Foundation (TPWAF) at 416-506-1400. Currently, this pilot project is only available to clients living in the Toronto area.

8.3 Documents and Evidence

Front-line workers can be extremely helpful to their clients living with HIV/AIDS who have hearings before the Immigration and Refugee Board, by helping them obtain relevant documents and other evidence. With your client's consent, it may be helpful to discuss any documentary requirements with your client's lawyer or legal representative. It can sometimes be easier for you to secure documents on behalf of your client, or to support your client's attempts to gather this information him or herself.

The following is a brief list of some of the documents and other types of evidence that are generally useful at such hearings:

8.3.1 Documents for Appeals from Removal Orders (before the Immigration Appeal Division)

- medical reports that confirm the Appellant's HIV/AIDS status;
- psychological reports, if applicable, on how the claimant's HIV/AIDS status may affect his/her ability to testify;
- evidence of employment, such as letters from employers;
- reports or other documents (newspaper articles, letters from physicians) on the medical situation for persons living with HIV/AIDS in the home country;
- the presence of family members in Canada and abroad. Ideally, one wants to show that the majority, if not all of the applicant's close relatives, live in Canada. Evidence from family members, or other relatives in Canada, who can provide financial and/or emotional support to the applicant can be very useful. Again, it is best for such evidence to be given orally during the hearing. Relatives should bring documents to prove their relationship to the applicant and, where applicable, proof of income

and/or assets to show that they are capable of supporting the applicant;

- evidence of community support. This can be in the form of letters of reference from people who can attest to the applicant's good character. Ideally, one or two such people should be prepared to testify at the hearing;
- any evidence of community involvement, such as volunteer or other charitable work; and
- other evidence of integration into Canadian society, or attempts to integrate, such as proof of language or skills training.

8.3.2 Documents for Appeals by Sponsors to the Immigration Appeal Division (where the person being sponsored is a PHA)

- medical reports, which include a prognosis. The report(s) should also address the long-term and short-term costs of treating the applicant's condition;
- psychological reports, if applicable, on how the claimant's HIV/AIDS status may affect his/her ability to testify;
- reports or other documents (newspaper articles, letters from physicians) on the medical situation for persons living with HIV/AIDS in the applicant's home country;
- evidence of the availability and cost of treatment in Canada. This can be in the form of a doctor's letter or more general documentation from a Canadian HIV/AIDS advocacy organization.
- family support available in Canada and the amount of support (or lack thereof) available in the home country;
- evidence of the amount of communication/support between the sponsor and the applicant in order to show, where applicable, the level of emotional and

financial dependency between the two parties; and

- capacity of persons being sponsored to support themselves in Canada. This would include evidence of education (diplomas or certificates), ability to speak English or French, work experience in the home country and, if possible, an offer of employment in Canada.

8.3.3 Documents for Appeals by Sponsors to the Immigration Appeal Division (where the *sponsor* is a person living with HIV/AIDS)

- the sponsor's medical report(s) which include a prognosis. A comment from the doctor on the need of the sponsor for live-in assistance and care would be helpful, as would an assessment of the long-term and short-term costs of treating the sponsor's condition;
- a psychological report, if applicable, on how the sponsor's psychological condition will be improved by the presence of the applicant in Canada and/or how the sponsor's HIV/AIDS status may affect his/her ability to testify;
- evidence of the close relationship that exists between the sponsor and the applicant. This may include proof of their communications, such as letters or telephone bills, photographs together, proof that the sponsor has traveled to the applicant's country, and the testimony or letters of friends or family who can attest to the nature of the relationship between the sponsor and the applicant; and
- the capacity of the applicant to support himself/herself (and potentially to support the sponsor) in Canada. This would include evidence of education level (diplomas or certificates), an ability to speak English or French, work experience in the home country and, if possible, an offer of employment in Canada.

8.3.4 Documents for Claims for Refugee/Protected Person Status

- medical reports concerning the claimant's HIV/AIDS status (N.B. It is crucial that the claimant's lawyer is aware of his/her client's health situation. Living with HIV/AIDS can be the basis for a successful claim);
- psychological reports, if applicable, on how the claimant's HIV/AIDS status may affect his/her ability to testify; and
- human rights reports and other documents (such as newspaper and magazine articles) on the treatment of persons living with HIV/AIDS in the home country, in particular evidence of human rights violations and/or discrimination against such persons.

8.4 Interpreters

Working with people from other countries often means a need to work with interpreters as well. Because interpreters often come from the same country as the client, a concern may arise over confidentiality. This concern is greatly aggravated where the person requiring interpretation is living with HIV/AIDS, and fears disclosure of this information to members of his/her community.

It is always preferable to work with professional, certified interpreters, who understand the need for confidentiality. In cases involving persons living with HIV/AIDS, it is nevertheless recommended that front-line workers discuss the question of confidentiality in the presence of both the interpreter and the client. This underscores the point for the interpreter and, at the same time, should help to reassure the person living with HIV/AIDS.

9 Getting Legal Help

There are a number of different sources for legal help with immigration matters. First, for particular information about HIV/AIDS and immigration, you can contact HALCO. While immigration is not one of our areas of practice, we may be able to provide basic legal advice and guidance. HALCO can sometimes also help with the issuance of a legal aid certificate by writing a referral letter. HALCO can be reached at 416-340-7790 or 1-888-705-8889 in Ontario.

9.1 The Lawyer Referral Services (LRS)

The Lawyer Referral Service, at 1-900-565-4577 will give you the name and contact information of a lawyer who practices the type of law you need, in an area close to your home. Through the LRS, you are entitled to a free half-hour of advice from a lawyer. The call costs \$6, which appears on your next phone bill. The lawyer will not undertake any legal action on your behalf like filing documents, writing letters or appearing in court, but will provide advice and answer questions. If you are unable to reach the lawyer, or the lawyer turns out not to have much experience or expertise in the area of law you need, call the LRS back and let them know that you were not successful. They may be able to provide you with another contact name.

9.2 Community Legal Clinics

Some community legal clinics also do a limited amount of immigration cases. You will need to contact your local clinic to find out if they handle these types of cases. Clinics that do immigration work are usually found in larger centres in Ontario. You can find the community legal clinic closest to you by calling 1-800-668-8258, or visiting www.legalaid.on.ca.

9.3 Legal Aid Ontario (LAO)

Legal aid certificates may be available through Legal Aid Ontario for refugee claimants and some other limited immigration matters. A legal aid certificate pays for a lawyer to work on your case and represent you for a specified type of matter and for a specified number of hours. If you are successful in getting a certificate, most lawyers who have experience with HIV and immigration will likely accept them. In the Toronto area, you may also present this certificate to the Refugee Law Office and they may be able to take on your case.

You can contact LAO at 1-800-668-8258. Eligibility for legal aid certificates depends on the type of matter you have, and on your financial circumstances. Most clients in receipt of social assistance will qualify financially for a certificate. Some individuals may have to enter into a repayment agreement with LAO in order to have a certificate issued.

9.4 Immigration Lawyers and Immigration Consultants

Some ASOs and HALCO also maintain a list of immigration lawyers who have some experience with HIV and can sometimes facilitate a referral. Remember that it is important to recognize the difference between lawyers and immigration consultants. Immigration consultants have only been regulated since April 13, 2003. Prior to that time, they were not bound by the legal professions rules of professional conduct which applied to lawyers, nor were they required to carry liability insurance in the event of an error on a file. Since April 2003, immigration consultants are required to be members of the Canadian Society of Immigration Consultants (CSIC) in order to be paid to represent individuals in immigration matters, or to give immigration advice. You can find out if someone is a member in good standing of CSIC by visiting their website at www.csic-scci.ca/indexE.htm or by calling them

at 416-572-2800 or toll-free at 1-866-308-CSIC (2742). Regulated immigration consultants are required to abide by the rules of professional conduct of the CSIC, as well as to carry liability insurance. The rules of professional conduct specifically address the issue of client confidentiality. CSIC also has a formal complaints procedure if you wish to complain about the services of an immigration consultant. It is important to note, however, that immigration “agents” or advisors who are not paid are not necessarily regulated and therefore not bound by the rules of professional conduct. In addition, it should be noted consultants cannot be hired with a legal aid certificate.

It is absolutely your right to know whether the professional you are consulting is a lawyer or a consultant. When seeking legal representation, you are the consumer, so do not be afraid to ask questions to be sure you know what you are paying for.

9.5 Other Community Resources

There are a number of other places where you may be able to get good advice, direction and support as you move through the immigration process, and deal with your HIV status as well. The staff at Community Health Centres will often have good connections with local services including community legal clinics and sources of support. Immigrant Serving Organizations also often have comprehensive lists of organizations and individuals who may be able to provide supports and referrals to legal help or information.

Community Legal Education Ontario (CLEO) publishes an extensive collective of plain language resources covering the immigration process. The resource includes a series of fact sheets covering a broad range of topics. These documents may be ordered free of charge from CLEO by calling them at 416-408-4420 or by email at cleo@cleo.on.ca or using their on-line order form at www.cleo.on.ca. All of their publications are also available for download from the same website. Click on “publications online” and look for the heading on Immigration.

Finally, Citizenship and Immigration Canada itself has an extremely comprehensive and up-to-date website, at www.cic.gc.ca. The website includes fact sheets and frequently asked question documents on a wide variety of topics. The website also includes complete application forms, and guides for completing for forms as well as online access to the legislation and policy manuals which provide important insight into the ways that CIC interprets its legislation and the process they follow when making decisions.

9.6 Word of Mouth

Also, try speaking with others who have been through the immigration process. This may be easier to do with contacts made through AIDS Service Organizations if you have concerns about disclosing your HIV status to a member of your community.

APPENDIX A

Operational Processing Instruction 2002-004 MEDICAL ASSESSMENT OF HIV POSITIVE APPLICANTS

Background:

Applicants may be divided into two groups:

1. those who are Excessive Demand Exempt (EDE), according to section 38(2) of the *Immigration and Refugee Protection Act (IRPA)*; and
2. those who are non-Excessive Demand Exempt (non-EDE).

EDE applicants who are HIV Positive:

- should only be assessed according to public health and public safety health grounds for inadmissibility (IRPA sections 38(1)(a) & (b)).
- should not be assessed for excessive demands. Thus, examining physicians or medical officers should not request further tests to determine excessive demands, such as CD4 or PVL tests.
- are medically admissible if they meet health admissibility criteria of public health and public safety.

Non-EDE applicants who are HIV Positive:

- should be assessed according to public health, public safety and excessive demands health grounds for inadmissibility (IRPA sections 38(1)(a)(b) & (c)).

When appropriate, examining physicians or medical officers should request further tests, such as CD4 or PVL tests, to help determine whether an applicant represents excessive demands.

HIV Positive Non-EDE Applicants - Information Relating to Excessive Demands:

Non-EDE applicants identified as being HIV positive should be asked to undergo CD4 testing by the examining physician. If an applicant's CD4 count is less than 350 cells/mm³, antiretroviral therapy (ARV) is required in a Canadian setting and applicant will represent excessive demands. - see Annex A which includes the consultant report "HIV Infection in Applicants for Immigration to Canada". If an applicant has a CD4 count above 500 cells/mm³, he/she should then be asked to undergo PVL testing. [Note: the consultant report refers to PVL testing for applicants with 500 cells/mm³, but this does not take into account what to do for CD4 counts 350-500.] Those applicants

With PVL results over 55,000 copies/mL are not medically admissible, because they meet the current Canadian criteria for ARV treatment. If PVL testing is not available, then a second CD4 test should be obtained approximately two (2) months after the first CD4 test was taken. See #6 below.

Non-EDE applicants who are HIV positive are assessed on an individual basis in order to determine their demand on health and social services if granted entry to Canada. These services are assessed over a five year period unless significant costs are anticipated in the five to ten year period following the immigration medical examination.

Antiretroviral therapy (ARV) costs average \$1000 per month. CD4 counts and viral loads cost \$150 each and are routinely done every three months. Assuming a conservative estimate of four (4) visits annually to a physician, the cost per quarterly visit plus blood work in stable patients is approximately \$360 (assuming \$30 MD fee and \$30 lab fee for other tests). The annual cost for ARV treated patients is thus approximately \$13,440 (\$1,120 per month of treatment). This figure does not include any hospitalizations which may occur. See Annex A for the paper prepared by the consultant, which includes information on HIV costs. It should be noted that the consultant does not separate HIV positive applicants into EDE and non-EDE cases. Thus, although the paper refers to all applicants, the information pertains solely to non-EDE applicants.

1. All non-EDE applicants should be requested to provide a current (and any previously available) CD4 lymphocyte count. Failure to provide this information is sufficient grounds to assess the applicant as medically inadmissible since the vast majority of newly diagnosed HIV individuals will require ARVs within the ten year assessment period.
2. The natural history of untreated HIV infection is characterized by progressive CD4 cell depletion. The rate of CD4 cell decline is determined principally by the PVL.
3. ARVs are initiated in Canada if the CD4 lymphocyte count is below 350 cells/mm³ or if plasma HIV-RNA concentration, commonly known as the plasma viral load or PVL, exceeds 55,000 copies/mL.
4. Any non-EDE applicant currently receiving ARV is inadmissible based on excessive demand on health care services.
5. Most HIV positive non-EDE applicants who have CD4 counts between 350 and 500 cells/mm³ will experience a fall in their CD4 count to below 350 cells/mm³ within the five year or ten year time frames placing an excessive demand on health services.
6. Non-EDE applicants identified as being HIV positive should be asked to undergo CD4 testing by the examining physician. If an applicant's CD4 count is less than 350 cells/mm³, antiretroviral therapy (ARV) is required in a Canadian setting and applicant will represent excessive demands. See Annex A which includes the

Consultant report „HIV Infection in Applicants for Immigration to Canada% If an applicant has a CD 4 count above 500 cells/mm³, he/she should then be asked to undergo PVL testing. [Note: the consultant report refers to PVL testing for applicants with 500 cells/mm³, but this does not take into account what to do for CD 4 counts 350-500.] Those applicants with PVL results over 55,000 copies/mL are not medically admissible, because they meet the current Canadian criteria for ARV treatment. If PVL testing is not available, then a second CD 4 test should be obtained approximately two (2) months after the first CD 4 test was taken.

- 7. Non-EDE applicants with CD 4 counts above 500 cells/mm³ and PVLs below 55,000 copies/mL will be few in number, and will generally be admissible if all other health factors are unremarkable.**

Summary:

EDE applicants who are HIV Positive:

- SHOULD be assessed only for public health and public safety, NOT excessive demands.**
- Are medically admissible if they meet admissibility criteria for public health and public safety.**

Non-EDE applicants who are HIV Positive:

- SHOULD be assessed according to public health, public safety, AND excessive demands health grounds for inadmissibility (IRPA sections 38(1)(a)(B) & (C)).**

Table 1 below includes information useful in determining whether a non-EDE applicant who is HIV positive is likely to represent an excessive demand on health or social services.

Table 1

HIV Positive Non-EDE Applicants	
Medically Admissible (assuming public health and public safety criteria are met)	Medically Inadmissible (based on Excessive Demand for health and/or social services)
<ul style="list-style-type: none"> • NON-EDE applicants with CD4 counts above 500 cells/mm³ and PVLs below 55,000 copies/mL will generally be medically admissible if all other health factors are unremarkable. 	<ul style="list-style-type: none"> • A non-EDE applicant who does not provide CD4 lymphocyte count information <p>Failure to provide this information is sufficient grounds to assess a non-EDE applicant as medically inadmissible since the vast majority of newly diagnosed HIV individuals will require antiretroviral therapy (ARV) within the ten year assessment period.</p>
	<ul style="list-style-type: none"> • Any non-EDE applicant currently receiving ARV.
	<ul style="list-style-type: none"> • Any non-EDE applicant with a CD4 lymphocyte count below 350 cells/mm³, as meets in Canada standard for receiving ARV.
	<ul style="list-style-type: none"> • Any non-EDE applicant with PVL exceeding 55,000 copies/mL, as meets in Canada standard for receiving ARV.
	<ul style="list-style-type: none"> • Most non-EDE HIV-infected persons with CD4 counts between 350 and 500 cells/mm³ will experience a fall in their CD4 count to below 350 cells/mm³ within the five year or ten year time frames placing an excessive demand on health services.

Note: The consultant in the report below does not separate HIV Positive applicants into EPE and non-EPE cases. Thus, although the paper refers to ALL applicants, the information pertains solely to non-EPE applicants.

HIV Infection in Applicants for Immigration to Canada

Background

- 1. CIC has implemented mandatory HIV serologic testing effective January 15, 2002 for all individuals aged 15 years and older applying to immigrate to Canada.**
- 2. Prospective immigrants to Canada can be excluded on medical grounds for 3 reasons: risk to public health, risk to public safety, or excess demand on Canadian health care services. Presently, „excess demand“ is usually defined as exceeding \$15,000 of publicly funded health care costs over the next 5 years, but the assessment time can be extended to 10 years (and costs to \$30,000), if relevant to the medical condition.**
- 3. HIV infection is not considered a reason for non-admittance on grounds of risk to public health, because its transmission requires specific voluntary behaviours, principally sexual activity and sharing of injection drug using materials.**
- 4. HIV infection could only be considered a risk to public safety under the unusual circumstance in which an HIV-infected person were a sexual offender.**
- 5. HIV infection will frequently meet the CIC definition of excess demand, due principally to the high cost of drug therapy (see below). The costs of antiviral therapy are borne entirely by some provinces and territories, and in some provinces and territories, the patient pays a small proportion thereof.**

Management and Costs of HIV Infection in Canada

HIV-infected persons typically require quarterly medical appointments when they are doing well medically, with more frequent visits (and occasional hospitalizations) when they are experiencing problems.

At these quarterly visits, blood work is required, including both CD 4 lymphocyte and Plasma HIV-RNA (viral load) quantifications, usually with additional blood biochemistry. The CD 4 and Plasma HIV-RNA quantifications each cost about \$150. Hence, the cost per quarterly visit plus blood work in stable patients is approximately \$360 (assuming \$30 MD fee and \$30 lab fee for other tests). These costs are all borne by the provinces/territories. This does NOT include x-rays and serologic tests for potential co-

infections, such as hepatitis B and C, which are routinely done, or the additional medical costs borne by those co-infected with either of those hepatitis viruses.

If the HIV-infected person requires antiretroviral (ARV) therapy, the costs of care increase markedly. Modern ARV therapy requires 3 drugs in most patients, and more than 3 in certain patients, particularly those who have failed to respond to prior ARV therapy. The cost for 3 drug containing ARV regimens ranges from a low of \$698.40 per month for the combination of zidovudine 400 mg BID plus (non-enteric coated) didanosine 400 mg QD plus zalcitabine 400 mg TID to a high of \$1560.60 per month for abacavir 300mg BID plus lamivudine 150 mg BID plus amprenavir 1200 mg BID. Neither of those regimens are prescribed frequently. The most commonly prescribed 3 drug ARV regimens range from \$849 to \$1116 per month. The costs for ARV regimens used in „salvage therapy“ for those who have failed other therapies is even higher. Thus, assuming a cost of \$1000 per month per ARV-treated patient is likely an underestimate of the mean cost per treated patient. When added to the lab and MD visit costs noted above for stable patients (again an underestimate for the „mean“ patient), the annual cost for ARV treated patients is \$13,340 or \$1112 per month. An additional plasma viral load test is required about one month after starting a new ARV regimen, but these costs have not been included.

Using the above costs and the usual 5 year window, an HIV-infected person requiring ARV for 8 months will incur \$8896 (8 x \$1112) costs while on ARV and \$6120 while off ARV (17 quarterly visits over 4 yr 4 mo at \$360 per visit) for a total of \$15,016. Consequently, any HIV-infected adult expected to require a minimum of 8 months of ARV therapy over the ensuing 5 years is ineligible for admission due to the criterion of excess demand.

Using a 10 year time window, an HIV-infected person who is followed off ARV for 8.5 years and treated with ARV therapy for 1.5 years will incur costs of \$12,240 (\$360 x 34 assessments) while off ARV therapy plus \$18,000 (\$1000 x 18) while on ARV therapy for a total cost of \$30,240. Consequently, any HIV-infected adult expected to require a minimum of 18 months of ARV therapy over the ensuing 10 years is ineligible for admission due to the criterion of excess demand.

Recommendations for CIC Medical Officers

It should be noted that a large majority of HIV-infected applicants will meet the criteria of excess demand, but there will be a small proportion which will qualify for admittance. Any applicant currently receiving ARV is inadmissible based on excess demand.

All other HIV-infected applicants should be requested to provide a current (and any previously available) CD4 lymphocyte count. Failure to provide this information should be sufficient grounds for non-admittance.

The current guidelines for ARV therapy (MMWR May 17, 2002; Vol. 51; N O.R.R -7; www.cdc.gov/mmwr/PDF/rr/rr5107.pdf) indicate that ARVs should be initiated if the

C D 4 lymPhocyte count is Below 350 cells/m m³ or if Plasma HIV-R N A concentration, commonly known as the viral load or PVL exceeds 55,000 copies/mL. Hence, persons with a C D 4 count below 350 cells/m m³ are clearly excluded, as they qualify for immediate ARV therapy. (In the Northern Alberta HIV Program, the median C D 4 count of newly recognized HIV-infected patients runs between 300 and 400 cells/m m³).

The natural history of untreated HIV infection is characterized by progressive C D 4 cell depletion. The rate of C D 4 cell decline is determined principally by the PVL. A significant percentage of HIV-infected persons with C D 4 counts over 350 cells/m m³ will experience a decline in C D 4 cells to below 350 cells/m m³ within 4 years plus 4 months, meeting the 5 year criterion for excess demand, and more still will develop a C D 4 count below 350 cells/m m³ after 8.5 years, meeting the 10 year criterion for excess demand.

It is reasonable to assume that most HIV-infected persons with C D 4 counts between 350 and 500 cells/m m³ will experience a fall in their C D 4 count to below 350 cells/m m³ within the 4.33 year or 8.5 year time frames noted above, meeting the criterion of excess demand. Therefore, HIV-infected persons with C D 4 lymphocyte counts below 500 cells/m m³ are considered inadmissible due to excess demand.

Applicants with C D 4 counts above 500 cells/m m³ should be requested to provide a current (and any previous) PVL result. Those with PVL results over 55,000 copies/mL are not admissible, because they meet the current criteria for ARV treatment.

Applicants with C D 4 counts above 500 cells/m m³ and PVLs below 55,000 copies/mL will be few in number, and will generally be admissible, although it is suggested that cases in which the applicants have C D 4 and PVL values very close to these thresholds be referred for an opinion by IMAB, or by a Canadian HIV treatment expert.

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APPENDIX B

Type of Status	Eligible for OHIP?	Eligible for Trillium Drug Program?	Eligible for Social Assistance?
Canadian Citizen	Yes Eligible for full OHIP 3 months after becoming resident in Ontario.	Yes Drug coverage possible through Trillium Drug Program	Yes (if sponsorship agreement still in effect, will have to go to sponsor first – social assistance will deem you to be getting at least \$100/month from your sponsor and deduct it from your cheque)
Permanent Resident	Yes Eligible for full OHIP 3 months after becoming permanent resident	Yes Drug coverage possible through Trillium Drug Program	Yes (if sponsorship agreement still in effect, will have to go to sponsor first -- social assistance will deem you to be getting at least \$100/month from your sponsor and deduct it from your cheque)
Visitor	No (Community Health Centres, but usually only after 6 months in Canada)	No	No
Worker	No (some temporary foreign workers are eligible for OHIP)	No	No
Student	No	No	No
Temporary Resident Permit Holder	No in most cases, yes for some workers (Community Health	No	Yes in some cases, no in others

	Centres only)		
Protected Persons	Yes Eligible for full OHIP 3 months after becoming permanent resident	Yes Drug coverage possible through Trillium Drug Program	Yes
Refugee/person in need of protection Claimant	No (Eligible for Interim Federal Health Program (IFH) until claim is finally decided)	No (Eligible for Interim Federal Health Program (IFH) until claim is finally decided)	Yes
No status	No (Community Health Centres only)	No	May be eligible if person is not removable from Canada for reasons wholly beyond their control

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- i *T.N.L. (Re)*, [1997] C.R.D.D. No. 251 (Q.L.), IRB file no. T95-07674, at paragraph 11.
- ii *G.P.E. (Re)* [1997] C.R.D.D. No. 215 (Q.L.), IRB file no. U96-02717.
- iii *T.N.L. (Re)*, supra, at paragraphs 12, 13.
- iv *G.P.E. (Re)*, supra.
- v *O.P.K. (Re)* [1996] C.R.D.D. No. 88 (Q.L.), at paragraph 47. IRB file no. U95-04575.
- vi Ibid, at paragraph 48.
- vii *Mare v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 712 (Q.L.).
- viii Ibid, at paragraph 11.
- ix Ibid.
- x *C.Y.T. (Re)*, [1998] C.R.D.D. No. 186, at paragraphs 3, 11.

