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NETWORK VIH • SIDA

HIV/AIDS and Immigration

Final Report

prepared by
Alana Klein



Canadian
Strategy on
HIV/AIDS

HIV/AIDS and Immigration: Final Report

Prepared by Alana Klein
for the Canadian HIV/AIDS Legal Network

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Executive Summary

Why a Report on HIV/AIDS and Immigration?

On 20 September 2000, Canadian newspapers reported that Health Canada had recommended to Citizenship and Immigration Canada that testing all prospective immigrants for HIV, and excluding those testing positive, was the “best public health option.” In response to media requests, the Minister of Citizenship and Immigration, Elinor Caplan, stated that her department was indeed considering implementing mandatory HIV testing for all prospective immigrants to Canada, and excluding all those testing positive from immigrating to Canada on both public health and “excessive cost” grounds (although refugees and certain sponsored “family class” immigrants would still be allowed to immigrate).

In the following months, many organizations and individuals across Canada raised their concerns about this proposal with the Minister of Citizenship and Immigration and the Minister of Health. In April 2001, the Minister of Health provided revised advice to the Minister of Citizenship and Immigration. According to the advice, mandatory testing for HIV is necessary, but prospective immigrants with HIV, after receiving counseling, need not be excluded from immigrating to Canada on public health grounds.

Even before these recent announcements, there was discussion and debate in Canada about the issues raised by HIV/AIDS in the context of immigration. In June 2000, the members of the Canadian HIV/AIDS Legal Network, various national HIV/AIDS organizations, and Health Canada were asked to identify which new and/or pressing issue the Legal Network should address in its 2000/2001 work plan. A majority of respondents asked the Legal Network to analyze legal, ethical, and human rights issues related to HIV/AIDS and immigration.

What Are the Issues?

An analysis of immigration policy in the context of HIV/AIDS must consider the following questions:

1. Should visitors with HIV ever be restricted from coming into Canada?
2. Should there be mandatory HIV testing of all prospective immigrants?
3. Should persons with HIV seeking to immigrate to Canada be prevented from becoming permanent residents?
4. Should there be mandatory testing of refugees?
5. Should refugees with HIV ever be barred from entering Canada?
6. Should there be any restrictions imposed on immigrants and/or refugees with HIV who are admitted once they arrive in the country?

Activities Undertaken

In 1998, the Legal Network, as part of its joint project with the Canadian AIDS Society, provided a short analysis of the issue of whether immigrants should be mandatorily tested for HIV in a final report on *HIV Testing and Confidentiality*. In 2000, the Network published an info sheet on HIV testing of immigrants in its series of info sheets on HIV testing.

In June 2000, the Network started undertaking comprehensive research on the legal issues related to immigration and HIV/AIDS. As part of this research, it conducted interviews with many key informants, and organized a workshop at the Legal Network's 2000 Annual General Meeting.

In October 2000, the Network widely distributed a draft discussion paper for comment and input. In particular, individuals and organizations, including federal and provincial ministries, HIV/AIDS and immigrants' organizations, members of the Legal Network, and many others were asked to let the Legal Network know whether they agreed with the conclusions and recommendations in the paper; whether relevant information needed to be added; and whether certain areas in the paper should be expanded. This final report on HIV/AIDS and immigration was then prepared, taking into account the comments and input received, as well as the results of additional research into law and policy in selected other countries.

What Does the Final Report Contain?

The final report:

- describes the general trends in approaches taken to disease and migration both internationally and in Canada;
- describes Canada's current policies regarding HIV/AIDS and visitors, immigrants, and refugees;
- describes some of the proposed changes in immigration legislation and policy that may affect visitors, immigrants, and refugees with HIV/AIDS;
- evaluates Canada's current and proposed policies regarding immigration and HIV; and
- presents a set of recommendations to the federal and provincial governments for the future direction of their policies on immigration and HIV.

The report does not contain any detailed ethical analysis of the issues related to immigration and HIV/AIDS. Such an analysis can be found in another recently published paper, prepared by Barry Hoffmaster and Ted Schrecker, entitled "An ethical analysis of the mandatory exclusion of

refugees and immigrants who test HIV-positive” (available at www.aidslaw.ca/Maincontent/issues/immigration.htm).

What Are the Goals of this Report?

The goals are to contribute to an informed and rigorous discussion concerning the many issues related to HIV/AIDS and immigration in Canada, and to ensure that decisions about whether prospective immigrants should be mandatorily tested for HIV, and excluded from immigrating if HIV-positive, will be based on a careful analysis of the legal, ethical, and policy issues involved that respects human rights.

What Does the Final Report Conclude?

The report concludes that:

- Canada’s policy of neither testing nor excluding **visitors** with HIV (except in some rare circumstances) is satisfactory and should be maintained;
- the possible benefits of mandatory **testing** of immigrants are outweighed by its potential harms;
- any **exclusion** of a prospective immigrant with HIV on **public health grounds** is discriminatory and inconsistent with current, commonly accepted public health practice;
- when assessing whether a prospective immigrant with HIV/AIDS would create “**excessive demands**” on health and social services, each person’s individual circumstances must be taken into account, and demands should be considered “excessive” only when the expected cost of government services estimated over a short period (of a few years at most) exceeds the estimated financial contribution that the applicant will make over the same period, and also outweighs the potential social contributions that the individual is expected to make;
- prospective immigrants with HIV who have compelling compassionate and humanitarian reasons for being in Canada should be granted permanent resident status, rather than being issued Minister’s Permits, which afford them no access to medical care and which may be revoked at any time; and
- all medical barriers to admission of **refugees** should be removed.

Any exclusion of a prospective immigrant with HIV on public health grounds is discriminatory and inconsistent with current, commonly accepted public health practice.

Next Steps

The final report will be submitted to Health Canada and to Citizenship and Immigration Canada, as well as to all those to whom recommendations in the report are directed. As usual, the Legal Network will then undertake a variety of follow-up activities aimed at ensuring that the recommendations will be implemented. The Legal Network will produce info sheets to accompany the final report, and these will be widely distributed with the report to our members and other individuals and organizations with an interest in these issues. In addition, all documents will be available in full on the Legal Network’s website (www.aidslaw.ca). The Legal Network will present the results of this analysis at local, regional, national and international conferences and workshops.

For Further Information...

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Background

Throughout history, the emergence of epidemics has resulted in national policies that exclude outsiders in the hopes of limiting the spread of disease. These restrictions have been motivated by various factors, including fear, anger, a wish to differentiate between “us” and “them,” a view of migrants as vectors of disease and, at times, “a measure of reason.”¹

The HIV/AIDS epidemic has resulted in particularly controversial migration policies. The disease’s magnitude, lingering misconceptions about it,² the lack of a cure, and its association with marginalized populations in an era of unprecedented movement of persons across borders, are factors that make HIV/AIDS-related restrictions on migration an especially contentious issue. For example, in the US, HIV-positive people are barred from entering the country even for short periods of time and all applicants for permanent residence are required to submit to an HIV test.³ US policy has attracted so much criticism that many international and national organizations in protest boycotted the 1990 VI International Conference on AIDS held in San Francisco.⁴ Since 1987, the World Health Organization has implemented a policy of not sponsoring international conferences on AIDS in countries with restrictions on short-term entry.⁵ This policy has been endorsed by the highest UN interagency coordinating body (the Administration Committee on Coordination), which has recommended that all organizations of the UN system adopt it.

In Canada, short-term visitors with HIV have generally not been denied entry into the country since 1991, and thus far there has been no legal requirement for or policy of mandatory testing for either short-term visitors or all longer-term immigrants. However, there have still been significant restrictions on the immigration of HIV-positive persons to Canada. For example, persons known by immigration authorities to be HIV-positive are generally considered “medically inadmissible” and denied

Throughout history, the emergence of epidemics has resulted in national policies that exclude outsiders in the hopes of limiting the spread of disease.

¹ Mann JM. Foreword I. In: Haour Kneipe M, Rector R (eds). *Crossing Borders: Migration, Ethnicity, and AIDS*. London: Taylor & Francis, 1996, at viii-ix.

² See Jürgens R. *HIV Testing and Confidentiality: Final Report*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 2001 (2nd edition), at 21.

³ See Johnson DS. The United States’ denial of the immigration of people with AIDS. *Temple International and Comparative Law Journal* 1992; 6: 145-167 at 150-152.

⁴ Somerville MA, Wilson S. Crossing boundaries: travel, immigration, human rights and AIDS. *McGill Law Journal* 1998; 43: 781 at 802.

⁵ World Health Organization. “WHO policy of non-sponsorship of international conferences on AIDS in countries with HIV/AIDS-specific short-term travel restrictions,” February 1993, with reference to World Health Assembly Resolution WHA41.24 (1988) (“Avoidance of discrimination in relation to HIV-infected people and people with AIDS”).

BACKGROUND

permanent resident status on the ground that they would place excessive demands on Canadian health or social services. Some of those deemed “medically inadmissible” may be permitted to remain in Canada under a Minister’s Permit, but permits are granted for a limited time and can be revoked; permit holders are also usually not eligible for most health or social services.

At the time of writing, a major review of Canada’s immigration law and policy is underway. A new *Immigration and Refugee Protection Act*⁶ is being proposed to replace the current *Immigration Act*.⁷ It is planned that under the new Act, some family-class immigrants and refugees would be exempt from some health-related restrictions on immigration. At the same time, as part of the review, Citizenship and Immigration Canada asked Health Canada to provide advice on “which medical screening procedures are required to protect public health.”⁸

On 10 August 2000, Health Canada recommended to Citizenship and Immigration Canada that testing all prospective immigrants for HIV, and excluding those testing positive, is the “lowest health risk course of action [and therefore] the preferred option.”⁹ On 20 September 2000, Canadian newspapers reported to the public that Health Canada had advised Citizenship and Immigration Canada that this constituted the “best public health option.”¹⁰ Subsequently, the Minister of Citizenship and Immigration, Elinor Caplan, publicly stated that her department is indeed considering implementing mandatory HIV testing for all prospective immigrants to Canada, and excluding all those testing positive (with the exception of refugees and family-class sponsored immigrants) from immigrating to Canada on both public health and excessive-cost grounds.¹¹

In the following months, many organizations and individuals across Canada raised their concerns about this proposal with the Minister of Citizenship and Immigration and the Minister of Health. In March 2001, the Minister of Citizenship and Immigration stated that her department was still proceeding with developing a plan for routine medical testing, to include HIV, for all prospective immigrants and refugees.¹² In its 2000 Annual Report, released in late March 2001, the Canadian Human Rights Commission reacted to this announcement by saying that it “is troubled to hear that Citizenship and Immigration Canada is considering mandatory screening of immigrants.” The Commission went on to say that it “is not convinced that mandatory HIV testing is necessary to ensure the health and safety of Canadians. Nor does it believe that the acceptance of HIV+ immigrants would necessarily impose an undue burden on the health care system.”¹³

In April 2001, while this Report was undergoing layout, the Minister of Health provided further advice to the Minister of Citizenship and Immigration on whether mandatory HIV testing and exclusion of HIV-positive immigrants are required for public health reasons. According to the advice, which replaced the advice given in August 2000 and was based on further analysis of the issues and extensive consultation, mandatory testing for HIV is necessary, but prospective immigrants with HIV, after receiving counseling, need not be excluded from immigrating to Canada on public health grounds.

⁶ Bill C-11, 37th Parliament, 1st Session, 2001 (available at www.parl.gc.ca or www.cic.gc.ca). Bill C-11 is a slightly amended version of legislation previously introduced as Bill C-31, 36th Parliament, 2nd Session, 2000.

⁷ RSC 1985, c I-2.

⁸ Citizenship and Immigration Canada. *Building on a Strong Foundation for the 21st Century*. Ottawa: Public Works and Government Services Canada, 1998, at 55.

⁹ Letter from David Dodge, Deputy Minister, Health Canada, to Janice Cochrane, Deputy Minister, Citizenship and Immigration Canada, 10 August 2000 [on file].

¹⁰ Papp L. Immigrants may face HIV test. *Toronto Star* 20 September 2000: A1, A21.

¹¹ Clark C. Immigrants facing blood tests: AIDS groups denounce proposed plan to test for HIV and hepatitis B viruses. *Globe and Mail* 21 September 2000: A4; Bueckerl D. Minister eyes HIV, hep-B tests for immigrants. *Gazette* [Montréal] 21 September 2000: A11.

¹² Letter from the Honourable E Caplan, Minister of Citizenship and Immigration to G Dafoe, Chief Executive Officer, Canadian Public Health Association, dated 9 March 2001 [on file].

¹³ Canadian Human Rights Commission. *2000 Annual Report*. Ottawa: The Commission, 2001, at 13 (available at www.chrc-ccdp.ca).



Issues

An immigration policy must consider the following questions with regard to HIV/AIDS:

- Should visitors with HIV ever be restricted from coming into Canada?
- Should there be mandatory HIV testing of all prospective immigrants?
- Should persons with HIV seeking to immigrate to Canada be prevented from becoming permanent residents?
- Should there be mandatory testing of refugees?
- Should refugees with HIV ever be barred from entering Canada?
- Should there be any restrictions imposed on immigrants and/or refugees with HIV who are admitted once they arrive in the country?



Outline

The first chapter (History) describes the general trends in approaches taken to disease and migration.

The second chapter describes Canada's current policies regarding HIV/AIDS and immigration (Current Policy). It examines how Canada has dealt with the issue of HIV infection in relation to the three main categories of entrants into Canada: visitors, immigrants, and refugees. For each type of entrant, Canada's policy on HIV testing, admission of people with HIV, and any restrictions placed on persons who are permitted to enter the country are described. The chapter explains that Canadian immigration policy has thus far not considered people with HIV to be threats to public health. Therefore, *visitors* with HIV are generally not denied entry into Canada, and are not required to undergo HIV testing. Although not all prospective *immigrants* are routinely required to submit to HIV testing, many are asked to do so at the discretion of examining physicians. Prospective immigrants identified as having HIV are generally prevented from becoming permanent residents on the ground that they are expected to place excessive demands on health or social services. *Refugees*, by contrast, are generally not denied permanent residence based on their health condition.

This chapter also describes the immigration policies of other countries in relation to HIV/AIDS, including the policies of the United States, Australia, New Zealand, and several members of the European Union, including France, Germany, and the United Kingdom.

The third chapter describes some of the proposed changes in legislation and policy that may affect visitors, immigrants, and refugees with HIV/AIDS (New Directions). It provides a brief commentary on the merits of each.

The fourth chapter (Assessment: Non-Discrimination and HIV-Related Entry Restrictions) begins by discussing whether and how the Canadian

OUTLINE

government is restricted in the way it treats non-citizens seeking to enter or remain in the country. It argues that there is a strong case to be made that the protections set out in the *Canadian Charter of Rights and Freedoms* should apply in many circumstances that would arise in the application of Canadian immigration law. Furthermore, the *Immigration Act* itself proscribes discrimination inconsistent with the Charter in the design and implementation of Canada's immigration policy.

The chapter then analyzes HIV-related entry restrictions. It first examines whether HIV-related restrictions on immigration to protect public health are justified, concluding that any *exclusion* of a prospective immigrant with HIV on *public health grounds* is misguided. People with HIV are not themselves a threat to public health, as HIV is not an airborne disease and cannot be transmitted by casual contact.

Next, it analyzes whether restrictions on immigration of people with HIV to protect the public purse are justified. It concludes that automatic exclusion of all persons with HIV on the ground that they would pose an *excessive burden* on health or social services is unwarranted. A case-by-case assessment is required by the legislation and by human rights norms. Any assessment of excessive demands must treat all diseases equally, must be conducted on a case-by-case basis, and should take into account the potential contribution to Canadian society that an applicant might make, as well as humanitarian considerations.

Finally, the chapter analyzes whether mandatory HIV testing of immigrants and refugees is justified. It concludes that, since exclusion of immigrants with HIV on public health grounds is unjustified, mandatory testing to serve the purpose of exclusion on public health grounds is equally unjustified. Mandatory testing for the purpose of providing counseling and other risk-reducing interventions to those testing positive is also unjustified, for many reasons. Finally, mandatory testing for the purpose of identifying HIV-positive immigrants, to enable an individual assessment of costs, should also not be undertaken, because of the serious drawbacks that any program of mandatory HIV testing of prospective immigrants would have.

Based on the analysis in the previous chapters, the final chapter (Conclusions and Recommendations) makes a set of recommendations on the central issues addressed in the report: HIV testing, and policy toward HIV-positive short-term visitors, applicants for permanent residence, and refugees.



History

Restrictions on the migration of people with HIV have usually been justified as measures to prevent the spread of disease to and within receiving countries or, alternatively, as measures to protect publicly funded health or social services. This chapter provides a brief overview of the origins of health-related restrictions on immigration in order to give context to the current debate regarding immigration and HIV/AIDS.

The chapter notes that models of mandatory testing and exclusion rooted in 19th century infectious disease/public health legislation are being replaced by a new notion of protection of public health. This new approach maintains that when dealing with diseases that cannot be transmitted by casual contact, non-coercive measures such as education and voluntary testing are superior to the coercive measures favoured in the past.

In addition, the chapter discusses the exclusion of immigrants who, as a result of their health condition, are expected to make excessive demands on health or social services. While the current explanation for exclusion in these circumstances is economic, “the history and underlying inconsistencies of immigration policy suggest that financial arguments mask a more fundamental stereotype that immigrants with disabilities will not be worthwhile members of ... society.”¹⁴

Restrictions on Immigration to Protect Public Health

In the 19th century, countries dealt with the threat of diseases and epidemics through coercive and restrictive measures such as screening, confinement through quarantine, and exclusion of people with disease.¹⁵ Indeed, the US first passed a law in 1891 restricting the admission of people “suffering from dangerous contagious diseases.”¹⁶ As early as 1869, pre-Confederation colonial governments in Canada introduced exclusionary policies directed at preventing the spread of disease.¹⁷

¹⁴ Mosoff J. Excessive demand on the Canadian conscience: disability, family, and immigration. *Manitoba Law Journal* 1999; 26: 149-177 at 149.

¹⁵ Somerville & Wilson, *supra*, note 4 at 792.

¹⁶ See Kidder R. Administrative discretion gone awry: the reintroduction of the public charge exclusion for HIV-positive refugees and asylees. *Yale Law Journal* 1996; 106: 389-422 at 394-396.

¹⁷ Goundry S. Final brief on the proposed amendments in Bill C-86 to sections 19(1)(a) and (b) of the Immigration Act. Canadian Disability Rights Council, Winnipeg, Manitoba, 19 September 1992 [unpublished].

In recent years, however, there has been increasing recognition that coercive measures like those favoured in the 19th century are not an effective tool for promoting public health and preventing the spread of HIV in the absence of a cure. When transmission can be avoided by modifications in the behaviour of the local population, public health efforts should focus on promoting safe behaviour in their attempts to prevent spread. Margaret Duckett refers to this as a “new” public health approach, “one that relies less on exclusion and screening and moves more to inclusion and co-operation with the relevant sub-population.”¹⁸ The new model is based on measures such as harm reduction, education, voluntary testing and counseling, and protection of privacy. In keeping with this philosophy, the International Guidelines on HIV/AIDS and Human Rights have stated that: “There is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status.”¹⁹

Despite the philosophic trend supported by many academics, public health officials, and non-governmental organizations,²⁰ many countries have reacted to the HIV/AIDS epidemic with legislation that is more reflective of the old approach.²¹ This is particularly true in the area of travel and immigration, where over 50 countries, including the United States, have enacted HIV-related entry restrictions.²²

Canada, however, has generally followed the new public health model in all areas related to HIV, including immigration. For example, calls for mandatory testing of so-called “high-risk groups” such as injection drug users and gay men, as well as other populations such as prisoners and pregnant women, have been rejected.²³ In addition, the Canadian government’s position on HIV/AIDS in the context of its immigration policy has been that “HIV/AIDS is not considered a dangerous, infectious disease, but rather a chronic disease like cancer or heart disease.”²⁴ Canada’s approach to dealing with the spread of HIV/AIDS has generally not been to treat it as a public health issue for which coercive measures are appropriate.

Restrictions on Immigration to Protect the Public Purse

The “public charge” rationale for the exclusion of certain individuals dates back even earlier, into the 19th century. In 1875, the United States Congress enacted legislation to prevent the emigration of people likely to become dependent on the public coffers for support.²⁵ In Canada, the 1869 *Immigration Act* required masters of sailing vessels to post a three-hundred-dollar bond in order to secure the landing of any person who was “Lunatic, Idiotic, Deaf and Dumb, Blind or Infirm” and therefore likely to become a public charge.²⁶ This public-charge rationale for exclusion of persons with certain conditions or disabilities predates the introduction of broader, state-sponsored health care.

From 1906 to 1976, labels and diagnoses became absolutely determinative of inadmissibility to Canada.²⁷ For example, certain diagnoses such as epilepsy made a person inadmissible, regardless of cost of treatment, severity, whether the condition could be controlled, or whether the state would be required to pay for treatment. “The result was that no amount of family support, no compensating strength, attribute, or proof of independent living could overcome the label and permit admission to Canada.”²⁸ The exclusion of persons with disabilities was based on an assumption that such persons would not be able to support themselves.²⁹ Again, this assumption predates the advent of socialized health care.

The principle of non-discrimination requires that when states exclude persons with medical conditions or disabilities, they must do so based on actual costs that the person is reasonably expected to place on publicly funded services, and not on assumptions and generalizations.

¹⁸ Duckett M. Migrants’ Right to Health, May 2000 [unpublished draft], at footnote 75.

¹⁹ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS. *HIV/AIDS and Human Rights. International Guidelines*. United Nations, New York and Geneva, 1998, at 39 (HR/PUB/98/1).

²⁰ Bayer R. Editorial Review – Ethical and social policy issues raised by HIV screening: The epidemic evolves and so do the challenges. *AIDS* 1989; 3:119-124.

²¹ Duckett M, Orkin AJ. AIDS-related migration and travel policies and restrictions: a global survey. *AIDS* 1989, 3 (Suppl 1): S231-S252; Gilmore N et al. International travel and AIDS. *AIDS* 1989; 3(Suppl 1): S225-S230.

²² Health Canada, Laboratory Centre for Disease Control, Travel Medicine Program. *Countries with HIV-Related Entry Restrictions*. Ottawa, June 1997.

²³ See Jürgens, supra, note 2 at 121-131.

²⁴ Employment and Immigration Canada & Health and Welfare Canada, *Medical Inadmissibility Review Discussion Paper*. Ottawa: Employment and Immigration Canada, 1991, at 44.

²⁵ See Kidder, supra, note 16.

²⁶ *Immigration Act, 1869*, SC 1869 c 10, s 11(2).

²⁷ *Immigration Act*, RSC 1906 c 93.

²⁸ Mosoff, supra, note 14 at 157.

²⁹ *Ibid* at 159.

HISTORY

Persons with disabilities are frequently being denied entry into Canada on the basis of discriminatory assumptions and practices.

But the principle of non-discrimination requires, at a minimum, that when states exclude persons with medical conditions or disabilities, they must do so based on actual costs that the person is reasonably expected to place on publicly funded services, and not on assumptions and generalizations about persons with particular medical conditions.³⁰ This has been the position taken by the World Health Organization³¹ and by the United Nations.³² It has also been affirmed in Canadian law.³³ Many countries fail to respect that principle by automatically refusing permanent residence to persons with particular medical conditions (including HIV/AIDS), as Canada did from 1906 to 1976.³⁴ Other countries, including Canada, have moved away from such blanket restrictions in their legislation to require case-by-case assessments. Even so, those assessments are regularly based on dubious or incorrect assumptions about demands that persons with certain medical conditions are likely to place on publicly funded services.

In 1976, Canada enacted its current *Immigration Act*, which removed references to specific diagnoses and focused instead on the actual cost that each person is likely to incur. This was expected to remove the reliance on stereotypical assumptions that made persons with disabilities automatically excludable. However, Mosoff remarks that

[a]lthough the language has been updated in recent times and the justifications for exclusion made more apparently rational, the same themes persist. The history shows that disability-based exclusions preceded the development of publicly funded health care and other important social programs in Canada [reference omitted]. Therefore, our current justification to exclude people with disabilities because they might draw too heavily on publicly funded health or social services is really a new twist on an old policy that is based on even older stereotypes.³⁵

Indeed, persons with disabilities appear in reported jurisprudence with disproportionate frequency.³⁶ In many such cases, courts have overturned findings of medical inadmissibility because medical officers have presumed that persons with disabilities would place excessive demands on health or social services based simply on diagnoses and without sufficient evidence about actual demands that the disabled person is expected to make.³⁷ These cases demonstrate that even in the application of the current *Immigration Act*, which is intended to preclude the reliance on stereotypical assumptions that form the basis of systemic discrimination, persons with disabilities are frequently being denied entry into Canada on the basis of discriminatory assumptions and practices. Furthermore, as discussed in more detail below, while Canada's legislation does not directly discriminate against people with HIV disease or other disabilities, the exclusion of would-be immigrants on the basis of "excessive cost" does indirectly discriminate.

³⁰ Goodwin-Gill GS. AIDS, HIV, Migrants and Refugees: International Legal and Human Rights Dimensions. In: Haour Knipe & Rector, supra, note 1, 50-69 at 53-54.

³¹ WHO. Global Program on AIDS: Statement on Screening of International Travellers for Infection with Human Immunodeficiency Virus, at 1.

³² *HIV/AIDS and Human Rights: International Guidelines*, supra, note 19.

³³ *Deal v Minister of Employment and Immigration* (1992), 18 Imm LR (2d) 1 (FCA); *Litt v Canada (Minister of Citizenship and Immigration)* (1995), 26 Imm LR (2d) 153 (FCTD); *Poste v Canada (Minister of Citizenship & Immigration)* (1997), 42 Imm LR (2d) 84, 5 Admin LR (3d) 69 (FCTD); *Fei v Canada (Minister of Citizenship and Immigration)* (1997), 39 Imm LR (2d) 266 (FCTD); *Lau v Canada (Minister of Citizenship and Immigration)* (1998), 43 Imm LR (2d) 8 (FCTD).

³⁴ Health Canada. *Countries with HIV-Related Entry Restrictions*, supra, note 22.

³⁵ Mossop, supra, note 14 at 160.

³⁶ See Goundry, supra, note 17.

³⁷ See, for example, *Poste*, supra, note 33; *Fei*, supra, note 33; and *Lau*, supra, note 33.



Current Policy

This chapter examines Canada's current policies on HIV testing and admission of non-Canadian persons seeking entry into Canada. Some other countries' policies regarding HIV/AIDS, immigrants and refugees are then briefly canvassed.

Canada

Non-Canadians who are in Canada, or who seek to come into Canada, can be divided into three broad categories: visitors, immigrants, and refugees.

A visitor is a person who is in Canada or who is seeking to come into Canada for a temporary purpose.³⁸ The category includes students and temporary workers as well as tourists.

Immigrants are persons who seek "landing" in Canada, defined as "lawful permission to establish permanent residence in Canada."³⁹ A person who has been granted landing but has not become a Canadian citizen is often referred to as a "landed immigrant," although the current official term for this status is "permanent resident."

Refugees, as defined by international law, are persons who: (1) are outside their country of nationality or former habitual residence; (2) have a well-founded fear of persecution due to their race, religion, nationality, membership in a particular social group, or political opinion, and (3) are unable or, owing to that fear, unwilling to return their country of origin.⁴⁰ Refugees can be divided into two categories, each governed by different policies: those seeking protection either from within Canada or at a port of entry, and those applying from abroad for resettlement in Canada.⁴¹

Canada's current *Immigration Act* does not mention HIV/AIDS or any other disease or illness specifically. However, s. 19(1)(a) of the Act sets out the classes of persons who are inadmissible because of their medical condition. It states:

³⁸ *Immigration Act*, supra, note 7 at s 2(1).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Galloway D. *Immigration Law*. Concord, Ontario: Irwin Law, 1997, at 117. See the 1951 UN Convention Relating to the Status of Refugees, (1954) 189 UNTS 137, [1969] CTS 29.

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19. (1) No person shall be granted admission who is a member of any of the following classes:

(a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity, or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,

- (i) they are or are likely to be a danger to public health or to public safety, or
- (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services.

This provision applies to all classes of persons seeking entry into Canada other than those specifically exempted from its application by some other provision of the *Immigration Act*. The remainder of this section will address HIV testing and the application of this provision to the various classes of non-Canadians seeking to enter into and/or remain in Canada.

Visitors

Testing

The *Immigration Act* does not require all visitors to undergo a medical examination. However, it does provide that every visitor of a “prescribed class” is required to undergo a medical examination.⁴² Visitors who are required to undergo medical examinations are listed in the *Immigration Regulations* as:

- visitors in particular occupations where the protection of public health is essential;
- persons who wish to remain in Canada for longer than six months; and
- visitors who have recently resided in a country where the incidence of communicable disease is higher than in Canada.⁴³ This latter category may include many residents of sub-Saharan Africa, parts of Asia, and Latin America.

In addition, if an immigration officer or a visa officer⁴⁴ suspects that a given visitor might be a threat to public health or safety, or might cause excessive demands on health or social services, the officer may require the visitor to undergo a medical examination.⁴⁵

The HIV status of a visitor may become known to immigration authorities in one of three ways.

- First, visitors from many countries are required to fill in a visa application form that includes an item asking applicants to disclose whether they have been “treated for any serious physical or mental disorders or any communicable or chronic diseases.”⁴⁶ Applicants who do not disclose risk denial of entry or removal later if this is discovered.
- Second, if the visitor is required to undergo a medical examination, as part of the examination the medical officer will ask the visitor if they have ever tested positive for HIV or any other immune deficiency.
- Third, the form used by medical officers during their examination states that an HIV test should be ordered where “clinically indicated.”⁴⁷ According to instructions circulated among examining physicians in Canada and internationally, “apparently healthy applicants for short

⁴² *Immigration Act*, supra, note 7 at s 11(1).

⁴³ *Immigration Regulations*, SOR/78-172, s 21.

⁴⁴ Immigration officers are the officials in charge of processing in Canada and at its borders; visa officers are responsible for processing in countries outside Canada.

⁴⁵ *Immigration Act*, supra, note 7 at s 11(2).

⁴⁶ Citizenship and Immigration Canada, Visitor's Visa Application Form IMM-5257.

⁴⁷ Citizenship and Immigration Canada, Medical Report Form, Section B – Functional Inquiry into Applicant's Declaration.

⁴⁸ Citizenship and Immigration Canada, Changes to the Role of Designated Medical Practitioners for Canadian Immigration Medical Examinations, 30 March 1998 [on file].

term temporary visa to Canada should be asked to undergo HIV testing only if signs of the acquired immunodeficiency syndrome are present.”⁴⁸

Exclusion

Prior to 1991, the government considered that people with HIV/AIDS represented a threat to public health. It was government policy that they should not be allowed to visit Canada. An exception was made for the V International Conference on AIDS in Montréal in 1989; people with HIV/AIDS were allowed to enter the country to attend the conference.

In April 1991, the Ministers of Health and Welfare and of Employment and Immigration jointly announced a new policy for short-term visitors. The policy stated that persons with HIV/AIDS did not constitute a threat to public health during short-term travel to Canada, and henceforth would be treated like any other visitor to Canada. Those who

posed a risk of becoming a significant burden on the health care system while in Canada would still be generally inadmissible, or at least subject to medical assessment, but the new policy effectively means that asymptomatic HIV-positive people entering Canada for a short term visit (less than six months) should not be denied entry or encounter trouble at the border because of their HIV status.⁴⁹

However, even after the new policy was announced, there were still a few instances of people with HIV being denied entry to Canada:

The new policy got off to a rocky start when an American man, Craig Rowe, alleged that he was denied entry for a three-day visit to Montreal on 29 December 1991. He is suing the government, alleging that an immigration officer told him that he posed a risk of becoming a burden on the health care system because he was HIV positive. This was despite Mr Rowe’s being in good health, having private medical insurance, and possessing a return ticket indicating that his intended visit was very brief.⁵⁰

Immigration officials later acknowledged that more training of border personnel was necessary to ensure uniform application of the short-term visitor policy.

On 3 August 1994, then Minister of Immigration Sergio Marchi wrote to the Canadian AIDS Society clarifying the government’s policy. According to Minister Marchi:

- a diagnosis of HIV/AIDS is not in itself a barrier to visiting Canada;
- persons with HIV/AIDS do not generally represent a danger to the public under s 19 of the *Immigration Act*;
- the issue is therefore whether visitors with HIV/AIDS would place excessive demand on the Canadian health-care system;
- it is not normally expected that asymptomatic visitors with HIV would place any demand on the Canadian health-care system;
- therefore, for the vast majority of short-term visits by persons with HIV/AIDS, the excessive demand criterion would not likely be invoked;
- the excessive demand criterion will only be invoked if there is a reason to believe a person would need medical treatment while in Canada, although even in this case, a person may still be able to enter the country if they have made arrangements for treatment and payment;

Asymptomatic HIV-positive people entering Canada for a short-term visit (less than six months) should not be denied entry or encounter trouble at the border because of their HIV status.

⁴⁹ Bartlett WC. *AIDS: Legal Issues*. Ottawa: Library of Parliament Research Branch, Current Issue Review 93-7E, 14 April 1994 (revised 19 April 1995) at 6-7.

⁵⁰ *Ibid.*

“We know that it is impossible to shrink wrap our borders.”

– Elinor Caplan, Minister of Citizenship and Immigration Canada, 2000

- the carrying of HIV/AIDS medication is not a ground for refusing admission; and
- the government will provide immigration officers with thorough information on the travel policy and implement a training program on HIV/AIDS for immigration officers.

This policy is still in place. On 20 September 2000, Minister of Citizenship and Immigration Elinor Caplan reaffirmed that it is not feasible to impose the HIV test on the millions of visitors and returning citizens/residents who enter Canada every year, saying: “We know that it is impossible to shrink wrap our borders.”⁵¹

Applicants for Permanent Residence

Testing

The *Immigration Act* requires every would-be immigrant to undergo a medical examination,⁵² which must be conducted by a physician whose name appears on a list of designated medical practitioners.⁵³ Generally, prospective immigrants must apply for permanent residence from outside the country. Exceptions include refugees, participants in the “live-in caregiver” program, persons who have been in Canada under a Minister’s Permit for five years, and those who are given special permission to apply for permanent residence from within Canada because of compassionate and humanitarian reasons. Medical examinations, therefore, usually take place in the country of origin.

There is currently no mandatory HIV test administered as part of the medical examination (this may change in the near future, see *infra*). As in the case of visitors, immigration officials can learn that a given applicant for permanent residence has HIV or AIDS in one of three ways. First, the application form requires applicants to disclose any serious illness,⁵⁴ and applicants who do not disclose risk refusal of entry or removal or prosecution after entry. Second, applicants are asked during the medical examination whether they have ever tested positive for HIV.⁵⁵ Third, examining physicians may order HIV tests when, in their opinion, it is “clinically indicated.”⁵⁶ Once a test is ordered, according to the *Medical Officers’ Handbook*, “the protocol with regard to pre-and post-test counseling and consent for HIV antibody testing should be based upon that required under the jurisdiction where the test is to be performed.”⁵⁷

Instructions have been circulated to examining physicians internationally indicating how they should exercise their discretion in ordering HIV tests. They state that “a test for HIV is not required as routine. Country of origin, race, gender, and sexual orientation, by itself, is NOT a sufficient reason to warrant a screening test for HIV.”⁵⁸ Physicians are reminded that HIV testing is required only when clinically indicated, and the age of the applicant should be taken into account and “common sense and a realistic estimation of risk should prevail” when testing is being considered. The instructions then provide the following “partial list of indications for HIV screening”:

- (1) The applicant has a history of receiving unscreened blood transfusions or blood products or the equipment utilized was reusable with inadequate sterilization.
- (2) The applicant has unexplained significant weight loss.
- (3) The applicant has used intravenous drugs at some point in the past – especially if the needles were shared.
- (4) The applicant’s history/physical examination is consistent with an

⁵¹ Thompson A. No entry for immigrants with HIV. *Toronto Star* 21 September 2000: A6.

⁵² *Immigration Act*, supra, note 7 at s 11.

⁵³ *Immigration Manual* IR-3 at 19.

⁵⁴ See, for example, Citizenship and Immigration Canada, Immigrant Application Form – Independent IMM-0008.

⁵⁵ Medical Report Form IMM-5419, Part B.

⁵⁶ *Ibid* at Part D.

⁵⁷ Health and Welfare Canada, Medical Services Branch. *Medical Officers’ Handbook: Immigration Medical Service*. Ottawa: Health and Welfare Canada, 1986, at 4.2.11(5)(e).

⁵⁸ See supra, note 48 [emphasis in original].

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AIDS-defining condition.

- (5) The applicant has X-ray evidence of a prior TB infection and is at risk of having acquired the human immunodeficiency virus (eg, unprotected sexual intercourse with prostitutes in areas where such HIV transmission is common).
- (6) The applicant's biologic mother was HIV-positive at the time of the applicant's birth.
- (7) The applicant has taken part in unsafe sexual practices where the HIV status of the sexual partner was known to be positive (or where it was reasonable to assume that the partner was HIV-positive).
- (8) The applicant has reason to believe that they may be HIV-positive.
- (9) Any child for adoption where there is a significant likelihood that the HIV status of the biologic mother was positive at the time of the child's birth.

Despite these instructions, it has been reported that some physicians have ordered HIV tests even where none of these indicators are present.⁵⁹ Although Citizenship and Immigration Canada has denied that this occurs, and has reiterated that all physicians are required to follow the guidelines described above,⁶⁰ reports of HIV testing in the absence of appropriate indicators persist.

Exclusion

Prospective immigrants, like visitors, may be excluded from Canada on medical grounds if the examining physician determines that as a result of their medical condition they are or are likely to be a danger to public health or safety, or that their admission would likely cause excessive demands on health or social services.⁶¹

No automatic exclusion of people with HIV on public health grounds

Current policy holds that persons with HIV do not themselves represent a danger to public health and safety. Employment and Immigration Canada has observed that the *Immigration Act* does not require a medical officer to determine

*whether the exclusion of an individual applicant will in any way prevent the spread of a particular disease in Canada.... What the [Immigration Act] does demand is the medical officer's opinion on whether an individual applicant's medical condition is such that the applicant is likely to be a danger to public health. The distinction is important; the Immigration Act is not intended to stand for a Public Health Act.... 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 is whether that person is 'likely' to do so.*⁶²

Exclusion based on "excessive demands" on health or social services

However, persons with HIV are generally prevented from becoming permanent residents because it is considered that they will place "excessive demand" on the public purse.⁶³ How does an examining physician determine whether someone will place an excessive demand on health or social services?

There is no clear definition of excessive demand in the *Immigration Act* or the Regulations, which courts have called "troubling."⁶⁴ Section 22 of the *Immigration Regulations*⁶⁵ provides a list of factors for medical officers to

Current policy holds that persons with HIV do not themselves represent a danger to public health and safety.

There is no clear definition of excessive demand in the *Immigration Act* or the Regulations, and Canadian courts have offered little guidance on how determinations of excessive demand should be made.

⁵⁹ Communication with Ruth Carey, HIV & AIDS Legal Clinic Ontario, 3 October 2000.

⁶⁰ Communication with Dr GA Giovino, Director, Immigration Health Services, 26 July 2000.

⁶¹ *Immigration Act*, supra, note 7 at s 19(1)(a).

⁶² Employment and Immigration Canada. 1991. *Medical Inadmissibility Review: Discussion Paper*. Ottawa, at 45-46 [emphasis in original].

⁶³ Supra, note 7 at s 19(1)(a).

⁶⁴ *Nyvit v Canada* (1995), 26 Imm LR (2d) 95 at 98; *Choi v Canada* (*Minister of Citizenship and Immigration*), [1995] FCJ No 1068 (TD) (QL); *Chun v Canada* (*Minister of Citizenship and Immigration*), [1998] FCJ No 1551 (TD) (QL).

⁶⁵ Supra, note 43.

The general rule is that demands are to be considered “excessive” if they are “more than what is normal or necessary.”

Medical officers must not automatically exclude all persons with particular medical conditions, but are to make individual assessments of the demand that each person is likely to make.

consider in determining whether a person is likely to be a danger to public health or to cause excessive demands on health or social services. However, in the case of *Ismaili v Canada (Minister of Citizenship and Immigration)*,⁶⁶ the Federal Court found that, as a result of 1992 amendments to the *Immigration Act*, s 22 of the *Regulations* was technically beyond the jurisdiction of the federal government insofar as it applied to determinations of excessive demand. The section was found to be applicable only to determining when a person is likely to be a threat to public health. Therefore, the court ruled that the “excessive demands” provision of the *Immigration Act* “must be interpreted without reference to the provisions of section 22 of the *Regulations*.”⁶⁷ Despite this ruling, on at least one subsequent occasion, the court itself, seemingly unaware of the *Ismaili* decision, has considered the factors in section 22 of the *Regulations* in reviewing an immigration officer’s decision that an applicant was medically inadmissible on the basis of excessive demands.⁶⁸

Canadian courts have offered little guidance on how determinations of excessive demand should be made. The general rule is that demands are to be considered “excessive” if they are “more than what is normal or necessary.”⁶⁹ This has been interpreted by Citizenship and Immigration Canada to mean that demand is excessive any time it is greater than that of the average Canadian.⁷⁰ The courts have also affirmed that the determination of “excessive” is to be made on an individual, case-by-case basis. Medical officers must not automatically exclude all persons with particular medical conditions, but are to make individual assessments of the demand that each person is likely to make.⁷¹

In response to the *Ismaili* decision, an operations memorandum was circulated among medical officers (most of whom are located outside Canada, given the general requirement that an application for landing be made from outside the country) outlining how they should exercise their discretion when considering whether a particular applicant is likely to make excessive demands on government services. It stated that “[m]edical officers must now interpret A19(1)(a)(ii) in view of all the reasonable information available to them. They must not restrict themselves to the factors in the former Regulation 22. They should also consider other relevant factors.”⁷²

The factors pointed out in the memorandum include:

- medical reports;
- availability of health or social services and, if available, whether they are in short supply;
- whether medical care or hospitalization (short- or long-term) is required;
- whether (short- or long-term) home care is required;
- whether the person’s condition is likely to respond to treatment or is chronic, requiring on-going monitoring or treatment on an indeterminate basis;
- any report by school boards, social workers or other social service providers on the likely costs associated with a person and/or class of person’s admission; and
- whether special education, occupational therapy, physiotherapy, or other rehabilitative devices are required on a short- or long-term basis.

After considering these factors, the medical officer states the reasonable or likely medical or social services that a given immigrant will require. There is no definite time period for which projected costs are to be assessed.

⁶⁶ (1995), 29 Imm LR (2d) 1 (FCTD), [1995] FCJ No 1127 (TD) (QL).

⁶⁷ *Ibid* at para 23 (QL).

⁶⁸ *Boateng v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1389 (TD) (QL).

⁶⁹ *Jim v Canada (Solicitor General)* (1993), 22 Imm LR (2d) 261 (FCTD); *Choi*, *supra*, note 64; *Yogeswaran v Canada (Minister of Citizenship and Immigration)* (1997), 129 FTR 151 (TD); *Mo v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 216 (TD) (QL).

⁷⁰ *Jim v Canada*, *ibid*.

⁷¹ *Ismaili v Canada (Citizenship and Immigration)*, *supra*, note 66; see also *Ajanev v Canada*, *infra*, note 77; *Poste v Canada (Minister of Citizenship and Immigration)*, *supra*, note 33; *Fei*, *supra*, note 33; *Lau*, *supra*, note 33; *Cooner v Canada (Minister of Citizenship and Immigration)*, [1999] IADD No 412 (QL); *Canada (Minister of Employment and Immigration) v Jivanpuri* (1990), 10 Imm LR (2d) 241 (FCA).

⁷² Citizenship and Immigration Canada, Operations Memorandum IP 96-08/OP 96-05 (1996).

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Generally, although there is no express rule or instruction to this effect, examining physicians will compare the expected demand of the applicant over the first five years following admission. If the average annual demand that the applicant is expected to make is higher than that of the average Canadian, the medical officer may determine that the individual has a medical condition that justifies refusal under s 19(1)(a)(ii) of the *Immigration Act*.⁷³

Procedure: The Medical Officers' Handbook

According to the directives in the *Medical Officers' Handbook*, examining physicians are to assign a case code to each applicant indicating their medical status, and then forward the code and its basis to immigration officers. These classifications are based on five criteria that are graded on a seven-point scale, which include risk to public safety or health (H); expected demand on health or social services (D); response to medical treatment (T); need for surveillance (S); and potential employability or productivity (E). Based on the grades the applicants receive in each of these five categories, they are assigned one of the following case codes:

- M1: there is no health impairment sufficient to warrant exclusion;
- M2: the applicant has a medical condition and could pose a risk to public health but exclusion is not warranted;
- M3: the applicant has a condition that will place some demand on health or social services, but the demand is not excessive and does not warrant exclusion;
- M4: the applicant has a condition that represents a danger to public health and safety and is presently inadmissible, but the condition may respond to treatment and the person might be admissible in the future;
- M5: the applicant has a condition which might reasonably be expected to cause excessive demands on government services, but the condition might respond to future treatment and the person may be admissible in the future;
- M6: the applicant has a condition that renders them likely to be a threat to public health and safety and precludes admission at present and in the foreseeable future;
- M7: the applicant has a condition that will place excessive demand on government services which is not expected to decrease in the future and precludes admission at present and in the foreseeable future.

The instructions and information regarding HIV/AIDS in the *Medical Officers' Handbook* include a sample case code assignment for prospective immigrants with HIV/AIDS. It reads:

“HIV positive	H ₄ D ₄ T ₄ S ₁ E ₄ M ₇
AIDS	H ₄ D ₄ T ₄ S ₁ E ₄ M ₇ ” ⁷⁴

In practice, people with HIV are generally assigned case code M7.⁷⁵ Somerville and Wilson have expressed concern that this classification system actually precludes the individual, case-by-case assessments that the *Immigration Act* prescribes:

This classification is supposed to be a summary of the various factors looked at by the medical officer in determining the

Generally, examining physicians will assess the expected demand of the applicant over the first five years following admission.

⁷³ Dr GA Giovino, Director, Immigration Health Services, indicated that, in practice, medical officers often decide that the person is likely to make excessive demands only when their demands significantly exceed those of the average Canadian: *supra*, note 59.

⁷⁴ *Medical Officers' Handbook*, *supra*, note 56 at 4.2.11(6)(b)(1).

⁷⁵ Communication with Dr GA Giovino, *supra*, note 59.

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The concern is that the use of case codes precludes the proper, case-by-case assessment of the individual's condition and all relevant circumstances.

individual's ability to be a contributing member of society. But these codes could be used to exclude people with certain diseases. Rather than looking at the individual's ability to contribute to Canada and whether his or her health status is likely to interfere with this contribution if the applicant is found to be HIV positive he or she may be automatically labelled an M7 and excluded on that basis. In other words, the concern is that the codes are being used to state a particular medical condition and to exclude an applicant on that basis, rather than on a proper evaluation of the individual's condition and all relevant circumstances. The medical officer looks up a particular condition in the Medical Officer's Handbook and sets forth the applicable codes in the prospective immigrant's medical profile.... [T]his procedure appears to limit, almost prohibit, the proper exercise of discretion by the medical officer and sets up a regime of rubber stamping certain conditions as being an excessive demand and therefore excluding the applicant automatically.⁷⁶

In *Ajane*,⁷⁷ the Federal Court considered whether the use of the *Medical Officer's Handbook* encourages examining physicians to automatically exclude persons with particular diagnoses and thus "fetters the discretion" of the medical officer. In that judgment, MacKay J quoted Cullen J's description of the proper function of guidelines such as the ones in the *Medical Officers' Handbook*:

Care must be taken so that any guidelines formulated to structure the use of discretion do not crystallize into binding and conclusive rules. If the discretion of the administrator becomes too tightly circumscribed by guidelines, the flexibility and the judgment that are an integral part of discretion may be lost.⁷⁸

There are at least five cases in which a person living with HIV has succeeded in obtaining permanent resident status in Canada after being found medically inadmissible.

MacKay J held that use of the Handbook does not amount to an improper fettering of physicians' discretion. However, he qualified his opinion, stating that:

Medical Officers may utilize and apply the rules set out in the Medical Officer's Handbook, but they must be flexible and look beyond the guidelines to decide whether an applicant is medically inadmissible on the basis of his or her individual circumstances. The medical officers must look upon the Medical Officer's Handbook as simply one of the elements of evidence to be considered in assessing individual cases. The weight assigned to the guidelines in the Handbook may vary in light of the circumstances of each case.⁷⁹

The reasoning in *Ajane* was endorsed wholeheartedly in a decision released shortly thereafter. In *Ludwig*, Nadon J reiterated that:

Medical officers must be careful not to apply the Handbook too rigidly; they must be flexible enough to look beyond the guidelines in the Handbook and decide the admissibility of each applicant on the basis of that person's individual circumstances. If medical officers determine that they are bound by the Handbook and cannot diverge from its guidelines, that would be a fetter on their discretion.... It is also arguable that it would not be unrea-

⁷⁶ Somerville & Wilson, *supra*, note 4.

⁷⁷ *Ajane v Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm LR (2d) 165 (FCTD).

⁷⁸ *Dawkins v Minister of Employment and Immigration* (1991), 45 FTR 198 at 204 (FCTD).

⁷⁹ *Ajane*, *supra*, note 77 at para 28.

sonable for medical officers to place a great deal of weight on the Handbook. Unlike guidelines, which reflect government policy, the Handbook reflects common medical knowledge and practice. As such, it is similar to medical journals and textbooks.... Medical officers must therefore examine the applicant's particular circumstances in light of these guidelines.⁸⁰

If, after an individual assessment of a given applicant's medical condition, the medical officer determines that an applicant can be expected to place excessive demands on health or social services, the opinion is forwarded to the visa or immigration officer. Although the visa or immigration officer does not have the authority to overturn medical diagnoses, the officer is required to look at the reasonableness of the opinion.⁸¹ For example, visa or immigration officers must be sure that all appropriate evidence was considered,⁸² and that there is a clear link between the applicant's medical condition and the likelihood of excessive demands.⁸³ Visa and immigration officers are required to refer back to the medical officers for review of any medical report form that has obvious errors⁸⁴ or is "vague, insufficient, ambiguous, or uncertain, or [if] their opinion was not reasonable at the time it was rendered."⁸⁵ If there are no such errors, the applicant will be considered medically inadmissible and will be denied landed immigrant status.

The applicant is then entitled to a letter in which the reason for the inadmissibility is provided.⁸⁶

Appeals

If a sponsored "family class" applicant⁸⁷ who is HIV-positive is found medically inadmissible on "excessive costs" grounds, their *sponsor* has an automatic right to appeal the decision to the Immigration Appeals Division of the Immigration and Refugee Board. The appeal can be based on mistake of fact or law, or on the ground that "there exist humanitarian and compassionate considerations that warrant the granting of special relief."⁸⁸ Courts have ruled that, on such an appeal regarding whether there are sufficient humanitarian and compassionate considerations to warrant granting landing to the medically inadmissible person, the issue of their possible demand on health or social service systems is not to be considered as a countervailing consideration.⁸⁹ Although not stated in the cases, certainly to do otherwise would arguably violate the equality rights protected by the Charter: it would be blatant discrimination to require the person with a more serious illness or disability to bring forward a more compelling case of humanitarian and compassionate reasons to justify granting landing than a person who is also medically inadmissible but who has a less costly condition.⁹⁰

However, for an independent applicant, there is no automatic right of appeal of a decision of medical inadmissibility. The applicant may only apply to the Federal Court for judicial review of the decision.⁹¹ The application for judicial review can only be based on mistakes of law or fact. Compassionate and humanitarian considerations cannot form the sole basis for the court to review the original decision.

There is one reported case in which an independent applicant sought judicial review of a visa officer's decision that he was medically inadmissible. On the facts of that case, the court rejected his argument that the medical information on which the decision was based was not up to date.⁹²

There are at least five cases in which a person living with HIV has succeeded in obtaining permanent resident status in Canada after being

⁸⁰ *Ludwig v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 474 (TD) (QL) at paras 19-20.

⁸¹ For example, see: *Deol*, supra, note 32; *Ahir v Minister of Employment and Immigration* (1983), 49 NR 185; *Mohamed v Minister of Employment and Immigration* (1986), 68 NR 20; *Badwal v Minister of Employment and Immigration* (1989), 9 Imm LR (2d) 85 (FCA).

⁸² *Gingiovenanu v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 1436 (FCTD) (QL).

⁸³ Operations Memorandum, supra, note 72.

⁸⁴ *Ibid.*

⁸⁵ *Uppal v Minister of Employment and Immigration*, [1987] 3 FC 565; 2 Imm. LR (2d) 143 (CA); *Jiwanpuri*, supra, note 70; *Mohamed (Nargisbanu Mohammad Ali) v MEI* [1986] 3 FC 90 (CA).

⁸⁶ See *Immigration Manual*, OP 14 at s 4 and OP 19 at s 4.

⁸⁷ "Family-class applicant" is a person who has been sponsored by a close family member who is a Canadian citizen or permanent resident. Family members that can be sponsored are defined in the *Immigration Regulations* at s 2(1). A sponsor undertakes to provide for the applicant for up to 10 years. Sponsored applicants are generally granted permanent resident status without being assessed under the "points system" used to assess independent immigrants. However, sponsored applicants are still required to meet the medical criteria in the *Immigration Act*.

⁸⁸ *Immigration Act*, supra, note 7 at s 77(3).

⁸⁹ *Kirpal v Canada (Minister of Citizenship and Immigration)*, [1997] 1 FC 352, [1996] FCJ No 1380 (TD) (QL); *Sandhu v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1398 (QL).

⁹⁰ Note, however, that this discriminatory reasoning is precisely that adopted by the Immigration Appeal Division in *Jugpall v Canada (Minister of Citizenship and Immigration)*, [1999] IADD No 600 (QL), and in *Sandhu v Canada (Minister of Citizenship and Immigration)*, [1999] IADD No 970 (QL). In the *Sandhu* case, this was overturned by the Federal Court Trial Division, which ruled that the IAD had failed to follow the binding precedent in *Kirpal*; see *Sandhu*, supra, note 89.

⁹¹ *Immigration Act*, supra, note 7 at s 82(1).

⁹² *Singh v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1297 (TD) (QL).

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found medically inadmissible; there has also been at least three reported unsuccessful cases. In each of the successful appeals, the decision was based on compassionate and humanitarian considerations rather than a finding that the HIV-positive applicant would not in fact place excessive demands on health or social services.

Successful appeals

There are at least five cases in which a person living with HIV has succeeded in obtaining permanent resident status in Canada after being found medically inadmissible.

In *Paslowski v Canada*,⁹³ a Canadian citizen appealed the refusal to approve the sponsored application of his wife, who is HIV-positive. He did not contest the finding that she would have placed excessive demands on government services. However, he argued successfully that due to their marital relationship, there existed compassionate or humanitarian considerations to warrant the granting of special relief. Although Singh J ultimately based his decision on the “love of a husband and wife and their natural desire to be together,”⁹⁴ he devoted a considerable part of his judgment to the positive assessment of the applicant’s health and the medical finding that she “is likely to continue to do well for at least the next 10 years and probably well beyond that.”⁹⁵ While it did not disadvantage the applicant in this particular case, it should be noted that, in light of the *Kirpal* decision noted above, the consideration of whether she was likely to require medical care in the coming years was incorrect. The focus should have been solely on the humanitarian and compassionate considerations.

The case of *Keels v Canada (Secretary of State)*⁹⁶ involved a married man and woman both living with HIV. The husband applied for permanent residence, but his application was denied by the visa officer; he was found medically inadmissible on the basis of “excessive costs.” His Canadian wife appealed. Although the issue of whether the refusal was valid was brought up before the hearing, the parties finally agreed not to argue this issue. As a result, the appeal was based only on compassionate and humanitarian grounds. The tribunal took a less generous approach than in *Paslowski* to family reunification, ruling that

the desire for family reunification is not, in and of itself, a basis for allowing an appeal on humanitarian or compassionate grounds, because family reunification is the common feature of all family class sponsorship applications. The issue really is whether there are exceptional circumstances in this case which in some way justify the granting of special relief, quite apart from the natural and normal desire for family members to be reunited.⁹⁷

Ultimately, however, the tribunal did rule that there were sufficient humanitarian and compassionate reasons to allow the appeal. It found that because the husband and wife were both HIV-positive, had a child together, and did not have an extensive support network, the family members were particularly dependent on each other.

In *Colterjohn v Canada (Minister of Citizenship and Immigration)*,⁹⁸ a husband contested the refusal of his HIV-positive wife’s application for permanent residence. Unlike the *Paslowski* and *Keels* cases, not only did the husband ask for special relief on humanitarian and compassionate grounds; he also challenged the finding that his wife would in fact cause excessive demands on health or social services as a result of her HIV infection. The tribunal chose to dismiss his argument against the finding of excessive demand on the ground that there was insufficient evidence to support it. As

⁹³ *Paslowski v Canada (Minister of Citizenship and Immigration)*, [1999] IADD No 151 (QL).

⁹⁴ *Ibid* at para 13, citing *Mahoney J in Canada (Minister of Employment and Immigration) v Burgon* (1991), 13 Imm LR (2d) 102 (FCA).

⁹⁵ *Ibid* at para 9.

⁹⁶ [1994] IADD No 270 (QL).

⁹⁷ *Ibid*.

⁹⁸ [1998] IADD No 1335 (QL).

in *Paslowski and Keels*, the appeal was allowed on compassionate and humanitarian grounds, based on the couple's marital situation and their inability to settle elsewhere.

In *Gretchen v Canada (Minister of Citizenship and Immigration)*,⁹⁹ the Canadian adoptive parents of an orphan from Romania with HIV and multiple other disabilities sponsored the application for immigration of their child (whose younger sister they had already adopted and brought to Canada). The application was refused on the ground of medical inadmissibility. The federal Minister of Immigration did not indicate opposition to the child's entry into Canada, and would have granted a Minister's Permit had the provincial government in question not refused agreement. The parents successfully appealed on humanitarian and compassionate grounds; the adjudicator of the Immigration Appeal Division found that the conditions of this case "do excite in the Board the desire to relieve the misfortune" of the child and her adoptive parents.

In *Alziphat v Canada (Minister of Citizenship and Immigration)*,¹⁰⁰ a father sponsored the application of his HIV-positive son from Haiti. After a finding of medical inadmissibility, the father successfully appealed the refusal on humanitarian and compassionate grounds. The adjudicator found a strong connection between the son and the father and his wife, that the biological mother was not capable of properly looking after the son but the father's wife who had a strong connection with the child was better equipped, and that the son missed his younger brother (already living in Canada with the father).

Unsuccessful appeals

In three reported cases, sponsors have been unsuccessful in sponsoring their HIV-positive spouses for immigration to Canada as permanent residents.

In *Jijimbere v Canada (Minister of Employment and Immigration)*,¹⁰¹ a husband appealed the refusal to allow his HIV-positive wife to immigrate. He did not challenge the finding of medical inadmissibility, but based his claim on humanitarian and compassionate considerations. An ethnic Hutu originally from Burundi, his wife was under the protection of the UN High Commissioner for Refugees in Rwanda. He had no other family in Canada, and was himself HIV-positive. However, the Immigration Appeal Division stated that he had chosen to have unprotected sex with his wife knowing the risks of infection and that his economic situation was such that he could not support another person likely to become sick, in addition to his own health expenses. Noting that he was alone in Canada, the adjudicator concluded he could not count on the support of family. The adjudicator somehow reached the view that there were not sufficiently compelling reasons to justify the special measure of allowing his medically inadmissible wife to immigrate to Canada on humanitarian grounds.

In *Marchand v Canada (Minister of Employment and Immigration)*,¹⁰² a wife appealed the refusal of her application to sponsor her HIV-positive husband from Haiti on medical inadmissibility grounds. She claimed that the diagnosis was incorrect, but did not provide convincing proof to the contrary. The adjudicator seemingly felt it necessary to describe her as "very imprudent" for having married a person without a good idea as to his health status and as being "extremely reckless" for having had unprotected sex with him after knowing of his HIV-positive diagnosis, although the adjudicator also felt that, in fact, she knew the diagnosis of HIV infection was correct and was taking the risk of unprotected sex as she claimed she was not. The adjudicator

The outcome of appeals of "medical inadmissibility" refusals based on compassionate and humanitarian considerations is unpredictable.

⁹⁹ [1994] IADD No 685 (QL).

¹⁰⁰ [1995] DSAI No 1229 (QL) [DSAI is the French version of the IADD database on QL].

¹⁰¹ [1994] DSAI No 582 (QL).

¹⁰² [1994] DSAI No 592 (QL).

Courts have ruled that it is wrong to simply assume, based on a person's medical condition alone, that the person will place "excessive demands" on health or social services.

The tribunals have yet to pronounce on whether it is reasonable to find that a person living with HIV will, merely by virtue of their HIV infection, place excessive demands on health or social services.

also stated, seemingly without considering any evidence on these points, that [TRANSLATION] "it is widely known that people with AIDS need expensive care and that such care is limited. There is a lack of medications to treat them, and a lack of shelters in which to house them.... For the moment, [the husband's virus] is in a period of incubation. He does not yet have AIDS. Sooner or later, the disease will declare itself and at that time that he will become an excessive burden on our limited resources. I am unable to evaluate when [he] will develop the disease."

Finally, an appeal was dismissed in the case of *Baginski v Canada (Minister of Citizenship and Immigration)*,¹⁰³ where a father contested the exclusion from Canada of his HIV-positive son, who was declared inadmissible on both medical and criminal grounds. Again, the validity of the refusal was not contested, but rather the father sought relief on compassionate and humanitarian grounds. The panel, after describing the applicant's criminal past and noting that he was very likely to require expensive medical treatment, found that "this case is not an appropriate one for the exercise of the Appeal Division's discretionary relief. In [our] view, the circumstances of this case, when assessed in their entirety, are not of the kind warranting extraordinary relief."¹⁰⁴

Conclusions regarding appeals

A number of points can be extracted from these cases:

First, the outcome of the appeals based on compassionate and humanitarian considerations is necessarily unpredictable. Tribunals view the relief as "extraordinary" and not necessarily justified simply because of marital or familial bonds.

Second, the potential costs that the applicant may place on health or social services may be considered in determining whether relief on compassionate and humanitarian grounds is justified, even though the current weight of legal authority indicates that this is legally incorrect and constitutes reviewable and reversible error on the part of the panel or adjudicator hearing an appeal on humanitarian and compassionate grounds. It appears that someone with a more promising medical prognosis is more likely to be granted landing on compassionate and humanitarian grounds despite a finding of medical inadmissibility.

Third, there has not yet been a case where a tribunal seriously questioned the validity of the finding that a person with HIV will necessarily place excessive demands on health or social services. Yet Canadian courts have held that it is wrong to simply assume, based on an applicant's medical condition alone, that the applicant will place "excessive demands" on these services. Instead, a proper assessment of likely costs is required: "merely suffering from a disease or disorder does not render a person inadmissible: it is the effect of the disease that it is critical to the determination."¹⁰⁵

Finally, there do not appear to have been any cases in which HIV-positive immigrants outside the "family class" have succeeded in getting refusals based on "medical inadmissibility" overturned. This is not surprising: as noted above, unsponsored applicants cannot argue their case on "humanitarian and compassionate" grounds, and are limited to simply arguing that the initial decision of medical inadmissibility is factually or legally wrong. But, thus far, tribunals have based their decisions granting permanent residence to medically inadmissible HIV-positive individuals on "humanitarian and compassionate" grounds, rather than overturn the original decision that the person will necessarily place excessive demands on

¹⁰³ [1997] IADD No 1899 (QL).

¹⁰⁴ *Ibid* at para 4.

¹⁰⁵ *Mo*, *supra*, note 69 at paras 37, 42; see also: *Deol*, *supra*, note 33 and *Litt*, *supra*, note 33.

health or social services. The tribunals have yet to pronounce on whether it is reasonable to find that a person living with HIV will, merely by virtue of their HIV infection, place excessive demands on health or social services.

Refugees

“Convention refugees” are persons who are outside their country of nationality or habitual residence, and are unwilling or unable to return to their home country owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group, or political opinion. In Canada, the basic rule is that refugees who appear at the border or who are in Canada have a right to stay in the country no matter what their health status. As a result, once it is determined that an individual in Canada or at its borders is in fact a refugee, that individual cannot be excluded from the country for testing positive for HIV.

Canada is bound by the 1951 United Nations Convention Relating to the Status of Refugees.¹⁰⁶ According to Article 33 of the Convention, states that have acceded to the Convention may not expel or return a refugee to a country where the refugee’s life or freedom is threatened. This is referred to as the principle of *non-refoulement*. A country in which a refugee is seeking asylum can expel a refugee only in one of two circumstances:

- a) if the refugee constitutes a “danger to the security of the country [of asylum]” or
- b) if the refugee has been convicted of a “particularly serious crime” and therefore “constitutes a danger to the community of that country.”

The Article does not provide for any exception to the principle of *non-refoulement* on public health or economic grounds. (Essential medical care for refugee claimants in Canada whose claims have not yet been adjudicated – and who are therefore not permanent residents entitled to coverage under the public health insurance plan of the province in which they are located – is covered by the Interim Federal Health Program (IFHP) administered by Citizenship and Immigration Canada.)

Because Article 33 of the Convention precludes a state from expelling or returning a refugee, a strict reading requires states to admit only those refugees who are at or within its borders. Refugees in other countries are not caught by Article 33, and therefore the Convention has generally been interpreted as not imposing any positive obligation on states to accept refugees who are situated in other countries.

Canada has reflected the distinction between refugees in Canada and those outside Canada in its legislation by creating separate legal regimes for the two kinds of refugee claimants. As outlined below, under these regimes, persons in Canada found to be Convention refugees are not subject to the medically inadmissibility criterion in the *Immigration Act*, whereas refugees outside may be excluded as medically inadmissible.

Refugees in Canada

Persons claiming to be Convention refugees from within Canada or at its borders may seek to have their claim determined by the Convention Refugee Determination Division of the Immigration and Refugee Board (CRDD).¹⁰⁷ The *Immigration Act* sets out which claims are eligible to be referred to the CRDD.¹⁰⁸

Where such persons’ claims are successful, they are granted various rights as Convention refugees. First, section 4(2.1) of the *Immigration Act* provides that Convention refugees in Canada have a right to remain in Canada except

Convention refugees within Canada have a right to remain, regardless of their medical condition.

¹⁰⁶ *Supra*, note 41.

¹⁰⁷ *Immigration Act*, *supra*, note 7 at s 44(1).

¹⁰⁸ *Ibid*, s 46.01. For example, persons who have made prior refugee claims that have either been denied or abandoned, and persons who have been recognized as Convention refugees by a country other than Canada to which they can be returned, are not eligible to have their claims determined by the CRDD.

in certain cases where they have committed serious criminal offences. Convention refugees also have a right to seek an employment authorization.¹⁰⁹ Finally, the *Immigration Act* states that persons recognized as Convention refugees by the CRDD “shall” be granted landing.¹¹⁰ While there are some exceptions to the landing requirement listed in that provision, medical condition is not one of them. As a result, persons in Canada determined to be Convention refugees have a right to stay in Canada, to work in Canada, and to become permanent residents of Canada regardless of their medical condition.

Although refugee claimants are required to undergo a medical examination “within such reasonable period of time as is specified by a senior immigration officer,”¹¹¹ a Convention refugee’s medical condition will have no (legal) bearing on their right to remain in Canada. As a result, refugees may be required to undergo HIV testing under the same conditions as all other immigrants, but any positive test result will not be a bar under the law to admission into Canada.

Persons at risk who are not Convention refugees

Refugee claimants in Canada who are found not to meet the definition of Convention refugee by the CRDD may apply to become a member of the Post-Determination Refugee Claimants in Canada (PDRCC) class.¹¹² They will be eligible to apply for permanent residence if their removal from Canada would subject them to an “objectively identifiable risk” that would apply in every part of the country to which they would be returned and would not be faced generally by other individuals in or from that country. The risk has to be the person’s life, or a risk of “extreme sanctions” or “inhumane treatment.”¹¹³ Citizenship and Immigration Canada has stated that the objective of establishing this PDRCC class was to “provide a ‘safety net’ ... [for] persons who might fail to meet the Convention definition, but who nonetheless should not be removed because they would be facing a personal risk of serious harm.”¹¹⁴

Like Convention refugees, persons in the PDRCC class are exempted from the medical inadmissibility provisions of the *Immigration Act*.¹¹⁵ However, there is a very significant limitation on the protection afforded by the PDRCC rules: the risk to the immigrant’s life that might entitle a person to remain in Canada can be any risk “other than a risk to the immigrant’s life that is caused by the inability of that country to provide adequate health or medical care.”¹¹⁶ Therefore, people with medical conditions who are at risk of death, extreme sanctions, or inhumane treatment may be able to remain in Canada even if a claim for refugee status fails, but only if the risk arises from something other than the fact that they cannot receive adequate health care in their country of origin. People who will die or face other serious harms by being returned to a setting of inadequate health care are denied the benefit of the PDRCC class.

This exclusion would seem to be at odds with the objective of placing security ahead of economic considerations, which is already reflected in the fact that persons in the PDRCC class need not be medically admissible to remain in Canada. It has been challenged as violating constitutional rights to life and security of the person (Charter section 7), as well as amounting to discrimination on the basis of disability in violation of equality rights (Charter section 15), but as the case was settled, the issue was not decided by the courts.¹¹⁷ (The same provision is maintained in the proposed new legislation and may be subject to challenge.¹¹⁸)

¹⁰⁹ *Immigration Regulations*, supra, note 43 at s 19(4)(j).

¹¹⁰ *Immigration Act*, supra, note 7 at s 46.04(1) and (3).

¹¹¹ *Ibid* at s 11 (1.1).

¹¹² *Immigration Regulations*, supra, note 43 at s 11.4. A person is not eligible if they have been found to have no credible basis for a refugee claim, or if they have been found inadmissible based on criminality or security considerations.

¹¹³ *Ibid* at s 2(1).

¹¹⁴ Citizenship and Immigration Canada. Operations Memorandum IS 93-19(a), issued 17 June 1993.

¹¹⁵ *Immigration Act*, supra, note 7 at s 11.4(1).

¹¹⁶ *Immigration Regulations*, supra, note 43 at s 2(1).

¹¹⁷ Communication from G Sadoway to R Jürgens, dated 6 November 2000, and accompanying factum in “X” v *Minister of Citizenship and Immigration* (FCTD), dated 13 December 1999 [on file].

¹¹⁸ Bill C-11, supra, note 6 at s 97(1)(iv).

Refugees outside Canada

Persons who meet the definition of a Convention refugee but who are outside Canada and seek permanent residence in Canada are not subject to the special refugee determination process outlined in the *Immigration Act*. They are also not granted the same set of rights and privileges as those in Canada found to be Convention refugees. They can, however, be considered “Convention refugees seeking resettlement,” which is a subcategory of the general class of immigrants.

The *Immigration Act* provides that categories of immigrants prescribed by regulation may be granted landing for reasons of public policy or for compassionate and humanitarian reasons.¹¹⁹ In order to give effect to that policy, certain categories of immigrants have been created; immigrants in those classes are subject to special landing requirements. In addition to Post-Determination Refugee Claimants in Canada¹²⁰ (the PDRCC class just discussed above), included under this rubric are Convention refugees seeking resettlement¹²¹ and the Humanitarian Designated Classes.¹²²

Immigrants who are included in these various humanitarian categories do not have the same right to remain in Canada as Convention refugees in Canada, but generally have to meet less stringent requirements than independent immigrants. Convention refugees seeking resettlement need not qualify under the “points system” by which independent immigrants’ applications are assessed, but must nonetheless demonstrate that they will be able “to become successfully established in Canada.”¹²³ This determination is based on the age of the applicant, level of education, work experience and skills, number and age of accompanying dependents, and personal suitability of the applicant and accompanying dependents.¹²⁴ In addition, applicants must be sponsored or have sufficient financial resources to support themselves. They may be sponsored either by a private group or by the government, which provides settlement costs for a specified number of refugees each year.¹²⁵

Convention refugees seeking resettlement are, like all other immigrants, required to undergo a medical examination. In addition, as they are treated as a class of immigrants and not subject to the same regime as refugees, members of the various humanitarian classes are subject to the medical inadmissibility provisions in the *Immigration Act*, whereas refugee claimants already in Canada are not. Therefore, those who are found to be HIV-positive are generally denied entry into Canada in the same manner as other immigrants.¹²⁶

HIV/AIDS as the Basis of a Refugee Claim

Not only must persons with HIV/AIDS in Canada who are found to be Convention refugees be granted the right to remain in Canada *despite* being diagnosed HIV-positive, but, in some cases, persons might be granted refugee protection precisely *because* they are HIV-positive. In order for such a claim to be successful, claimants would have to demonstrate that they have a well-founded fear of persecution owing to their “membership in a particular social group.” Claimants would also have to show that they were unwilling or unable to avail themselves of the protection of their country of habitual residence.

There have been several cases in which HIV/AIDS-based persecution has been a basis for a successful refugee claim in Canada. In *Re GPE*,¹²⁷ the Immigration and Refugee Board accepted that the claimant, if returned to Mexico, would face inadequate state protection from harassment as a gay man and would also be persecuted as person who is HIV-positive. In *Re OPK*,¹²⁸

Under current law, refugees outside Canada are required to undergo a medical examination and may be denied entry into Canada on the basis of medical inadmissibility.

¹¹⁹ *Immigration Act*, supra, note 7 at s 6(3) and 6(5).

¹²⁰ *Ibid* at s 11.4.

¹²¹ *Immigration Regulations*, supra, note 43 at s 7.

¹²² The Humanitarian Designated Classes consist of two categories: (a) persons outside their country of origin who do not meet the definition of Convention refugee but who have been and continue to be personally and seriously affected by massive human rights violations, armed conflict, or civil war in their country of origin (known as the Country of Asylum class); and (b) persons from particular countries identified in the Regulations who are still residing in their country of origin and who have been unfairly imprisoned or affected by civil war or armed conflict in their country of origin, or would fit the definition of Convention refugee if they were outside their country of origin (known as the Source Country class).

¹²³ *Immigration Act*, supra, note 7 at s 6(1).

¹²⁴ *Immigration Regulations*, supra, note 42 at s 7(1)(c).

¹²⁵ Galloway, supra, note 40 at 176.

¹²⁶ Communication with Dr GA Giovannozzo, supra, note 59.

¹²⁷ [1997] CRDD No 215 (QL).

¹²⁸ [1996] CRDD No 88 (QL).

There have been several cases in which HIV/AIDS-based persecution has been a basis for a successful refugee claim in Canada.

the Board accepted that a gay man with HIV from Singapore had good grounds for fearing persecution based on his sexual orientation and “AIDS condition.” In *Re YHI*,¹²⁹ the Board accepted that being an immediate family member of a person with HIV/AIDS could constitute membership in a “particular social group” that could face persecution (although on the facts it rejected the unrepresented Romanian claimant’s claim of a well-founded fear of persecution because it felt that he had an “internal flight alternative” to move within Romania to avoid persecution). There have been a number of other, unreported cases in which refugees have successfully claimed asylum in Canada as a result of persecution based on their HIV status.¹³⁰

The most extensive and significant discussion of HIV/AIDS as a basis for refugee claims is in the case of *Re TNL*,¹³¹ where a Polish former drug user with HIV was found to be a Convention refugee as a result of persecution faced by people with HIV/AIDS in Poland.

The Immigration and Refugee Board held that the harm feared by the claimant was serious enough to constitute persecution (as opposed to mere discrimination, which would not be sufficient to support a refugee claim). In addition to factors such as denial of medical care to people with HIV, the majority noted that people with HIV (together with drug users, with whom they are closely associated in Polish society) faced such violent threats as firebombing of their homes to drive them out of their communities.

The Board affirmed that the denial of so-called “core human rights” such as the right to physical integrity guaranteed in Article 3 of the Universal Declaration of Human Rights¹³² constitutes persecution. The Board also went on to state that in some circumstances, the denial of so-called “lower-level rights” (such as the right to personal privacy,¹³³ the right to housing,¹³⁴ the right to international movement and choice of residence,¹³⁵ the right to work,¹³⁶ the right to medical care,¹³⁷ and the right to social security¹³⁸) may also amount to persecution. The Board stated that

[w]hile the standard of persecution for some 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.¹³⁹

It was also held that the Polish government was not taking sufficient initiatives to protect people with HIV and AIDS in Poland from the persecution they suffer.

However, to meet the definition of a Convention refugee, it is not sufficient merely to have a well-founded fear of persecution and for the country of origin to fail to protect the refugee claimant. In addition, the persecution feared must be based on one of the five grounds listed in the Convention refugee definition: race, religion, nationality, political opinion, or membership in a particular social group. The Immigration and Refugee Board stated that “membership in a particular social group” refers to groups defined by an “innate (or unchangeable characteristic,” such as gender, linguistic background, or sexual orientation. A condition such as being HIV-positive is indeed unchangeable. On that basis, the Board found that the claimant had established a well-founded fear of persecution owing to his membership in a particular social group – persons with a medical disability.

It should be noted that, in this case, the Immigration and Refugee Board allowed the claim based on the fact that the claimant was a member of a

¹²⁹ [1996] CRDD No 65 (QL).

¹³⁰ Written communications from R Hughes, Barrister & Solicitor (13 March 2001); E Kkahi, Barrister & Solicitor (13 March 2001), and T Quandt, BCPWA (14 March 2001). Successful claimants have been from countries such as: Egypt, Mexico, Chile, Singapore, Uganda, Philippines, Antigua, St Vincent, Jamaica, and Peru.

¹³¹ [1997] CRDD No 251, No T95-07647 (QL). See also Wilson S. HIV-positive refugee admitted into Canada. *Canadian HIV/AIDS Policy & Law Newsletter* 1995; 1(3): 5.

¹³² UN General Assembly Resolution 217 A (III), UN Doc A/810.

¹³³ Article 17, International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, [1976] CTS 47 (ICCPR).

¹³⁴ Article 11(1), International Covenant on Economic, Social and Cultural Rights, (1976), 993 UNTS 3, [1976] CTS 46 (ICESCR).

¹³⁵ ICCPR, Article 12(1).

¹³⁶ ICESCR, Article 6.

¹³⁷ *Ibid*, Article 12.

¹³⁸ *Ibid*, Article 9.

¹³⁹ *Re TNL*, *supra*, note 131 at para 11.

minority of the population that was *singled out for exclusion* from “lower-level rights.” That is, persons with HIV in Poland were systematically being denied rights that other citizens were being allowed. Refugee claimants who come from countries that may not have the resources to provide adequate medical care, housing, and social security for all its citizens, including those who have HIV/AIDS, will likely have more difficulty making a successful refugee claim on that basis.

Minister’s Permits

Some persons who are found medically inadmissible under s 19(1)(a) of the *Immigration Act* may apply for a Minister’s Permit that would allow them to enter into and/or remain in Canada despite medical inadmissibility.

What Is a Minister’s Permit?

A Minister’s Permit is a document that allows inadmissible or removable persons to legally enter into and/or remain in Canada for a temporary period. It is issued under the discretionary authority of the Minister of Citizenship and Immigration; no applicant is entitled to receive a permit. From a policy perspective, Minister’s Permits are intended for people who are legally inadmissible, but for whom there are compelling reasons to allow them to enter into and/or remain in the country.¹⁴⁰ According to Citizenship and Immigration Canada,

Minister’s Permits may be issued for a variety of reasons, whether the inadmissibility is on technical, medical or criminal grounds. Permits can be issued to facilitate family reunification, protect refugees or bring highly skilled workers to Canada. In all cases, it will have been determined that admitting, rather than barring the person is the appropriate response.¹⁴¹

Who Can Be Granted a Minister’s Permit?

Refugee claimants whose applications are being processed, applicants for permanent residence, and visitors who are found to be inadmissible may apply for a Minister’s Permit. However, there are two exceptions: a family-class immigrant whose sponsor has lost an appeal of a finding of inadmissibility may not apply for a Minister’s Permit, nor may persons against whom a removal order has been made.¹⁴²

The *Immigration Manual* provides guidelines to immigration and visa officers on when and how to issue Minister’s Permits. It stipulates that permits should only be granted for humanitarian or compassionate reasons, or if it is in the national interest that the person in question be allowed to remain in Canada. Minister’s Permits, it is emphasized, should only be issued in special circumstances.¹⁴³

A visa officer or immigration officer who considers recommending the issuance of a Minister’s Permit is instructed to begin by ensuring that the risk posed by the applicant to Canadian society is minimal. These risks include any threat to the health, safety, and good order of Canadian society that the person might pose. In the case of persons who are medically inadmissible on “excessive cost” grounds, immigration and visa officers are instructed to consider all factors related to the demands that the individual is likely to place on health or social services. Regarding those who are suffering from communicable or contagious diseases, the Manual states that it must be “guaranteed” that the individual “will not pose a threat to ANYONE encountered en route or in Canada.”¹⁴⁴

In most provinces and territories, immigrants who are found medically inadmissible and issued Minister’s Permits are not eligible for publicly insured health services.

¹⁴⁰ *Immigration Manual*, c IP-12/OP-19 at 1.3.

¹⁴¹ Citizenship and Immigration Canada, News Release 99-23, 29 April 1999 (hereinafter 1999 News Release).

¹⁴² *Immigration Act*, supra, note 7 at s 37(2)(c).

¹⁴³ *Immigration Manual*, supra, note 140 at 1.3.

¹⁴⁴ *Ibid* at 5.2 [emphasis in original].

If the visa officer considers the risks posed to be minimal, the officer may assess the needs of the individual to remain in Canada and balance them against whatever risk is posed. The *Immigration Manual* states that “an inadmissible person wanting to enter or remain in Canada would have to demonstrate a higher level of need than an admissible person.... [T]he need may be compelling enough in the case of a spouse of a Canadian citizen where there is a *bona fide* relationship, whereas the need may be less compelling for distant relatives.”¹⁴⁵

Following an assessment that the needs of an applicant to be in Canada outweigh the risks, an immigration or visa officer may choose to recommend the issuance of a Minister’s Permit. When the original reason for inadmissibility was related to the applicant’s health condition, the recommendation is then forwarded to the provincial health authorities, if the province to which the person is destined has indicated a desire for such involvement. The province will make a recommendation as to whether a permit should be issued based on public safety, health-care access, and health-care eligibility concerns. While the province’s opinion is not binding, Minister’s Permits are generally only issued with the support of provincial health authorities.¹⁴⁶

The Manual emphasizes that “[a] Minister’s permit is a document issued only in special circumstances. It can carry privileges greater than visitor status, therefore great care should be exercised in its issuance.”¹⁴⁷ Indeed, the exceptional nature of the Minister’s Permit is evidenced by the fact that the Minister is required to make a report to Parliament indicating the number of permits issued per year and to which inadmissible class the permit holder belongs.¹⁴⁸ While Minister’s Permits were once considered a relatively common device for the exercise of ministerial discretion to overcome statutory barriers,¹⁴⁹ the number of permits issued has dropped considerably in recent years from more than 16,000 in 1992¹⁵⁰ to only 2600 in 1998.¹⁵¹

What Rights Do Permit Holders Have?

Persons who are admitted to Canada on Minister’s Permits are not considered visitors or immigrants, but are simply known as “permit holders.”¹⁵² They may remain in Canada for the length of time stated on the face of the permit. Permits may be valid for up to three years, and are renewable.¹⁵³ In addition, the federal cabinet may authorize the landing of a person who has resided in Canada for at least five years as a permit holder.¹⁵⁴

Minister’s Permits, however, can be canceled at any time,¹⁵⁵ and they are intended to be temporary in nature.¹⁵⁶ Once a Minister’s Permit expires or is canceled, the permit holder can be deported.

Minister’s Permits are granted in a wide variety of circumstances. When permits are issued, a “type of case” code is entered on the face of the permit. The “type of case” code indicates whether the applicant originally sought entry as a visitor or for permanent residence. It also indicates whether the applicant is inadmissible for the time being because their file is incomplete or is awaiting an expected approval (known as “early admission” or “under application” cases), or whether the applicant has been refused permanent residence for criminal or security reasons or for medical inadmissibility.

Codes are indicated on the face of the permit, and are used by the province or territory to which the immigrant is destined to determine eligibility for health insurance and social assistance.¹⁵⁷ In most provinces and

¹⁴⁵ *Ibid* at 4.2.

¹⁴⁶ Communication with R Wallace, Director, Health Insurance Registration, Saskatchewan Health, 27 June 2000.

¹⁴⁷ *Supra*, note 140 at 1.3 [emphasis in original].

¹⁴⁸ *Immigration Act*, *supra*, note 7 at s 37(7).

¹⁴⁹ Wydrzynski CJ. *Canadian Immigration Law and Procedure*. Aurora, Ontario: Canada Law Book Limited, 1983, at 347.

¹⁵⁰ Citizenship and Immigration Canada, News Release 97/21, 16 April 1997.

¹⁵¹ 1999 News Release, *supra*, note 141.

¹⁵² *Supra*, note 140 at 1.4.

¹⁵³ *Immigration Act*, *supra*, note 7 at s 37(3) and (4).

¹⁵⁴ *Ibid* at s 37(5). In the case of permit holders in Québec, the Governor in Council may authorize landing only with the consent of the province: s 38(2).

¹⁵⁵ *Ibid* at s 37(4).

¹⁵⁶ 1999 News Release, *supra*, note 141.

¹⁵⁷ *Immigration Manual*, *supra*, note 140 at 3.7.

territories, immigrants who are found medically inadmissible and issued Minister's Permits are not eligible for publicly insured health services. [See Appendix A for a list of case codes and summary of eligibility for government health insurance in each province and territory.]

International

Many countries have restrictions on the admission of travelers, immigrants, and even refugees with HIV/AIDS. This section will describe various national governments' policies regarding restrictions on the travel and migration of persons living with HIV/AIDS.

United States

United States policy regarding travelers and immigrants with HIV/AIDS has been described as "one of the most unenlightened in the world."¹⁵⁸

The US Immigration and Naturalization Service currently conducts the largest mandatory HIV-testing program in the world. Every applicant for permanent residence over the age of 15 is required to undergo HIV testing, and largely without informed consent or pre- and post-test counseling.

Furthermore, since 1987, US immigration law has provided for the exclusion on public health grounds of visitors and applicants for permanent residence who are living with HIV. Certain limited classes of people seeking to enter or remain in the US may be eligible for waivers of medical inadmissibility.

Visitors may obtain waivers allowing them to remain in the US for up to thirty days if they are in the US for one of the following reasons:

- (a) to participate in academic or health-related activities;
- (b) to conduct temporary business;
- (c) to seek medical treatment; or
- (d) to visit close family members.

Applicants for permanent residence with a spouse, parent or child who is a permanent resident of the US, as well as refugees applying from outside the US, may also be eligible for waivers of medical inadmissibility. However, these applicants must prove the following:

- (a) that there are sufficient humanitarian grounds to support the granting of a waiver;
- (b) that they will present minimal danger to the public health of the United States; and
- (c) that they will impose no cost on any government agency without the prior consent of that agency.¹⁵⁹

Asylum seekers (refugees) applying from inside the US may not be excluded from the US for medical reasons, in keeping with the principle of *non-refoulement*.

Opposition to the US policy culminated in a boycott of the VI International Conference on AIDS held in San Francisco in June 1990; the threat of another international boycott of the VIII International Conference on AIDS scheduled in Boston in 1992 led its sponsors to move the conference to Amsterdam. While there were attempts by the administration in 1993 to remove the public health exclusion of persons with HIV, Congress quickly responded by passing a bill maintaining the exclusion. HIV thus remains a statutory basis for exclusion until the unlikely event of a repeal by Congress.¹⁶⁰

United States policy regarding travelers and immigrants with HIV/AIDS has been described as "one of the most unenlightened in the world."

¹⁵⁸ Rubenstein WB, Eisenberg R, Gostin LO. *The Rights of People Who Are HIV Positive: The Authoritative ACLU Guide to the Rights of People Living with HIV Disease and AIDS*. Carbondale and Edwardsville, Illinois: Southern Illinois University Press, 1996, at 315.

¹⁵⁹ See *ibid* at 315-331 for an overview of United States immigration law as it affects persons living with HIV/AIDS. See also Webber DW (ed). *AIDS and the Law* (3rd ed). New York: Wiley Law Publications, 1997, 471-513 for a more detailed account.

¹⁶⁰ See Webber, *ibid* at 490.

Australia does not exclude persons with HIV for public health reasons.

Australia

Other countries, such as Australia and New Zealand, have immigration policies that more closely resemble the Canadian one. The Australian system allows people with HIV permanent residence in certain circumstances.¹⁶¹

Australia currently includes an HIV test as a part of its medical examination procedure. Therefore, HIV testing is compulsory for applicants for permanent residence or longer-term temporary residence (more than 12 months) who are aged 15 years or older, for refugees applying both from within and from outside the country, and for a minority of short-term entry applicants.¹⁶²

However, a positive test result does not necessarily lead to automatic exclusion. In December 1989, the Australian government issued the following statement as part of its *National HIV/AIDS Strategy* with regard to HIV testing of migrants:

HIV testing will be required for applicants for permanent residence. This is not intended to have a significant impact on the spread of HIV infection, but HIV infection status, as with other medical conditions, is a factor to be considered when assessing applications on the ground that there are considerable potential costs to the Australian community. A positive result will not automatically exclude applicants from permanent residency; scope will be retained to approve applications where justified by compassionate or other circumstances.¹⁶³

In keeping with this policy, Australia does not exclude persons with HIV for public health reasons. Visitors are therefore not generally excluded. However, applicants for permanent residence living with HIV/AIDS and other persons who are expected to remain in Australia and use its services may be denied permanent residence due to costs that they are expected to impose on Australian social and medical services as a result of their condition.

In order to determine whether an applicant's potential cost to Australian government-sponsored services is enough to warrant exclusion, an applicant's potential cost is compared to a threshold of approximately A\$16,000 over five years. However, if applicants are unlikely to incur immediate costs, but can be expected to incur costs in the foreseeable future totaling over approximately A\$240,000, then they may also fail the medical test. As a result, even HIV-positive applicants who are in present good health are likely to fail the medical test.¹⁶⁴

Those who fail the medical test can apply to an Australian migration officer for a waiver. Waivers are available only for spouses, de facto spouses, gay or lesbian partners, or children of Australian citizens or permanent residents, as well as for persons making refugee and humanitarian applications. If an applicant in any of these classes does not meet the usual health requirements, the Department of Immigration and Ethnic Affairs (DIEA) has an obligation to consider the question of whether to waive the health requirements. In making this decision, the DIEA must weigh the estimated costs (a "negative factor") against the positive factors identified in the application, including any compelling or compassionate or humanitarian grounds. Wealth is not normally considered a "positive factor," nor can one opt out of future medical care. If the positive factors are stronger, the decision-maker may waive the health requirements and grant the visa.¹⁶⁵ Note, however, that even if a person is a refugee, they must still apply for a waiver of the health

¹⁶¹ See Jürgens R. Australia: allowing people with HIV permanent residence. *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(3): 16-17, with reference to Alexander M. HIV and permanent residence. [Australian] *HIV/AIDS Legal Link* 1995; 6(2): 8-10. Parts of the following text are taken from Alexander's article. See also New Zealand AIDS Foundation. Refugees, HIV and Immigration: Comparison of New Zealand's HIV/AIDS Immigration Proposal with Australia. January 2000 (on file), from which parts of the following text are also taken (hereinafter NZAF Comparison).

¹⁶² Applicants for short-term entry may be required to undergo medical examinations if it is thought their health is of special significance to their work or lifestyle (for example if they work in a classroom, in healthcare, food processing, hospitality) or where there are other indications they might not meet health requirements.

¹⁶³ Jürgens, supra, note 2 at 203.

¹⁶⁴ NZAF Comparison, supra, note 161.

¹⁶⁵ Ibid. See also Jürgens, supra, note 2 at 203.

requirement, which theoretically could be refused, meaning the refugee could be removed from the country.¹⁶⁶

According to the Australian Federation of AIDS Organisations (AFAO), the policy appears to be working satisfactorily. The Federation is not aware of any applicant since early 1994 who has been refused permanent residence solely on the basis of having HIV. Applications have been approved in the following circumstances: husbands and wives of Australian citizens and permanent residents; gay partners of Australian citizens and permanent residents; children of Australian citizens and permanent residents; and refugees.¹⁶⁷

It is important to note that those testing HIV positive are still assessed as to their likely cost, rather than immediately failed. In this sense, applicants with HIV are considered in the same way as applicants with other disabilities, such as heart disease. However, there are still many people with HIV who are otherwise qualified to migrate who cannot possibly qualify for residence under the present law because they are expected to impose excessive costs and are not eligible for waivers.

New Zealand

In New Zealand, mandatory HIV testing of immigrants has recently been introduced by the Ministry of Immigration despite opposition from immigrant and HIV/AIDS rights groups,¹⁶⁸ and in the face of opposition from the Ministries of Health, Foreign Affairs and Trade, Social Policy, Internal Affairs, and Labour, and the Crown Law Office.¹⁶⁹ As of 1 July 2000, all applicants who intend to stay in New Zealand for two years or more, including refugees, are required to submit to mandatory HIV testing. Refugees at or within New Zealand's borders are not excluded based on their medical condition. However, all other applicants with HIV who seek residence for more than two years may be excluded if they are expected to make demands on health services in excess of approximately NZ\$20,000 over five years. As in Australia, the assessment is conducted on a case-by-case basis. In addition, persons with HIV who seek to enter New Zealand could theoretically be excluded on public health grounds; unlike Australia, New Zealand has not declared that persons with HIV are not a "public health risk." Some ministerial waivers of medical inadmissibility are contemplated in New Zealand's immigration scheme, but unlike in Australia, these are used only exceptionally.¹⁷⁰

European Union

Article 14 of the European Community Treaty provides for the removal of all internal frontiers among member states and ensures the free movement of persons within the European Union. Article 2-1 of the Convention implementing the Schengen agreement (which was signed by every EU member state with the exception of the UK, Ireland, and Denmark) ensures that internal borders may be crossed at any point without controls. As a result, internal borders may be crossed by EU-country citizens as well as citizens of other countries without restrictions of any kind, including health-related restrictions.¹⁷¹ Non EU-country nationals, however, have an onus upon them to make a declaration as to their nationality and their entry into the country when they travel among Schengen signatory states.¹⁷²

According to a European Community directive, member states may refuse residence or refuse entry to Union citizens arriving from non-EU countries on grounds of public health.¹⁷³ The directive, which was issued in

¹⁶⁶ Department of Immigration and Multicultural Affairs. DIMA Fact Sheet 2: Health Checks to Enter Australia. 13 September 1999. (Available at www.immi.gov.au/facts/22health.htm, accessed 13 January 2001).

¹⁶⁷ *Ibid.*

¹⁶⁸ New Zealand Aids Foundation. Mandatory Testing and Exclusion of HIV Positive Immigrants and Refugees (April 1999): on file.

¹⁶⁹ Office of the Minister of Immigration. Paper: HIV Testing Quota Refugees (CAB (99) 653), 5 October 1999; Office of the Minister of Immigration. Paper: HIV/AIDS: Testing Residence Applicants and Quota Refugees (CAB (99) 690), 15 October 1999.

¹⁷⁰ NZAF Comparison, *supra*, note 161.

¹⁷¹ Carlier JY. *The free movement of persons living with HIV/AIDS* at para 30 (available at http://europa.eu.int/comm/development/aids/html/freemov_en.htm).

¹⁷² Art 22; see *ibid* at para 22.

¹⁷³ Directive 64/221.

1964, contains a list of medical conditions that may support a public health exclusion. Obviously, the list does not include HIV. Any countries that have enacted public health exclusions pursuant to this directive have reproduced or partially reproduced the list contained in the directive, and no country has added HIV. As a result, citizens of one EU country are not denied entry into other EU countries for being HIV-positive, nor are they generally refused permanent residence solely on that ground.¹⁷⁴

Thus, there are currently no HIV-related restrictions on short-term travel or choice of residence within the EU for citizens of European Union states.

Refugees are generally not required to submit to mandatory HIV testing in European Union states.¹⁷⁵ In addition, all EU countries (with the exception of Bavaria, a German *Land*) respect the principle of *non-refoulement* and do not return refugees on health grounds.

With regard to nationals of non-EU states, each EU country determines its own policy independently. The policies of Germany, France, and the UK are examined below.

France

France does not require mandatory HIV testing of travelers, immigrants, or refugees.¹⁷⁶ As a result, there is no restriction on short-term travel to France for persons with HIV. Travelers who plan to stay more than three months are, however, required to undergo a medical examination, and HIV testing may be required as part of the examination if the applicant shows clinical signs of HIV infection.

French law stipulates that foreigners do not fulfil the health requirements for obtaining residence if they are suffering from plague, cholera, yellow fever, active pulmonary tuberculosis, drug addiction, or mental disorder. However, a December 1987 government circular concerning the health inspection of foreigners wishing to stay in France stipulates that the existence of positive serology for HIV, in the absence of clinical signs, does *not* constitute a ground for refusing a right of residence. This has generally been interpreted as meaning that the mere presence of HIV cannot, in itself, justify a refusal to grant residence, though some have expressed concern that the requirement could be read as stating that residence *may* be refused when clinical signs *are* present.¹⁷⁷ Nonetheless, in order to be granted residence, an applicant with HIV would still be required to meet the usual conditions for the granting of residence imposed on all applicants.

Other than tourists, all foreigners residing in France (including those without official residence permits) have the same right to health care as French nationals.¹⁷⁸

Germany

The German *Aliens Act*¹⁷⁹ does not require medical examinations for entering the country. Although a circular from the Minister of the Interior of the Federal Republic of Germany previously authorized border police to refuse entry to the territory of persons suspected of suffering from AIDS, that circular is no longer in application.

Normally, the granting of German residence does not depend on a prior medical examination, and consequently there is no routine HIV testing of persons seeking long-term residence. However, German law does authorize refusal of a residence permit if the applicant is suffering from a contagious disease, and will request a medical certificate if this appears to be the case. HIV is considered a contagious disease under the federal law on epidemics.

France does not require mandatory HIV testing of travelers, immigrants, or refugees.

¹⁷⁴ Carlier, *supra*, note 171 at para 35 et seq and 63.

¹⁷⁵ *Ibid* at para 71.

¹⁷⁶ *Ibid* at para 131.

¹⁷⁷ *Ibid* at para 138.

¹⁷⁸ *Ibid* at para 141.

¹⁷⁹ *Aliens Act* (Ausländergesetz) of 9 July 1990 (BGBl, at 1354) (1994 version: BGBl, I, at 3186), cited in Carlier, *supra*, note 171 at para 103 et seq.

In practice, therefore, persons with HIV can be refused permanent residence on public health grounds if they show symptoms of HIV infection, are consequently required to submit to a medical examination, which may include an HIV test, and are found to be HIV-positive.¹⁸⁰

The *Land* of Bavaria, however, provides an exception to this general policy of not routinely requiring HIV testing, and has enacted several measures aimed at preventing foreigners with HIV/AIDS from residing in Bavaria. It is the *Länder* that establish the conditions for the medical certificate to be provided. Bavaria requires mandatory screening of all foreigners wishing to stay in Bavaria for more than three months, with the exception of EU citizens and nationals of a handful of other countries.¹⁸¹ There may be exceptions to the screening requirement for people with special links to Germany, such as marriage to a German national. Those who are HIV-positive may still be granted a residence permit provided they give assurance that they will not spread the disease. Once a permit is obtained despite seropositivity, it can be rescinded at any time at the discretion of immigration authorities, who will take into account the foreigner's ties with Germany, family ties, and length of residence. The European Commission has condemned Bavaria's policy as contravening the principle of free movement of persons.¹⁸²

United Kingdom

Non-EU citizens seeking entry to the UK may be examined by a medical inspector, but there is no mandatory HIV testing as part of the medical examination. When immigration officials are aware that the person seeking temporary entry is suffering from AIDS, the person will not be automatically excluded on public health grounds or on the ground of costs that they might be expected to impose. However, if it appears for some specific reason that public health may be at risk, advice would be sought from the Department of Health, and the applicant could be excluded. Furthermore, an applicant for short-term entry who is known to be HIV-positive must prove that they have sufficient means to pay for medical treatment while in the UK.¹⁸³

Persons with HIV/AIDS are permitted to enter the country to seek treatment, provided they can show that the treatment will be of finite duration; that they have the intention of leaving the UK after the treatment is complete, that they can pay for the treatment, and that, in the case of communicable diseases, there is no danger to public health.¹⁸⁴

Non-EU citizens seeking to reside in the UK for the long term (more than six months) must report to a medical inspector. If the inspector finds that a foreigner is suffering from an illness that might affect their ability to support themselves and their family (as HIV/AIDS may be), this will be taken into account in deciding whether to grant a right of residence. There is, however, no financially based automatic exclusion, nor is there any public health-based exclusion for persons with HIV/AIDS.¹⁸⁵

It should be noted that EU citizens cannot be refused residency in the UK based on insufficient resources, as they are not, in principle, subject to the system of prior authorization for entry or residence in the territory.¹⁸⁶ While they can be excluded for public health reasons, as discussed above, HIV/AIDS is not considered a disease that warrants a public health exclusion.¹⁸⁷

¹⁸⁰ *Ibid* at 104.

¹⁸¹ Andorra, Iceland, Liechtenstein, Malta, Monaco, San Marino, Switzerland, and Norway. See *Carlier supra*, note 171 at para 111.

¹⁸² *Ibid* at para 107.

¹⁸³ *Ibid* at para 208.

¹⁸⁴ *Ibid* at para 212.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Immigration Act 1988* (1988, c 14), s 7 (Persons Exercising Community Rights and Nationals of Member States).

¹⁸⁷ See *Carlier, supra*, note 171 at para 221.



New Directions

A Review of Immigration Law and Policy

Citizenship and Immigration Canada has been planning a major restructuring of its immigration and refugee policy, laws, and regulations. Since it was first passed in 1976, the *Immigration Act* has been amended over 30 times, but it has never been subject to a comprehensive review. In 1996, the Legislative Review Advisory Group was appointed to evaluate Canada's immigration system. The Group submitted a report to the Minister of Citizenship and Immigration that included 172 recommendations for reform.¹⁸⁸ The then Minister of Citizenship and Immigration, Lucienne Robillard, responded in 1998 by publishing a document outlining the broad directions of the proposed reform.¹⁸⁹ Elinor Caplan, Minister of Citizenship and Immigration, followed up in April 2000 by tabling Bill C-31, the *Immigration and Refugee Protection Act*. Parliament was dissolved for general elections held in November 2000, which returned the same party to government. With some minor changes as a result of public input, the legislation was re-introduced into the new Parliament in February 2001 as Bill C-11. If passed, this will replace the current *Immigration Act*. At the same time as the framework legislation is being proposed, the accompanying regulations and administrative procedures are being developed, and the immigration program's medical screening procedures are being reviewed.

Changes to the Immigration Act (and Regulations)

The proposed legislation and regulations would have a significant impact on Canada's immigration policy, and the Minister has invited comment on these new developments. There are a number of changes contemplated in both the proposed new Act and the accompanying regulations (which have

¹⁸⁸ Immigration Legislative Review. *Not Just Numbers: A Canadian Framework for Future Immigration*. Ottawa: Minister of Public Works and Government Services Canada, 1998.

¹⁸⁹ See supra, note 8.

yet to be fully developed) that would affect people with HIV/AIDS. Some of these are positive changes, but some are cause for serious concern. Five major areas of change are discussed here.

- (1) First, slight changes in the wording of the provision on medical inadmissibility could (but should not) weaken the requirement for individual, case-by-case assessment of likely demands.
- (2) Second, exemptions from the medical inadmissibility provision have improved, but some concerns remain.
- (3) Third, the possibilities for directly granting permanent residence on humanitarian and compassionate grounds have expanded, which could be of benefit to people living with HIV/AIDS.
- (4) Fourth, as mentioned above, HIV testing may soon become a mandatory component of the medical examination given to all immigrants.¹⁹⁰ In April 2001, the Minister of Health, in a letter to the Minister of Citizenship and Immigration, reaffirmed that mandatory testing is necessary, but emphasized that there are no public health reasons to exclude those testing HIV-positive from immigrating to Canada.¹⁹¹ The background to this proposal is presented here, and the next section of the report analyzes it in detail.
- (5) Finally, in the regulations accompanying Bill C-11, Citizenship and Immigration Canada plans to define “excessive demand” on health or social services in relation to a five-year window “unless reasonable evidence indicates that significantly longer-term costs are likely to occur,” in which cases “the assessment window may be extended, though rarely beyond ten years.” In addition, it is planned to compare costs “to the average annual cost of health and social services for Canadians (currently \$2800 annum), multiplied by the number of years for the assessment window.”¹⁹² For many reason, such a definition is of serious concern for people living with HIV/AIDS (and for all other people living with chronic, life-threatening diseases).

Each of these areas is discussed below.

Changes to the Wording of the Medical Inadmissibility Provisions

The provision governing inadmissibility has been reworked for the proposed legislation and generally appears to maintain the existing grounds for medical inadmissibility. However, it has become more vague, and could be read as derogating from the principle that each applicant must be assessed on a case-by-case basis.

As already noted above, the medical inadmissibility provision in the current *Immigration Act* states:

19. (1) No person shall be granted admission who is a member of any of the following classes:

- (a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity, or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,
 - (i) they are or are likely to be a danger to public health or to public safety, or
 - (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services.

¹⁹⁰ Clark, *supra*, note 11.

¹⁹¹ Previously, Health Canada had identified exclusion of all persons who test positive as the preferred public health approach (see Health Canada Report, 26 November 1999, Annex 3, Montebello Process; on file). After further analysis of the issues and extensive consultations, this position was however changed.

¹⁹² Citizenship and Immigration Canada. Bill C-11. *Immigration and Refugee Protection Act*. Explanation of Proposed Regulations. Prepared for members of the House of Commons Standing Committee on Citizenship and Immigration. Ottawa, CIC, March 2001, section on “definition of excessive demand” (available via www.cic.gc.ca).

The proposed replacement of that provision in Bill C-11 reads as follows:

38. A foreign national, other than a permanent resident, is inadmissible on health grounds if their health condition

- (a) is likely to be a danger to public health,
- (b) is likely to be a danger to public safety, or
- (c) might reasonably be expected to cause excessive demand on health or social services.

“A finding of medical inadmissibility cannot be premised solely on the medical condition under review; rather, the individual applicant’s personal circumstances must be carefully reviewed.”

– *Lau v Canada*, 1998

Case law under the existing provision has affirmed that an individualized assessment is required in evaluating medical inadmissibility under the current *Immigration Act*.¹⁹³ For example, in *Lau v Canada (Minister of Citizenship and Immigration)*, the court ruled that “[t]he jurisprudence has clearly established that a finding of medical inadmissibility cannot be premised solely on the medical condition under review; rather, the individual applicant’s personal circumstances must be carefully reviewed.”¹⁹⁴

The language of section 38 of Bill C-11 refers to a foreign national’s “health condition” without any further clarification or definition. The wording of this provision could be interpreted to allow for the automatic exclusion of persons with particular medical conditions, regardless of other personal circumstances. As discussed above, the concern has already been raised (and taken seriously by the courts) that the case codes currently used by examining physicians should not lead to applicants being deemed inadmissible solely on the basis of the illness or disability they have, precluding an individual, case-by-case assessment.¹⁹⁵ The wording of the new legislation could encourage such improper fettering of the medical officer’s discretion.

However, this should not (and likely would not) happen. Citizenship and Immigration Canada has stated that this provision “maintains the existing inadmissibility grounds for medical reasons.”¹⁹⁶ And the basic principle of fairness that underlies the existing requirement for individual assessments under the current Act would be just as applicable under the new legislation. However, it would be best to err on the side of caution, given that lack of clarity can have a significant impact on the person being assessed: Citizenship and Immigration Canada must ensure clear written policy instructing all examining medical and immigration/visa officers that under any provisions regarding medical (in)admissibility in new legislation, the requirement for individual, case-by-case assessments of medical (in)admissibility remains.

Exemptions from “Excessive Demand” Criterion: Improved but Not Perfect

Expanded Exemptions for Certain Family Members and Refugees Welcome

Under the proposed new Act and regulations, it is planned that the following persons would be exempt from inadmissibility to Canada based on “excessive demand” on health or social services:

- the family class spouse, common-law partner or child of a Canadian citizen or permanent resident; and
- Convention refugees in Canada, overseas Convention refugees, and persons in need of protection (and their dependants).

In a few key respects, this expands the category of people who are exempt

¹⁹³ See, eg, *Poste*, supra, note 33; see also *Lau*, supra, note 33; and other cases cited above.

¹⁹⁴ *Supra*, note 33.

¹⁹⁵ Eg, see *Ajane*, supra, note 77; *Ludwig*, supra, note 80.

¹⁹⁶ Citizenship and Immigration Canada. *Immigration and Refugee Protection Act (Bill C-31): Clause by Clause Analysis*. June 2000, at 30. New Bill C-11 available at www.cic.gc.ca; see supra, note 6.

from the excessive demand barrier to entry into Canada. In a statement accompanying the planned changes, Citizenship and Immigration Canada offers several rationales for this change.

First, under the current system,

A significant number of excessive demand-based refusals of sponsored family class spouses and dependants are overturned on appeal to the IAD on humanitarian and compassionate grounds and immigrant visas are subsequently issued. In other cases, Minister's permits are issued to allow the spouse or child to enter and remain in Canada. Thus, many family class sponsored spouses and dependants, deemed medically inadmissible on excessive demand grounds, are already entering Canada as permanent residents or with the possibility of eventually obtaining permanent residence.¹⁹⁷

Those exempted from medical inadmissibility based on excessive demand would still be subject to inadmissibility if their health condition represents a threat to public health or to public safety.

Creating a general exemption for refugees and for certain family-class immigrants would therefore result in greater efficiency and uniform treatment among family-class immigrants. It would also provide support for Canada's commitment to family reunification.¹⁹⁸

Second, the Minister is seeking equality in the application of medical assessment criteria for Convention refugees whether they are in Canada or overseas. She has stated:

The exemption is in keeping with Canada's humanitarian stance towards refugees and is key to giving meaning to the policy of making the need for protection the overriding objective in resettlement from abroad.... It would be inconsistent to accept that a person is in need of protection and then render them inadmissible because they would cause excessive demands on health services.¹⁹⁹

Those exempted from medical inadmissibility based on excessive demand would still be subject to inadmissibility if their health condition represents a threat to public health or to public safety. As mentioned above, since 1991 persons with HIV have not been considered to be a threat to public health. If that view continues (as it should), refugees, family class-sponsored spouses and dependent children, overseas Convention refugees, as well as persons in need of protection and their dependants, would not be excluded from Canada based on HIV seropositivity or a diagnosis of AIDS under the proposed regulations.

However, had Citizenship and Immigration Canada, based on the initial advice provided by Health Canada in August 2000, decided to exclude persons with HIV on public health grounds, everyone known to be HIV-positive would have been excluded. This would have been contrary to what Minister Caplan stated on 20 September 2000, when she said that refugees who come to Canada because they fear persecution in their homelands, or immigrants who already have close family members in Canada, would not be banned from entering Canada even if HIV-positive.²⁰⁰ At the time of writing, Citizenship and Immigration Canada had not taken a final decision, but it seemed unlikely that persons with HIV would be considered to be a threat to public health. If the Minister of Health's final advice of April 2001 is followed, HIV-positive people belonging to the groups exempted from medical inadmissibility based on excessive demand will not be excluded from Canada based on their HIV status.

¹⁹⁷ Citizenship and Immigration Canada. Immigration and Refugee Protection Act – Issue Paper 4. March 2001: 1. Available at www.cic.gc.ca.

¹⁹⁸ *Immigration Act*, supra, note 7 at s 3(c).

¹⁹⁹ Supra, note 196.

²⁰⁰ Thompson, supra, note 51.

Same-Sex Partners

In a welcome move, the government has recognized that the “family class” of immigrants must include not only married spouses, but also common-law partners, and that same-sex couples must be included in the category of common-law partners. Common-law partners are expressly referred to in Bill C-11 (s 12). According to Citizenship and Immigration Canada, the proposed regulations require persons to have cohabited in a conjugal relationship for one year in order to be considered common-law partners.²⁰¹

The government has also stated that the regulations will “be sensitive to the needs of same-sex couples who cannot live together in the country of origin.” Specifically, it has said that the regulations will provide that “an individual who has been in a conjugal relationship with a person for at least one year, but has been unable to cohabit with the person due to exceptional reasons such as persecution or any form of penal control, may be considered a common-law partner of the person.”²⁰²

However, placing such provisions in regulations, as opposed to the Act itself, means they can be easily changed by the government of the day, without having to go through the process of amendments introduced and debated in Parliament. A core concept such as who has access under the “family class” should be defined in the Act itself, rather than in the regulations. The term “common law partner” in Bill C-11 should therefore be replaced by the phrase “common law partner (same-sex or opposite-sex).”

Furthermore, as the Ottawa-based organization EGALE has pointed out in its brief of 27 March 2001 to the House of Commons Standing Committee on Citizenship and Immigration, there is concern with the proposed definition of “common law partner” as “a person who is cohabiting in a conjugal relationship with another person, having so cohabited for a period of at least one year.”²⁰³

[I]t is inappropriate in the immigration context to treat cohabitation as a prerequisite for a qualifying relationship.

In practice, couples in *bona fide* relationships may not cohabit for a wide variety of reasons, including discrimination, cultural, social and financial factors. The most common scenario will be same-sex partners who are unable to live together due to visa restrictions or their immigration status. Couples will be in a cruel Catch-22 position if they are separated by immigration difficulties and thereby precluded from fulfilling the one prerequisite they need to overcome their immigration difficulties. Many of these couples are currently admitted to Canada on humanitarian and compassionate grounds and, ironically, would be worse off under a regime where they are disqualified from the family class.

Even those couples able to live in the same country may not cohabit for straightforward and legitimate reasons, such as the need for one partner to study in a different city, to work elsewhere or to attend language training in a different part of the country. It would be wholly unjust if couples maintain a *bona fide* relationship and take every opportunity to spend weekends and other time together, but are precluded from meeting the requirements of the family class by unreasonably high prerequisites.

²⁰¹ Citizenship and Immigration Canada. Bill C-11. Explanation of Proposed Regulations, *supra*, note 192.

²⁰² *Ibid*, section on “common-law partners” under “family class sponsorships.”

²⁰³ EGALE. Brief to the House of Commons Standing Committee on Citizenship and Immigration. Bill C-11: the *Immigration and Refugee Protection Act*. Ottawa: EGALE, 27 March 2001 (available at www.egale.ca/documents/c-11committeebrief.htm). See also the Canadian HIV/AIDS Legal Network's original submissions (dated 26 September 2000) on the proposed regulations under the new Act (then Bill C-31), including discrimination against “de facto” partners, which can be found at www.aidslaw.ca/Maincontent/issues/Immigration/BillC-31comments.htm.

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As mentioned above, the proposed regulations make some provision for an individual who has “been in a conjugal relationship with a person for at least one year,” but has been unable to cohabit “due to exceptional reasons such as persecution or any form of penal control.” This recognizes that some lesbians, gay men, bisexual and transgendered people live in countries where they are unable to cohabit for fear of persecution, but appears to set a very high threshold and does not cover a variety of other situations in which people in genuine relationships do not cohabit.

According to EGALE,

the goal should be to identify *bona fide* relationships, and it should be sufficient to define a common-law partner as someone who has “maintained a conjugal relationship with another person for a period of one year.” The submission of written materials documenting the legitimacy of the relationship has worked well for the past 7 years without any real practical difficulties based on fraud. In practice, couples maintaining a *bona fide* long-distance relationship frequently have ample evidence in the form of photographs, letters, testimonials, phone bills, proof of visits etc to support the bona fides of the relationship.

The proposed regulations will create a hierarchy of relationships, irrespective of the *bona fides* of the relationship. Married opposite-sex spouses and those who are engaged to be married automatically qualify under the family class without needing to satisfy any cohabitation requirement. By contrast, same-sex couples, with no current capacity to marry or become engaged, will be denied access to the family class irrespective of the *bona fides* or duration of their relationship, unless they can meet a cohabitation requirement or meet the high threshold for inability to cohabit.

As a result, cohabitation is not a prerequisite for all opposite-sex couples, and may be unattainable by many same-sex couples due to practical, financial, social or other reasons. There seems to be little constitutional or policy justification for distinguishing between different classes of relationship, each of which is equally genuine. In EGALE’s view, the proposed hierarchy of relationships would invite a challenge under the *Charter of Rights*.²⁰⁴

Finally, EGALE points out that it is not clear what constitutes one-year cohabitation:

Given that many couples are separated by immigration restrictions, is it sufficient for the partners to visit each other in their respective home countries for extended periods within a one-year time-frame? Must they actually be domiciled together in one country? How much time apart can they spend before they are deemed to be no longer cohabiting?

As EGALE states:

These are questions a married or engaged heterosexual couple will not need to address. The same criteria should apply to all couples, whether married or unmarried, heterosexual or same-sex. Heterosexual fiancé(e)s are not required to cohabit or maintain a relationship for a specific duration. Equality requires that any

²⁰⁴ Ibid.

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provisions available to opposite-sex couples be available to same-sex couples.

The current practice of allowing persons to remain on Minister's Permits, but then denying them access to the public health system, calls into question the very principles of humanitarianism and compassion that are the reasons for granting the permit in the first place.

EGALE therefore urged the Standing Committee on Citizenship and Immigration to recommend that, in developing regulations:

- the one-year cohabitation requirement be removed, and a common-law partner be defined to include a person who has maintained a *bona fide* conjugal relationship with another person for a period of one year;
- if the cohabitation requirement is retained, the threshold of the exemption for couples unable to live together be at least broad enough to cover couples separated by reason of immigration; and
- care be taken to ensure that every provision applicable to opposite-sex "spouses" and fiancé(e)s is equally available to "common-law partners."²⁰⁵

If implemented, EGALE's recommendations would, among other things, clarify that HIV-positive prospective immigrants who have maintained a *bona fide* conjugal relationship with a Canadian sponsor for a period of one year would be exempted under the proposed new medical inadmissibility provision in Bill C-11 (s 38) from the "excessive demand" barrier to immigrating to Canada.

Granting Permanent Residence Based on Compassionate and Humanitarian Considerations

Section 25 of the proposed *Immigration and Refugee Protection Act* allows the Minister to grant permanent resident status (or an exemption from any part of the Act) to a "foreign national"²⁰⁶ who is inadmissible or does not meet the requirements of the Act "if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations."

This marks a positive change from the current Act, which allows the Minister to grant landing on compassionate and humanitarian considerations only to members of classes prescribed under the regulations.²⁰⁷ This new section could be used to grant landing directly to otherwise inadmissible persons with HIV who are not eligible to appeal to the Immigration Appeal Division on humanitarian and compassionate considerations.

It could also be used to grant an otherwise inadmissible person permanent resident status immediately, without requiring them to apply for and receive a succession of Minister's Permits over a five-year period, with the accompanying disenfranchisement from most health or social services.²⁰⁸ This would be consistent with granting landing on humanitarian and compassionate grounds. It would represent an improvement over the current half-hearted practice that allows a person to remain in Canada on a Minister's Permit but in limbo for years, with no or limited access to public health care or social services and no certainty about their future status in the country. This current practice of allowing persons to remain on Minister's Permits, but then denying them access to the public health system, calls into question the very principles of humanitarianism and compassion that are, according to Citizenship and Immigration Canada, the reasons for granting the permit in the first place.²⁰⁹

It should be remembered that in the case of "humanitarian and compas-

²⁰⁵ Ibid.

²⁰⁶ "Foreign national" is defined as any person who is not a Canadian citizen, including a stateless person (who technically does not have a nationality): Bill C-11, s 2.

²⁰⁷ *Immigration Act*, supra, note 7 at s 6(5).

²⁰⁸ It should be noted that the proposed Act would also allow an immigration officer to issue a "temporary resident" permit, which may be canceled at any time, to an otherwise inadmissible person if the officer "is of the opinion that it is justified in the circumstances": Bill C-11, s 24(1). This would, in essence, be equivalent to the current practice under the present Act of issuing a Minister's Permit – it would not confer the entitlements of permanent residence, such as access to public health care.

²⁰⁹ *Immigration Manual*, supra, note 140 at 1.3.

sionate” appeals to the Immigration Appeal Division by a person who is medically inadmissible, it has been ruled incorrect²¹⁰ (and is arguably unconstitutional) for the adjudicator to take into account the possible health-care demands of the person in deciding whether there are sufficiently compelling humanitarian and compassionate reasons to allow the person to immigrate. The same considerations should apply to the Minister in exercising such discretion under the new provision proposed in Bill C-11; the question is whether there are humanitarian and compassionate considerations, not the possible cost to the health-care system that the person may represent.

Plans to Change the Medical Screening Procedures

The exemption of certain classes of immigrants from medical inadmissibility based on excessive demand would enable certain immigrants with HIV/AIDS to enter Canada, and is welcome. But policies threaten to become more restrictive in other ways.

In particular, as mentioned above, HIV testing may soon become a mandatory component of the medical examination given to all immigrants. Minister Caplan first announced on 20 September 2000 her intention to institute mandatory testing of all prospective immigrants.²¹¹ At the time, she stated that it was being considered to exclude those who test positive for HIV (with the exception of refugees and the spouses and children of people already admitted to Canada) on both public health and “excessive cost” grounds. This would have marked a significant change in Canada’s policy with respect to HIV/AIDS, which since 1991 has not treated persons with HIV as a threat to public health simply because they are HIV-positive. At the time of going to print, it seemed, however, more likely that HIV testing would become mandatory, but that those testing positive, after receiving counseling, would not be excluded on public health grounds.

Background

Since the early preparation stages of the reforms, Citizenship and Immigration Canada has been planning to change the immigration program’s medical screening procedures.²¹² Specifically, it has been seeking advice from Health Canada on “which medical screening procedures are required to protect public health,”²¹³ as Health Canada currently has responsibility for all aspects of national health policy, including the determination of what diseases constitute threats to public health. At the same time, in early 2000, the Auditor General released a report that criticized Citizenship and Immigration Canada’s current medical screening procedures and expressed concern that there is currently no universal testing for HIV and hepatitis.²¹⁴

The Montebello Process

In September 1995, representatives from Health Canada and Citizenship and Immigration Canada met at Château Montebello to discuss the development of new medical screening and risk-assessment procedures. A technical working group under the supervision of Health Canada was established following that meeting. The working group developed a risk-assessment approach that, according to its designers, “uses decision tree methodology as the underlying scientific process to examine the rationale for medical screening”²¹⁵ of infectious diseases. This new approach was dubbed the “Montebello Process.”

Specifically, the Montebello Process analyzes the public health risks posed by certain diseases by estimating the degree to which a given disease will spread through the population from a given source. In determining spread, the analysis takes into account various disease-specific factors, such as mode of transmission (eg, can the disease be transmitted through casual contact?

Health Canada undertook focus groups in order to assess possible public reactions to mandatory HIV testing and exclusion of those who test positive.

²¹⁰ Kirpal, supra, note 89; Ludwig, supra, note 80.

²¹¹ Clark, supra, note 11.

²¹² Supra, note 8 at 55.

²¹³ Ibid at 55.

²¹⁴ 2000 Report of the Auditor General of Canada, Chapter 3: Citizenship and Immigration Canada: The Economic Component of the Canadian Immigration Program; available at www.oag-bvg.gc.ca/dominio/reports/nf/html/00menu_e.html.

²¹⁵ Health Canada Report, November 26, 1999, supra, note 191.

There are serious concerns about the manner in which the focus group sessions were conducted and the accuracy of the information that participants were given.

sexually transmitted? transmitted from mother to child?); period of communicability; infectivity; and susceptibility of the population (eg, has the local population been vaccinated against the disease?).²¹⁶

Some factors must be estimated or assumed in the application of the Montebello analysis. For example, in order to determine the likely spread of HIV from one migrant in the Canadian population, the analyst might estimate the number of times the average person might be likely to engage in unprotected sex, or the likelihood that the average prophylactic on the market will be ineffective.²¹⁷ An underlying *assumption* used in the Montebello model was that an immigrant to Canada who is HIV-positive will spread the virus to, on average, one other person already resident in Canada.²¹⁸

The Montebello Process was used to compare the public health outcomes of what Health Canada claimed to be “only possible options.”²¹⁹

- (1) No screening to identify the infected individual.
- (2) Identification of the infected individual and exclusion from entry of the infected individual.
- (3) Identification of the infected individual but inclusion for entry with the implementation of certain public health interventions.

The current practice of asking applicants if they have ever tested positive for HIV, of testing only when there are clinical indications to do so and of excluding only in cases of “excessive costs,” was not considered or assessed using the Montebello Process.

According to the Montebello Process, mandatory HIV screening of all prospective immigrants and exclusion on that basis was considered the best way to protect public health, “as there can be no spread from persons who are excluded.”²²⁰ Health Canada’s report indicated that requiring screening but allowing entry provided each person identified as HIV-positive undergo counseling on reducing risk behaviour would be the second most desirable policy.

Focus Groups to Evaluate Public Opinion on Proposals for Mandatory Testing and Exclusion

Health Canada undertook focus groups in order to assess possible public reactions to mandatory HIV testing and exclusion of those who test positive. The focus groups were not satisfied with the current screening process as it was presented to them and supported mandatory HIV testing and exclusion of all immigrants who test positive.²²¹

However, judging from the available reports and summaries of the focus group sessions, there are some serious concerns about the manner in which the focus group sessions were conducted and the accuracy of the information that participants were given.

First, participants were not accurately informed about current practice with regard to HIV testing. There was no mention that the medical questionnaire currently used contains a question about whether the person has tested positive for HIV, and that it is at the discretion of the examining physician whether to require an HIV test or not. Instead, participants were told that “in some countries, doctors can ask for HIV/AIDS testing to be done. However, this is not consistent, and Canada has no policy on what to do if someone tests positive.”²²² In fact, since 1991 Canada has not considered prospective immigrants with HIV to be a public health risk, but has routinely excluded them on “excessive cost” grounds.

Second, participants may not have accurately understood the options

²¹⁶ Communication with Quarantine and Migration Health, Centre for Emergency Preparedness and Health Security, Population and Public Health Branch, Health Canada, 27 July 2000.

²¹⁷ *Ibid.*

²¹⁸ Letter from Quarantine and Migration Health, Centre for Emergency Preparedness and Health Security, Population and Public Health Branch, Health Canada, dated 16 November 2000, on file.

²¹⁹ *Supra*, note 191.

²²⁰ *Ibid.*

²²¹ Angus Reid Group. Health Canada – Migrant Screening: Final Report, November 1999 [on file].

²²² *Ibid.* at 14.

open to Citizenship and Immigration Canada. Health Canada only advises on whether HIV screening should become mandatory for public health reasons. Independent of this advice regarding public health, it is still open to Citizenship and Immigration Canada to choose to exclude some immigrants based on excessive cost. According to the report of the consultants hired to run the focus groups, this issue of costs was reportedly the primary concern of focus group participants.²²³ Yet without a clear understanding of Canada's current practice of generally excluding would-be immigrants with HIV on "excessive cost" grounds, the focus group participants may have concluded that if they did not endorse mandatory screening and exclusion of all immigrants testing positive, all immigrants with HIV would be permitted to immigrate.

Had the participants been better informed about current policy and about the distinction between exclusion based on public health grounds and "excessive cost" grounds, they may have responded differently to the survey. Consequently, the conclusions reached by the focus groups should be disregarded.

In addition to concerns about *how* the focus groups were conducted, there are concerns about *why* they were conducted. Health Canada's mandate was to assess the public health risks created by various policies regarding different communicable diseases, and to advise Citizenship and Immigration Canada of the wisest course of action in that regard. Public opinion regarding choice of policy should not have entered into Health Canada's analysis of the consequences of the various policy options open to Citizenship and Immigration Canada. Not only is it irrelevant to the "scientific" Montebello process, it also suggests that the rights and interests of immigrants and people living with HIV/AIDS can or should legitimately be determined or influenced by public opinion (ill-informed opinion in this case), which is ethically suspect.

Additional Analysis and Consultation

As mentioned above, on 10 August 2000, Health Canada recommended to Citizenship and Immigration Canada that testing all prospective immigrants for HIV, and excluding those testing HIV-positive, is the "lowest health risk course of action [and therefore] the preferred option." This advice was based on the analysis undertaken in the Montebello process (and on the focus group results). Subsequently, the Minister of Citizenship and Immigration publicly stated that her department was indeed considering implementing mandatory HIV testing for all prospective immigrants to Canada, and excluding those testing positive – with the exception of refugees and sponsored "family class" immigrants – from immigrating to Canada on both public health and "excessive cost" grounds. In the months following these announcements, many organizations and individuals from across Canada expressed their concerns about this proposal with the Minister of Citizenship and Immigration and the Minister of Health. In particular, they:

- noted that Health Canada, when providing advice to Citizenship and Immigration on the issue of medical screening, should have considered the matter in a broad public health context, rather than providing narrow advice on what allegedly constitutes "the lowest health risk course of action";
- pointed out that the Montebello Process only provides information on probabilities of infection, based on many assumptions, but does not provide answers for decision makers;

²²³ Ibid.

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- emphasized that using the Montebello Process alone was therefore not enough for Health Canada to be able to provide the advice that Citizenship and Immigration Canada requested, namely advice on “which medical screening procedures are required to protect public health”; and
- concluded that further analysis of the broader public health and human rights implications of the various options considered by Health Canada was required, including weighing the estimated level of risk against the harms that may derive from adopting a policy of screening and exclusion on prevention efforts in Canada; human rights; compassionate and humanitarian considerations; etc.

Most importantly, organizations and individuals pointed out that persons with HIV are not a threat to public health since HIV is not transmitted through casual contact, and that the exclusion of immigrants with HIV is therefore not necessary for the protection of Canadians. In addition, organizations and individuals expressed concern that, by claiming that immigrants with HIV are a threat to public health by virtue *only* of their HIV status and regardless of their behaviour, people with HIV generally would be stigmatized as dangers to public health and safety. Finally, concern was expressed that the exclusion of prospective immigrants with HIV on the ground that they represent a danger to public health would stigmatize not only all Canadians living with HIV, but also all immigrants, regardless of whether they are or are not HIV-positive.

In light of these concerns, the Minister of Health agreed to undertake further analysis of the issues related to mandatory testing and exclusion, as well as more extensive consultations. As mentioned above, while this report was undergoing layout, the Minister did provide further advice to the Minister of Citizenship and Immigration, stating that mandatory HIV testing was necessary, but that prospective immigrants with HIV, after receiving counseling, did not need to be excluded from immigrating to Canada on public health grounds. While no final decisions had been taken as of April 2001, it is likely that HIV testing will soon become a mandatory component of the medical exam that each prospective immigrant has to undergo.

Definition of “Excessive Demand”

Finally, as mentioned above,²²⁴ there is no clear definition of what constitutes “excessive demand” on health or social services in the current *Immigration Act* or the *Regulations*. Courts have called this “troubling.”²²⁵ This general assessment of testing and exclusion policies informs the final chapter, which makes recommendations for Canadian policy. However, the proposal to define “excessive demand” in relation to up to a ten-year window (when there is reasonable evidence indicating that longer-term costs are likely to occur, such as would likely be the case with HIV/AIDS),²²⁶ and without taking financial and social contributions that an applicant is expected to make over the same period into account, causes serious concern. In practice, this could result in all persons living with HIV or AIDS being considered medically inadmissible, unless they fall into the narrow categories of persons who are exempt from inadmissibility to Canada based on “excessive demand” on health or social services, or are granted permanent residence based on compassionate and humanitarian considerations. This issue is analyzed in detail in the next chapter.

²²⁴ Chapter on “Current Policy,” at notes 63 ff.

²²⁵ See *supra*, note 64.

²²⁶ Citizenship and Immigration Canada. Bill C-11. Explanation of Proposed Regulations, *supra*, note 192.



Assessment: Non-Discrimination and HIV-Related Entry Restrictions

Canada has a strong commitment to human rights, but for most of us this is a commitment in theory rather than one that is regularly tested in practice. HIV transmission and AIDS present a test in practice of our real commitment to human rights; and how we meet that challenge in relation to immigration will provide a particular and important example in this respect.²²⁷

Can Canada choose to admit or exclude anyone, based on any criteria whatsoever? This chapter begins by discussing whether and how the Canadian government is restricted in the way it treats non-citizens seeking to enter or remain in the country. While it is not certain in law, there is at least a strong case to be made that the protections set out in the *Canadian Charter of Rights and Freedoms* should apply in many circumstances that would arise in the application of Canadian immigration law. Furthermore, the *Immigration Act* itself proscribes discrimination inconsistent with the Charter in the design and implementation of Canada's immigration policy, and this is consistent with guidance from international human rights principles. This chapter will discuss how the requirement of non-discrimination delimits Canada's treatment of persons with HIV/AIDS.

The *Immigration Act* itself proscribes discrimination inconsistent with the Charter in the design and implementation of Canada's immigration policy.

²²⁷ Somerville MA. The case against HIV antibody testing of refugees and immigrants. *Canadian Medical Association Journal* 1989; 141: 889 at 893.

Could Canada choose to exclude someone based on their race, age, or political views?

This chapter will then demonstrate that mandatory HIV testing and automatic exclusion, whether based on public health grounds or excessive costs to public services, are not justified. Blanket exclusions based on either ground are discriminatory and will do little if anything to achieve any goals related to public health or economics. Rather, “from the perspective of an uninformed and apprehensive public, for whom elected representatives want to be seen as ‘doing something,’ screening [and exclusion] seems an easy enough and necessary way by which to raise a barrier to the spread of disease and to protect the public purse.”²²⁸

This general assessment of testing and exclusion policies informs the final chapter, which critically reviews Canada’s current and proposed policies toward visitors, immigrants, and refugees, and makes recommendations for Canadian policy in each of these areas.

The Principle of Non-Discrimination in Canadian Immigration Law

The Canadian Disability Rights Council has argued that:

Mandatory HIV testing and automatic exclusion are not justified.

Persons who apply [to come to Canada] and are processed under [the *Immigration Act*] and its Regulations are entitled to the constitutional guarantees [against discrimination] provided by s. 15 [of the *Canadian Charter of Rights and Freedoms*.] Section 3(f) of the *Act* is further evidence that legislators intend that immigration applicants will have their applications processed in accordance with s. 15 of the *Charter*. Simply stated, this means that there can be no discrimination against immigration applicants with disabilities (and refugees) at any point in the application process.”²²⁹

The Application of the Canadian Charter of Rights and Freedoms

It can be said that for those who are not permanent residents, entry into Canada is a privilege, not a right. If Canada is under no legal obligation to admit non-Canadians (other than refugees at or within its borders), can it decide, in its immigration program, to treat any applicant in any manner it wants? For example, could Canada choose to exclude someone based on their race, age, or political views? Could it choose to restrict the liberty of applicants?

Immigration law is a complicated area in which to apply principles of equality and non-discrimination. As Galloway points out:

Immigration law has as its primary subject the stranger: the outsider who is under no obligation of allegiance to the state, who is not represented in its political processes, and whose needs and interests are, in most situations, accorded less concern than those of people who already participate in the social and political life of the community.²³⁰

It is clear that Canada does not owe the same legal duties to outsiders that it owes to its own citizens. Nonetheless, it has been held that the *Canadian Charter of Rights and Freedoms*²³¹ is, at least under certain circumstances, applicable to non-citizens who are subject to the *Immigration Act* and its regulations.

The Supreme Court has ruled that the acts of the Canadian state in conducting extradition proceedings are subject to the Charter, particularly the

²²⁸ Goodwin-Gill, *supra*, note 30 at 64.

²²⁹ Goundry, *supra*, note 17 at 6.

²³⁰ Galloway D. Strangers and members: equality in an immigration setting. *Canadian Journal of Law and Jurisprudence* 1994; 7:149-172 at 149.

²³¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11 [hereinafter the *Charter*].

principles of fundamental justice.²³² However, it has also ruled in *Chiarelli*²³³ that the scope of these principles must be informed by considering the principles and policies underlying immigration law, and the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. In that case, which involved the deportation of a permanent resident convicted of a serious offence, the Court found that a deportation scheme that applies to permanent residents, but not citizens, does not infringe the equality provisions (s 15) of the Charter, and that the Charter (s 6) specifically provides for differential treatment of citizens and permanent residents in this regard.

There is also some uncertainty as to whether the Charter might protect people outside Canada in the application of Canadian immigration law. In *Singh v Minister of Employment and Immigration*,²³⁴ Justice Wilson of the Supreme Court of Canada stated that the word “everyone” in section 7 of the Charter “includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.”²³⁵ The meaning of that pronouncement has been the subject of considerable debate – specifically, was Wilson J stating that physical presence in Canada was a *necessary* prerequisite for Charter application in general, or merely *sufficient* for the Charter to apply in the *Singh* case itself?²³⁶ Subsequent cases would appear to show that it is the latter – that is, in the *Singh* case, it was sufficient for the Charter to apply that Singh was physically present in Canada, but it was not necessary, as the Charter may in fact apply outside Canada in some cases.

The extent to which the Charter may be extraterritorially applied to the benefit of non-citizens remains uncertain. There is no doubt that the Charter may apply outside Canada’s borders in some circumstances. This has been expressly stated by the Supreme Court of Canada.²³⁷ A number of cases indicate the Charter applies to the conduct of officials applying Canadian law abroad, and this should arguably include in the context of the Canadian immigration system.

In the *Cook* case (involving Canadian police interrogating, in the US, a US citizen suspected of a crime in Canada), the Supreme Court held that the Charter is not absolutely restricted in its application to just Canadian territory, but can apply outside Canada to Canadian authorities engaged in the enforcement of Canadian law where this will not conflict with the foreign state’s jurisdiction.²³⁸ The Court held that it was reasonable both to expect Canadian officers to comply with Charter standards, and to permit the accused who was being made to adhere to Canadian law and procedure, to claim Canadian constitutional rights relating to the interrogation by Canadian officers. However, the Supreme Court cautioned that “the holding in this case marks an exception to the general rule in public international law discussed above that a state cannot enforce its laws beyond its territory. The exception arises on the basis of very particular facts before us. Specifically, the impugned actions were undertaken by Canadian governmental authorities in connection with the investigation of a murder committed in Canada for a process to be undertaken in Canada. The appellant, the rights claimant herein, was being compulsorily brought before the Canadian justice system. This situation is far different from the myriad of circumstances in which persons outside Canada are trying to claim the benefits of the Charter simpliciter.”²³⁹

In the *Harrer* case, the Supreme Court held that the Charter cannot generally apply to evidence gathering abroad by *foreign* officers. But the Court stated that what was “determinative” in that case was that the US authorities “were not acting on behalf of any of the governments of Canada, the

The extent to which the Charter may be extraterritorially applied to the benefit of non-citizens remains uncertain.

²³² *Canada v Schmidt*, [1987] 1 SCR 500; 33 CCC (3d) 193.

²³³ *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711.

²³⁴ [1985] 1 SCR 177; 12 Admin LR 137 [hereinafter cited to SCR].

²³⁵ *Ibid* at 202.

²³⁶ Galloway D. The extraterritorial application of the Charter to visa applicants. *Ottawa Law Review* 1991; 23: 335.

²³⁷ *R v Harrer*, [1995] 3 SCR 562 at paras 10-11; *R v Cook*, [1998] 2 SCR 597 at para 33.

²³⁸ *Cook*, *ibid*.

²³⁹ *Ibid* at para 53.

The Charter is not merely a list of protections which ‘the people’ have negotiated for themselves while striving to maximize their self-interest.

provinces or the territories, the state actors to which, by virtue of s. 32(1) the application of the Charter is confined.... It follows that the Charter simply has no direct application to the interrogations in the United States because the governments mentioned in s. 32(1) were not implicated in these activities.”²⁴⁰

In the subsequent *Terry* case, the Supreme Court clarified that the Charter does not apply to foreign officers merely informally assisting Canadian authorities, such as US police arresting a fugitive facing charges in Canada at the request of Canadian police. However, McLachlin J for the majority acknowledged that a state “may ... formally consent to permit Canada and other states to enforce their laws within its territory for limited purposes. In such cases, the Charter may find limited application abroad.”²⁴¹ As noted in *Terry* and two later cases,²⁴² one reason for this conclusion is the principle of international comity, which suggests that it would be unrealistic to expect foreign authorities to know and comply with the laws of Canada.

While these decisions do not directly address the issue of whether Charter protections apply in the administration of Canadian immigration law abroad, they certainly suggest that they should. This would certainly accord with the principle of comity: to use the language of the Supreme Court in the *Schreiber* case (cited in *Cook*), officials acting on behalf of the Canadian government abroad in the application of Canadian immigration law “can be expected to have knowledge of Canadian law, including the Constitution, and it is not unreasonable to require that they follow it.”²⁴³ Such officials could, for example, include visa officers and medical officers acting on behalf of Citizenship and Immigration Canada applying Canadian law.

Galloway offers other persuasive arguments in favour of applying the Charter to strangers seeking admission to Canada, and thus according them rights that could be asserted in a Canadian court. He rejects the view that the Charter is “merely a list of protections which ‘the people’ have negotiated for themselves while striving to maximize their self-interest.” Instead, he claims, “it is more felicitous to conceive of a Constitution as a document which expresses a community’s devotion to humanist principles.”²⁴⁴

Galloway cites Wilson J’s statement in *McKinney v University of Guelph* that “the purpose of the equality guarantee is the promotion of human dignity.”²⁴⁵ He notes that

she does not qualify this statement with references to membership or to other criteria which would exclude strangers or otherwise limit the class of beneficiaries. Equality is presented as a universal value and the right to equality is a right which people have solely by virtue of being equal.²⁴⁶

He argues that immigration policies that contravene the principles of human dignity protected by the Charter, such as those that discriminate based on race, cannot be acceptable for a number of reasons. First, others of the same group, or indeed all members of minority races in Canada, would suffer indirect injury from a racist immigration criterion. Perhaps more important, “liberal communities are founded on the principle that it is not only wrong for us to treat ourselves in that manner, it is also wrong to treat others thus.”²⁴⁷ After all, if Canadians subject to Canadian laws are protected by the rights guaranteed in the Charter (which is the supreme law of the country), why should others subject to Canadian laws not also have the same

²⁴⁰ *Harrer*, supra, note 237 at para 12.

²⁴¹ *R v Terry*, [1996] 2 SCR 207 at para 15, cited in *Cook*, supra, note 237 at para 38.

²⁴² *Schreiber v Canada (Attorney General)*, [1998] 1 S.C.R. 841, at para 15; *Cook*, ibid at para 45.

²⁴³ *Ibid* at para 16; *Cook* at para 46.

²⁴⁴ *Supra*, note 230 at para 23.

²⁴⁵ [1990] 3 SCR 229 at 391.

²⁴⁶ *Supra*, note 230 at para 56.

²⁴⁷ *Galloway*, supra, note 236 at 362.

protections? Furthermore, the principles expressed in the provisions of the Charter are fundamentally the same as those expressed in international human rights law, which Canada has agreed to respect and promote.

Galloway points out that even if the government had a constitutional right not to admit any aliens, it does not follow that once it decides to do so, it can admit aliens according to any criteria or impose any conditions it chooses. As Goodwin-Gill points out,

a restriction or limitation that is otherwise permissible must not itself be imposed in a discriminatory manner, and even though a state may not be obliged to provide a benefit or entitlement, where it does so, it ought not to introduce discriminatory measures in its implementation.²⁴⁸

Thus, Galloway concludes that the rights enshrined in the *Canadian Charter of Rights and Freedoms* that are accorded to “all persons” should equally be accorded to those who participate in the immigration program.

The application of the Charter to persons seeking entry into Canada would afford them, in addition to protection from discrimination, protection from infringements on their life, liberty and security of the person, and from other rights enshrined in the Charter as the most fundamental to Canadian society. In addition to substantive guarantees, it would provide procedural guarantees and, finally, a cause of action in Canadian courts if those guarantees were not met. Galloway concludes:

Having taken the responsibility for the treatment of aliens, the government is committed to ensuring that the treatment is proper, much as the Good Samaritan who offers treatment to an injured party is held legally liable for his or her negligence, but is under no obligation to intervene in the first place.²⁴⁹

The Principle of Non-Discrimination in the Immigration Act

In addition to the protection to immigrants that may be afforded by the Charter if it applies directly, Parliament has clearly articulated its commitment to the principle of non-discrimination in the *Immigration Act* itself. Section 3 of the Act sets out the objectives and basic principles on which the immigration program is based. It states in section 3(f):

3. It is hereby declared that Canadian immigration policy and the rules and regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need...

(f) to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*.

The proposed new Act (Bill C-11) contains a similar (but improved) statement of this principle in section 3(3):

3(3). This Act is to be construed and applied in a manner that...

(d) ensures that any person seeking admission to Canada is subject to standards, policies and procedures consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination.

If Canadians subject to Canadian laws are protected by the rights guaranteed in the Charter, why should others subject to Canadian laws not also have the same protections?

Parliament has clearly articulated its commitment to the principle of non-discrimination in the *Immigration Act* itself.

²⁴⁸ Goodwin-Gill, supra, note 30 at 54. This very principle was affirmed by the Supreme Court of Canada in its decisions in *Vriend v Alberta*, [1998] 1 SCR 493 and *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

²⁴⁹ Galloway, supra, note 236 at 363.

Whether or not the Charter itself applies to strangers extraterritorially in their dealings with the Canadian government, it is clear that Parliament intended that the immigration process be conducted according to non-discriminatory principles. The conception of prohibited discrimination in the immigration process is to be understood the same way as it has been under the Charter. The remainder of this section will therefore briefly describe the protection from discrimination afforded under the *Canadian Charter of Rights and Freedoms*.

The Meaning of Discrimination in the Canadian Charter of Rights and Freedoms

Section 15 (1) of the Charter states that:

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

Not every distinction, however, will be considered unlawful discrimination. Goodwin-Gill defines unlawful discrimination as “some exclusion or restriction, privilege or preference, which has the effect of nullifying a particular right.”²⁵⁰ He further points out that:

The principle of non-discrimination places on those who would make distinctions in the recognition or protection of rights, the burden of showing that any particular status is a relevant basis for differentiation; that the distinction is implemented in pursuit of a reasonable aim or objective; that it is necessary, no alternative action plan being available; and that the discriminatory measures taken or contemplated are proportional to the end to be achieved.²⁵¹

This definition closely parallels the way in which Canadian courts have determined whether a particular government action constitutes discrimination under the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada’s approach to identifying discrimination is expressed in *Law v Canada (Minister of Employment and Immigration)*.²⁵²

- (1) Is there substantively differential treatment between the person and others on the basis of one or more personal characteristics, either because the law draws a formal distinction between the person and others, or because the law fails to take into account the person’s already disadvantaged position within Canadian society? (*differential treatment*)
- (2) Is that differential treatment based on one or more of the grounds that are either listed in the Charter as prohibited grounds of discrimination (race, national or ethnic origin, colour, religion, sex, age, disability) or are analogous to the listed grounds (eg, sexual orientation, marital status)? (*distinction on prohibited ground*)
- (3) Does the differential treatment discriminate in a substantive sense, contrary to the purpose of the Charter’s equality guarantee, the overriding concern of which is protecting and promoting human dignity by remedying such ills as prejudice, stereotyping and historical disadvantage? (*discrimination*)

²⁵⁰ *Supra*, note 30 at 59.

²⁵¹ *Ibid*, at 54.

²⁵² [1999] 1 SCR 497.

Once an action has been found to constitute discrimination, the question is whether that discrimination is unlawful. It is unlawful when it is not “demonstrably justified in a free and democratic society.”²⁵³ In *R v Oakes*,²⁵⁴ the Supreme Court of Canada stated that in order for a restriction or denial of benefit to be justified:

- First, the objective which the denial of benefit is designed to serve must be sufficiently pressing and substantial to warrant the overriding of a constitutionally protected right or freedom. (*important objective*)
- Second, the means chosen must be “carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective.”²⁵⁵ (*rational connection*)
- Third, if the means are rationally connected to the objective in question, they should impair as little as possible the right or freedom in question. (*minimal impairment*)
- Finally, “there must be a proportionality between the *effects* of the measures which are responsible for limiting the [freedom] and the objective which has been identified as of ‘sufficient importance’”²⁵⁶ (*proportionality*)

In *Law*, Iacobucci J indicated that

probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability to stereotyping, or prejudice experienced by the individual or group.²⁵⁷

HIV/AIDS has been called the “scapegoat disease of our era.”²⁵⁸ Because HIV and AIDS are associated with marginalized and stigmatized populations such as drug users, gay men, and prostitutes, people with HIV and AIDS have been subject to many kinds of discriminatory treatment.²⁵⁹ Whenever people with HIV are singled out for differential treatment, we must carefully examine whether those distinctions are justified.

This has been recognized in the interpretation of international human rights law, specifically in the context of HIV/AIDS. The UN’s International Guidelines on HIV/AIDS and Human Rights indicate that the settled interpretation of international human rights law reflects an approach essentially the same as the *Oakes* analysis under the Canadian Charter:

In order for restrictions on human rights to be legitimate, the State must establish that the restriction is [among other things] based on a legitimate interest, as defined in the provisions guaranteeing the rights, [and] proportional to that interest and constituting the least intrusive and least restrictive measure available and actually achieving that interest in a democratic society.²⁶⁰

The remainder of this paper, in examining whether HIV testing and exclusion are warranted, will examine how the principle of non-discrimination applies to immigration and refugee policy in relation to HIV/AIDS. This analysis, along with other considerations that have been identified throughout the paper, then informs the recommendations for Canadian policy presented at the end.

HIV/AIDS has been called the “scapegoat disease of our era.”

²⁵³ Charter, *supra*, note 231, s. 1.

²⁵⁴ [1986] SCR 103; 19 CRR 308.

²⁵⁵ *Ibid* at para 70.

²⁵⁶ *Ibid*.

²⁵⁷ *Law*, *supra*, note 252 at para 63.

²⁵⁸ Somerville, *supra*, note 227 at 893.

²⁵⁹ Johnson, *supra*, note 3 at 148. For a discussion, see de Bruyn T. *HIV/AIDS and Discrimination: A Discussion Paper*. Montréal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1998.

²⁶⁰ *International Guidelines*, *supra*, note 19 at para 82.

HIV-Related Entry Restrictions

Are HIV-Related Restrictions on Immigration to Protect Public Health Justified?

Restrictions on the movement of people with HIV/AIDS intended to control the domestic and international spread of HIV have been considered impractical, ineffective, wasteful, discriminatory, and scientifically and medically unfounded.

Most individuals and international organizations have opposed restrictions on the movement of people with HIV/AIDS intended to control the domestic and international spread of HIV. Such restrictions have been considered impractical, ineffective, wasteful, discriminatory, and scientifically and medically unfounded.²⁶¹

According to the United Nations International Guidelines on HIV/AIDS and Human Rights:

Public health is most often cited by States as a basis for restricting human rights in the context of HIV/IDS. Many such restrictions, however, infringe on the principle of non-discrimination, for example when HIV status is used as the basis for differential treatment with regard to access to ... travel ... and asylum....

There is no public health rationale for restricting liberty of movement or *choice of residence* on the grounds of HIV status. According to the current international health regulations, the only disease which requires a certificate for international travel is yellow fever [reference omitted]. Therefore, any restrictions on those rights based on suspected or real HIV-status alone, including HIV screening of international travellers, are discriminatory and cannot be justified by public health concerns.²⁶²

Jean-Yves Carlier summarizes the arguments supporting the position that restrictions introduced by states for reasons of public health are unfounded:

- States cannot in any event prevent their nationals from traveling and so avoid any risks attached to travel.
- Screening is not perfectly reliable, as a person can test seronegative when in fact he or she is in the process of developing the virus.
- A false sense of security is created within the population, which comes to think that AIDS is a “foreign” problem that can be solved by border controls.
- HIV/AIDS can be passed on only in specific circumstances and not by day-to-day contact.
- AIDS is already present in every country in the world.
- It is impossible to close frontiers effectively and permanently.
- Restrictions may lead people to enter a country clandestinely and, because of their clandestine status, not use preventative measures.
- Restricting travel is expensive, and funds should be used instead for education and promotion activities.²⁶³

Many, including academics and public health representatives, agree with this analysis. Somerville has pointed out that “it is totally irrational to exclude HIV-antibody-positive immigrants on the ground that they constitute a danger to public health or safety.”²⁶⁴ Decosas and Adrien agree that “HIV is well-established everywhere in the world, and attempts to halt its spread by controlling the movement of infected or potentially infected persons have proven futile and expensive besides causing considerable per-

²⁶¹ Gilmore et al, *supra*, note 21 at S225; Goodwin-Gill, *supra*, note 30.

²⁶² *International Guidelines*, *supra*, note 19 at 50, paras 83 and 105-106 [emphasis added].

²⁶³ Carlier, *supra*, note 171 at 211, para 549.

²⁶⁴ Somerville, *supra*, note 227 at 890.

sonal hardship.”²⁶⁵ The reasons for this position will be examined in greater detail in this section.

HIV Cannot Be Transmitted through Casual Contact

The most significant reason why persons with HIV are not a threat to public health is that HIV is not transmitted through casual contact. The exclusion of immigrants with HIV is therefore not necessary for the protection of local populations. HIV can be distinguished from airborne diseases such as tuberculosis that are transmitted by the simple presence of an infected individual. In addition, Goodwin-Gill points out that “HIV infection is not like certain psychopathic conditions in which the afflicted are *unable* to control their behaviour and for that reason constitute a potential danger to other members of society.”²⁶⁶

A country’s population can protect itself from the risk of HIV infection (either from new immigrants or from people who are already residents) by engaging in safe sex practices, by refraining from sharing injection equipment, and by ensuring that donated blood and plasma are carefully screened. The entry of people with HIV/AIDS creates no direct and unavoidable risk to the health of the general public.

Entry Restrictions to Prevent the Spread of HIV Are Likely to Be Ineffective

Rates of HIV in a country are unrelated to immigration

Decosas and Adrien point out the futility of trying to control rates of HIV by restricting immigration:

The virus may have entered the country in the body of a migrant or a traveler. It has, after all, the characteristics which allow it to slip through the tightest *cordon sanitaire*. But once in a country, the epidemic curve follows its own dynamic, which is soon independent of any fuel from abroad. Importation of HIV remains visible because infected foreigners capture public attention, but is only significant in epidemiological terms at the very beginning of the epidemic and has little influence on its course. We do not know all the reasons why adult HIV prevalence reaches 30% in some locations and only 0.1% in others, but we know that it is not related to the rate of importation of HIV.²⁶⁷

Attempts to exclude HIV-positive travelers will be ineffective

In addition, even if it were possible to control the rates of transmission of HIV by erecting border controls (which it is not), attempts to exclude HIV-positive travelers are unlikely to be effective for a number of reasons.

Gilmore et al point out that with all current screening methods, a certain number of persons who are in fact seropositive will be erroneously labeled negative.²⁶⁸ In addition, they note “the design of screening policies may arbitrarily, or by political, diplomatic, economic or other necessity, exempt some people or groups from screening.”²⁶⁹ In particular, states may not, under international law, exclude returning nationals who are HIV-infected.²⁷⁰

Somerville contends that

if we were thinking about potential transmission hours (the total number of hours during which conduct that could result in HIV transmission is engaged in) and opportunities, [immigrants] represent a miniscule proportion of the risk presented by the total number of people entering Canada each year.²⁷¹

Persons with HIV are not a threat to public health by virtue of their status because HIV is not transmitted through casual contact.

²⁶⁵ Decosas J, Adrien A. Migration and HIV. *AIDS* 1997; 11(Suppl A): S77-S84 at S77.

²⁶⁶ Goodwin-Gill, *supra*, note 30 at 64.

²⁶⁷ Decosas and Adrien, *supra*, note 265 at S77.

²⁶⁸ Gilmore et al, *supra*, note 21 at S227.

²⁶⁹ *Ibid*.

²⁷⁰ ICCPR, *supra*, note 133 at Art 12(4).

²⁷¹ Somerville, *supra*, note 227 at 890.

Resources can be better spent in preventing HIV risk behaviours than focusing on restricting the entry of people with HIV/AIDS at the border.

She goes on to point out:

If one considers one of the modes of transmission of HIV, sexual intercourse – especially casual sexual encounters – and looks at the likelihood of an infected person spreading HIV to other members of the population, this would appear to be far more likely with tourists and with business travellers than with immigrants, many of whom have families with young children and are seeking a new life, a home and work.²⁷²

The screening of all visitors, however, would be impossible in practical terms, and is likely to be undesirable in economic terms, as it could deter tourism. This was acknowledged by Minister Caplan when she said that “it is impossible to shrink wrap our borders.”²⁷³

False sense of security

Exclusion of immigrants with HIV as a way to protect public health denies society’s collective responsibility for HIV/AIDS by focusing on the HIV status of immigrants rather than the population’s behaviour. A number of authors have suggested that creating restrictive policies at the border, particularly when those policies profess to protect the public from disease, creates a false sense of security among the local population that counteracts efforts to educate the public about safe practices.²⁷⁴

Somerville and Wilson point out that entry restrictions often appeal to people’s need to distance and dissociate themselves from perceived sources of fear, such as disease, even when such measures are unnecessary.²⁷⁵ For example, during the cholera epidemic, demands from the public for quarantine overwhelmed medical experts’ assurances that the quarantine was an expensive and completely useless way to combat the disease.²⁷⁶ People may want to believe that they can be protected from HIV by excluding certain persons from the population and may begin to believe that their country is or will become “HIV free” because positive travelers are excluded. An unfortunate consequence of that belief is that risky behaviour might in fact be encouraged, and the spread of HIV increased.

Diversion of resources from national prevention efforts

Resources can be better spent in preventing HIV risk behaviours than focusing on restricting the entry of people with HIV/AIDS at the border. As mentioned above, the rates of HIV transmission in a country are tied to risk-producing activities, not immigration. The only way for an individual to guarantee that they will not contract HIV, and the best way for governments to reduce the spread of HIV and AIDS among their population, is by ensuring safe practices. As Gilmore et al have stated:

Since we do not know how effective exclusionary policies are at preventing HIV transmission, their justification is doubtful and would be unacceptable if national prevention programs were jeopardized or limited by such a policy. Even if the costs of testing are transferred to the traveler, administration of such policies and verification of results could require resources which might be better allocated to prevention efforts at home. These include education, which is essential to any HIV control program, as well as the availability for both nationals and travelers of condoms, clean injection equipment and voluntary HIV-antibody testing and blood donor screening.²⁷⁷

²⁷² Ibid.

²⁷³ Thompson, *supra*, note 51.

²⁷⁴ See, eg. Johnson, *supra*, note 3 at 161; Gilmore et al, *supra*, note 21.

²⁷⁵ Somerville & Wilson, *supra*, note 4 at 832.

²⁷⁶ Ibid at 792.

²⁷⁷ Gilmore et al, *supra*, note 21 at S228 (references omitted).

Excluding Immigrants with HIV on Public Health Grounds Is Unjust

Stigmatizes people with HIV/AIDS and immigrants

By claiming that immigrants with HIV are a threat to public health by virtue *only* of their HIV status and regardless of their behaviour, people with HIV will generally be stigmatized as dangers to public health and safety. The view rests on a false assumption that people with HIV/AIDS will engage in behaviour that will contribute to the spread of the virus. Not only does such a stigma inflict hardship on members of our society living with HIV, but it may also discourage members of the population from voluntarily choosing to be tested.

The view that immigrants with HIV are themselves a danger to public health and safety “may set a precedent that all HIV-infected people in Canada could be similarly characterized.”²⁷⁸ Given the stigma that people with HIV and AIDS already face in society, any policy that would worsen that stigma while providing uncertain (if any) benefit to the public must be avoided.

The exclusion of prospective immigrants with HIV on the ground that they represent a danger to public health also stigmatizes all immigrants, who are often viewed as threatening. For example, “Sweden’s ombudsman on ethnic discrimination found that citizens opposed to immigrants in general usually cloaked their prejudice by expressing it as a fear that immigrants might have some terrible, unknown disease that would be passed on to the citizens’ children.”²⁷⁹ Excluding immigrants with HIV as a means of combating the spread of the diseases would reinforce the view that the rates of HIV in the country are the “fault” of immigrants who “spread the disease.”

Causes personal hardship

There is no cure for HIV or AIDS at this time. As a result, persons who are excluded from a country on the ground that they represent a threat to public health are permanently excluded. In this respect, HIV can be distinguished from curable diseases such as syphilis.

There is mandatory testing and exclusion of those who test positive for syphilis in Canada and the US.²⁸⁰ This practice has been opposed in Canada²⁸¹ and in the United States, most notably by the US Secretary of State for Health and Human Services,²⁸² because neither disease can be transmitted by casual contact. However, while mandatory testing and exclusion of those who test positive are equally irrational with respect to both diseases, the consequence is far harsher for those with HIV than for those with syphilis.

While those with syphilis may join their families or pursue their goals in Canada following successful treatment, those with HIV unfortunately would never be able to enter the country following exclusion on public health grounds. Furthermore, the knowledge that HIV-positive persons are excluded from Canada may encourage families to leave HIV-positive family members behind, where they may suffer without care, treatment, and family support.

Constitutes unlawful discrimination

Singling out persons with HIV on the ground that they constitute a threat to public health is discriminatory, according to the test set out in *Law* described above. When persons with HIV are singled out for exclusion, they are denied the benefit of admission to Canada based on a personal characteristic, namely disability. The differential treatment is not demonstrably justified according to the test set out by the Supreme Court of Canada in *Oakes*.

²⁷⁸ Somerville, *supra*, note 227 at 891.

²⁷⁹ *Ibid* at 893 [reference omitted].

²⁸⁰ Goodwin-Gill, *supra*, note 30 at 62; see also Somerville & Wilson, *supra*, note 4 at 801.

²⁸¹ See Mickleburgh R. Stop syphilis tests for immigrants, panel urges. *Globe and Mail* 3 November 1992: A6, cited in Somerville & Wilson, *ibid*.

²⁸² See Goodwin-Gill, *supra*, note 30.

As a measure to protect the Canadian public, the exclusion of HIV-positive immigrants can be characterized as “arbitrary, unfair, and based upon irrational considerations.”

Generalizations and estimations of the conduct of populations may be useful for tracking and explaining broad patterns of infectious diseases. But such assumptions have no place in immigration policy, which should treat applicants with respect and dignity, as individuals.

- The ostensible *objective* of the exclusion is to protect society from threats to public health in the form of contagious diseases. That is an important objective.
- However, it is arguable the measure of testing all immigrants for HIV and automatically excluding all those known to be HIV-positive is *not rationally connected* to the objective. Persons with HIV are not a threat to public health simply because they are HIV-positive, and exclusion of immigrants with HIV will not prevent the spread of HIV domestically. The exclusion of all people with HIV may prevent the transmission of the disease from a given individual to another, so there could conceivably be some marginal benefit in a relatively small number of instances. However, the “rational connection” portion of the *Oakes* test requires that the measure be “carefully designed to meet the objective” of protecting the Canadian public from contagious diseases. By fostering a false sense of security and by undermining people’s responsibility for protecting themselves, by singling out immigrants in a manner that obscures other potential sources of exposure to HIV, the measure may indeed achieve the very opposite objective. In that sense, as a measure to protect the Canadian public, the exclusion of HIV-positive immigrants can be characterized as “arbitrary, unfair, and based upon irrational considerations.”
- In addition, even if excluding all immigrants with HIV were an effective way to prevent spread of the virus within the population, it is *not the way that least impairs* the right to be free from discrimination. Encouraging all individuals to undergo voluntary testing and to avoid risky behaviour is a less impairing and far more effective way to protect members of the public from contracting HIV.

Not only is the exclusion of immigrants with HIV based solely on their HIV status unrelated to any public health objective; it is premised on assumptions with respect to individual behaviour. That is, it is presumed that persons with HIV will engage in activities that will contribute to the spread of the virus. This constitutes the kind of stereotypical reasoning that frequently informs unjustified discrimination.²⁸³ Many would be excluded even though they would not engage in exposure-producing activities with the nationals of the excluding country.

It must be noted that epidemiological approaches such as the Montebello Process do not serve as reasonable justifications for testing and excluding persons with particular diseases under immigration law, particularly when that exclusion would be permanent. The Montebello Process is itself based on generalizations. Generalizations and estimations of the conduct of populations may be useful for tracking and explaining broad patterns of infectious diseases. However, they give rise to statements such as the one made by a Health Canada official that “on average, a migrant with an infectious disease like HIV transmits the condition to at least one Canadian resident.”²⁸⁴ Such assumptions have no place in immigration policy, which should treat applicants with respect and dignity, as individuals. We do not say that “on average” members of certain races or from certain countries are more likely to become involved in criminal activities, and use this as a justification for excluding all individuals who belong to those races or who come from those countries. A fair immigration policy must provide a rational, individualized explanation for the treatment of applicants.

²⁸³ See, eg, *Miron v Trudel*, [1995] 2 SCR 418.

²⁸⁴ Papp, *supra*, note 10.

- Overall, the harmful effects of stigma and personal hardship that would be visited upon all would-be immigrants who are HIV-positive by a policy of automatically excluding all of them on public health grounds would be grossly disproportionate to any benefit, marginal if any, to be gained in protecting the public health.

Are Restrictions on Immigration of People with HIV to Protect the Public Purse Justified?

The issue of whether states should deny permanent residence to people with HIV on the ground that they are likely to place an excessive burden on health or social services is complex. It is a reasonable criterion for immigration that the individual be expected to contribute to the society where they seek permanent residence. Indeed, people with HIV can be expected to place demands on health or social services, as do other immigrants and current citizens and residents. But are these demands “excessive”? And is it justified to presume that *all* people with HIV will place “excessive demands” on health or social services?

The UN’s International Guidelines on HIV/AIDS and Human Rights state:

Where States prohibit people living with HIV/AIDS from longer-term residency due to concerns about economic costs, States should not single out HIV/AIDS, as opposed to comparable conditions, for such treatment and should establish that the costs would indeed be incurred in the case of the individual alien seeking residency. In considering entry applications, humanitarian concerns, such as family reunification and the need for asylum, should outweigh economic considerations.²⁸⁵

Not All Persons with HIV Will Place “Excessive” Demands on Health or Social Services

It is difficult to determine what kinds of demands constitute “excessive” demands. Somerville points out that “all of us, including immigrants, will at one time or another place some demand on the health care system. Whether the cost of that demand is excessive, assuming the cost of the demand is a relevant criterion, is a value judgment.”²⁸⁶ Indeed, as described above, neither the current *Immigration Act* or regulations, nor the courts, have offered any clear standard for making this assessment. Despite this, on at least three occasions, the Immigration Appeal Division of the Immigration and Refugee Board has rejected a challenge that this provision is void because it is unconstitutionally vague.²⁸⁷

Current Canadian immigration policy holds that demands are “excessive” when they exceed the cost of health care for the average Canadian.²⁸⁸ This is problematic in that it presumes that any Canadian who draws more heavily than the average on the health-care system is imposing an “excessive” burden.

Citizenship and Immigration Canada plans to provide a clear definition of “excessive demand” in the regulations that will accompany Bill C-11. As mentioned above, it plans to define excessive demand “in relation to a 5-year window unless reasonable evidence indicates that significant longer-term costs are likely to occur,” in which cases “the assessment window may be extended, though rarely beyond ten years.”²⁸⁹ “Costs would be compared to the average annual cost of health and social services for Canadians (currently \$2800 per annum), multiplied by the number of years for the assessment period.”²⁹⁰ At the time of writing, no further details were known, and it was thus

Current Canadian immigration policy holds that demands are “excessive” when they exceed the cost of health care for the average Canadian.

²⁸⁵ *Supra*, note 19 at 50, para 106.

²⁸⁶ Somerville, *supra*, note 227 at 891.

²⁸⁷ *Natt v Canada (Minister of Citizenship and Immigration)*, [1997] IADD No 1143 (QL); *Grewal v Canada (Minister of Citizenship and Immigration)*, [1997] IADD No 1181 (QL); *Renthey v Canada (Minister of Citizenship and Immigration)*, [1997] IADD No 1559.

²⁸⁸ See *Jim*, *supra*, note 69.

²⁸⁹ Citizenship and Immigration Canada. Bill C-11. Explanation of Proposed Regulations, *supra*, note 192.

²⁹⁰ *Ibid.*

Current Canadian policy only considers the “demands” a potential immigrant might make on health or social services systems, and ignores their likely financial and other contributions to Canada.

not clear how “excessive” will be defined.

However, what is known is cause of great concern for persons living with HIV or AIDS and, more generally, for all persons with disabilities or chronic, life-threatening diseases. Because of the difficulty in predicting costs far into the future, an applicant’s projected demands on health or social services should not be assessed over a period of up to ten years. Furthermore, what is being proposed differs from the definitions of “excessive demand” suggested by international organizations such as the United Nations and the World Health Organization. The World Health Organization, for example, has stated that when a state considers excluding a person on “excessive cost” grounds, it should do so only if “the cost of the financial support exceeds the benefits that are expected from the traveller.”²⁹¹ If the goal of any exclusion on “excessive demand” grounds is indeed to protect the public health-care system, then contributions by each immigrant to the domestic economy and hence to the health-care system must be also taken into account. Current and proposed future Canadian policy only considers the “demands” side of the equation, ignoring the “contributions” side.

Yet, as Hoffmaster and Schrecker point out, the criteria for acceptance as an immigrant

are designed to ensure that the individuals admitted will make financial contributions to Canadian society through taxes and premiums, in addition to making claims on tax-supported services. Determinations of “excessive demand” therefore require a comparison of potential benefits and costs. Moreover ... that comparative judgment must be made on an individual, not a class, basis. The relevant issue is whether *this particular* immigrant would contribute more than he or she would cost.²⁹²

Many immigrants with HIV will make a greater net financial contribution to the economy of the state to which they are destined than the costs they will impose on its health-care system. “Because of new treatments, people with HIV lead longer and potentially very productive lives during which they can contribute a lot to ... society.”²⁹³ While it is true that these treatments can be expensive, there will be many cases in which the economic contribution will be greater than the cost of those treatments, particularly since the cost of treatment will vary from person to person.

Furthermore, people with HIV can make important non-economic contributions to society that should be considered when determining whether the costs they will impose on society are “excessive.” There is no question that it is difficult to measure non-economic contributions, as these cannot be quantified. However, this does not mean it is impossible for such factors to be considered. Canadian courts and tribunals are called upon daily to interpret qualitative requirements or factors set out in statutes, and to weigh non-quantifiable evidence in the balance in attempting to do justice. In the context of immigration and refugee cases, they currently already engage in such a task when assessing humanitarian and compassionate considerations for landing an otherwise inadmissible person, or when assessing the risk of persecution to which a refugee claimant may be subjected if removed from Canada. A list of factors to be considered in determining whether the costs required for care of a particular individual would be “excessive” should be developed. This list should include, among other factors: (1) expected contributions to domestic work supporting a household, caring for dependents

²⁹¹ Carlier, *supra*, note 171, summarizing the position of the WHO.

²⁹² Hoffmaster B, Schrecker T. *An Ethical Analysis of the Mandatory Exclusion of Refugees and Immigrants Who Test HIV-Positive*. Halifax: The Names Project, 2000, at 19 (available at www.aidslaw.ca/Maincontent/issues/immigration.htm).

²⁹³ Jürgens, *supra*, note 2 at 206.

(children, elders, family member with disability or special needs); (2) expected contributions to community services; (3) meeting a particular need for skilled/trained workers in a particular area (a factor already considered for independent applicants); (4) expected contribution to Canada's educational, scientific, or cultural life; and (5) compassionate and humanitarian factors, such as the need for reunification with loved ones and the suffering that could result from being returned to the applicant's country of origin.

Somerville and Wilson have noted that applying the "excessive demand" criterion for exclusion, without taking other considerations into account, would

indicate an unacceptable attitude toward migrants as persons – in that it views them only in terms of the economic benefit they offer. In addition, it places only a monetary value on their worth – in that it states that they do not merit the cost they would present to society.²⁹⁴

In addition, as Hoffmaster and Schrecker have said, "[r]egarding prospective immigrants solely in economic terms and therefore as potentially substitutable (e.g., an applicant with a medical condition that could be expensive to manage can be replaced by a more cost-effective one who does not have such a condition) denies them inherent moral dignity and status as persons."²⁹⁵

Finally, Hoffmaster and Schrecker remark that, although

the financial pressures being exerted on Canada's health care systems make every avenue for controlling costs appealing, it is not clear how or whether those pressures would be eased by barring prospective immigrants who are HIV-positive ...

The overall demand for health services in Canada is driven by much bigger and more powerful forces, including the aging of the population; the ever-expanding array of expensive pharmaceutical and technological interventions; the failure of health promotion efforts to have significant impacts on behaviour such as smoking; and the expectations of the public and health care professionals. Genuine attempts to address the perceived health care crisis should be directed at those forces, and not deflected by worries about the "excessive demands" that immigrants might impose on health care services.²⁹⁶

Routinely Excluding People with HIV on the Grounds That They Will Place Excessive Demands on Health or Social Services Would Be Unjust

Stigma

The assumption that all immigrants with HIV will excessively burden the public purse reinforces views of immigrants as abusers of the social welfare system,²⁹⁷ and of persons with HIV as people who are unable to contribute to society.

Parity with Other Diseases

If a country chooses to institute mandatory testing and exclusion policies on grounds of economic cost to public health or social services, it must do so in a non-discriminatory manner. In March 2001, the Minister of Citizenship and Immigration stated that she would not accept testing for HIV/AIDS if it was

"The financial pressures being exerted on Canada's health care systems make every avenue for controlling costs appealing, [but] it is not clear how or whether those pressures would be eased by barring prospective immigrants who are HIV-positive."

– Hoffmaster & Schrecker, 2000

²⁹⁴ Somerville & Wilson, *supra*, note 4, at 831.

²⁹⁵ *Supra*, note 292, at 23.

²⁹⁶ *Ibid.*, at 20.

With respect to the criterion of “excessive demand” on health or social services, how different is HIV-positive status from other medical conditions?

conducted in a discriminatory manner, and that she opposed the *mandatory* exclusion of those that test positive.²⁹⁸ One way in which testing for HIV would be done in a discriminatory fashion is to single it out for screening as opposed to other medical conditions that risk imposing a similar or even greater burden on the public purse.

For example, one study that may provide a useful example despite the fact that it is now somewhat dated, found that the estimated cost of caring for coronary heart diseases in the five-year period immediately following diagnosis is in fact greater than the cost of medical care incurred by an individual who tests positive for HIV.²⁹⁹ While this study predated the advent of protease inhibitors as part of the standard of care in Canada for people living with HIV/AIDS, there have no doubt also been corresponding changes to the standard treatment for heart disease, including new, expensive drugs. The point to be noted is that costs for treatment are variable over time, not just with treatment of HIV/AIDS but of other medical conditions as well. This is due not only to medical advances, but also to marketplace considerations that affect various components of the cost of treatment (eg, prices of drugs). This highlights the difficulty of making a fair assessment or comparison that justifies singling out one disease condition from others in excluding would-be immigrants on “excessive demand” grounds.

Generally, Hoffmaster and Schrecker ask:

With respect to the criterion of “excessive demand” on health or social services, how different is HIV-positive status from other medical conditions?³⁰⁰

They point out that the list of potentially costly medical conditions and risk factors for future illness, such as tobacco consumption and alcohol abuse, could easily be extended. They conclude that consistency and fairness demand that they be treated the same.³⁰¹

Slippery slope to further exclusion

This leads us to the question of how far we want to go in excluding those who can be expected to use health or social services. Should we hold persons over 50 years of age medically inadmissible because they are more likely to need health or social services? Should we use genetic screening tools to predict who might develop expensive genetic conditions?

As Hoffmeister and Schrecker point out:

If mandatory testing of immigrant were introduced, and if parity with other diseases were accepted, the slide down an ethically problematic slippery slope could be impossible to stop. The internationally funded and conducted Human Genome Project, which will map the entire human genome, is well ahead of schedule. One outcome of all the genetic information being produced will be the equally rapid development of an extensive set of genetic screening tools. The ability of medical science to identify individuals who are more likely than the population as a whole to develop serious or lethal diseases will be enormously enhanced. It is already possible to identify carriers of a limited number of hereditary conditions, to determine the probability of transmission to offspring, and (in a much smaller number of cases) to screen for individual susceptibility. Testing for Huntington’s disease is an example of the last category. The

²⁹⁷ Somerville & Wilson, *supra*, note 4 at 798.

²⁹⁸ See *supra*, note 12.

²⁹⁹ Zowall H et al. Economic impact of HIV infection and coronary heart disease in immigrants to Canada. *Canadian Medical Association Journal* 1992; 147: 1163-1172.

³⁰⁰ *Supra*, note 292, at 22.

³⁰¹ *Ibid*.

recent commercialization of a test for the BRCA 1 mutation, which confers high hereditary susceptibility to breast cancer, is almost certainly a harbinger of a much larger range of genetic tests.

Would the “excessive demand” criterion justify expanding the medical screening of immigrants to include such tests? How might that criterion be interpreted as more and more tests become readily available? What apprehensions about the medical costs of treating the offspring of prospective immigrants who are carriers of a particular condition might lead to blanket exclusions? Are we comfortable with a future in which, for example, prospective immigrants at high hereditary risk for breast cancer would be excluded based on the “excessive demand” criterion? After all, prospective immigrants are not our compatriots, and it is easy to imagine the subtle and covert introduction of “biological fitness” as a *de facto* test for admission to Canada.³⁰²

Blanket exclusion would be discriminatory

In addition, as has been noted, Canada’s courts have already ruled in the 1992 *Deol* case (widely cited in subsequent cases, including the 1995 *Litt* case) that it is legally wrong to automatically assume, based on a person’s medical condition, that they will place an excessive demand on health or social services, and that a fuller, individual assessment is required.³⁰³ Indeed, in the recent *Mo* case, the court reiterated the point that “merely suffering from a disease or disorder does not render a person inadmissible: it is the effect of the disease that is critical to the determination.”³⁰⁴

Thus, any judgment about “excessive demand” has to be individualized. Imposing a blanket exclusion of all persons with HIV on the *assumption* that they would *all* place excessive demands on health or social services would constitute an unjustified generalization, and discriminate against those who would not place excessive demands on health or social services. Such a blanket denial of the benefit of residence to all people who are HIV-positive would likely not pass Charter scrutiny under the *Oakes* test outlined above.

- The objective of protecting the Canadian health care and social services systems from “excessive” demands is an important objective.
- However, a policy of excluding all people living with HIV/AIDS would not meet the *rational connection* requirement because it would not be “carefully designed to meet the objective.” As explained above, not all HIV-positive people place an “excessive” demand on the health or social services systems. In order to meet this constitutional requirement, a policy would need to take into account the costs that each applicant would be expected to impose on health or social services, given all their personal circumstances.
- A policy of exclusion of all HIV-positive applicants would also fail the requirement of *minimal impairment* of Charter equality rights in pursuing the objective of preventing excessive demand. Those HIV-positive applicants who would be excluded would have been discriminated against because of their HIV-positive status by being denied landing – and all the associated benefits – even if they would not have placed an “excessive” demand on Canada’s health or social services systems. This would certainly be more than a minimal impairment of equality rights.

³⁰² *Ibid* at 22-23.

³⁰³ *Deol*, *supra*, note 33; *Litt*, *supra*, note 33.

³⁰⁴ *Mo*, *supra*, note 69 at para 37. It should be noted that there is (at least) one reported case in which an adjudicator of the Immigration Appeal Division, with very little analysis, dismissed the argument that it is unconstitutional disability discrimination to automatically determine that a disability will create an excessive demand. The adjudicator was “not satisfied that the Charter is applicable to the instant case, as at issue is the medical status and potential admissibility of a non-Canadian living outside Canada”: *Sidhu v Canada (Minister of Citizenship and Immigration)*, [1997] IADD No 1064 (OL) at para 17. Given the many other cases that confirmed the requirement of looking at the probable link between a health condition and the demand for services, the discussion above about the complexity of whether or not the Charter could govern the application of Canadian immigration law, and the lack of any substantive analysis in this case, it is properly seen as an aberration and likely bad law.

- Finally, the harmful effects of a policy of exclusion of all HIV-positive applicants, such as the stigma and significant personal hardship described above, would be out of proportion to any savings to the health or social services systems resulting from excluding that subset who would place an “excessive” demand on those systems.

Is Mandatory HIV Testing of Immigrants and Refugees Justified?

Arguments Advanced in Favour of Mandatory Testing

Mandatory testing can only be justified if it serves a worthy goal. Those who advocate mandatory testing justify it on three major grounds.

First, they argue that it would protect public health by identifying those who are HIV-positive in order that they may be excluded from Canada and prevented from contributing to the spread of HIV in Canada. However, as has been demonstrated above,³⁰⁵ exclusion of immigrants with HIV on public health grounds is unjustified. This means that mandatory testing to serve the purpose of exclusion on public health grounds is equally unjustified.

Second, some argue that, even if those who test HIV-positive are not excluded from immigrating to Canada on public health grounds, testing all prospective immigrants for HIV, and providing counseling, would protect the public health. They argue that immigrants who know that they are HIV-positive and have received counseling would be less likely to engage in risky behaviours. However, for the same reasons that mandatory testing for the purpose of excluding all HIV-positive prospective immigrants is unjustified, mandatory testing for the purpose of providing counseling and other risk-reducing interventions to those testing positive is also unjustified. The ostensible objective of mandatory testing of all immigrants is to reduce the threat of HIV transmission from immigrants to Canadians. This is an important objective. However, it is arguable the measure of testing all immigrants for HIV is not rationally connected to the objective. Persons with HIV are not a threat to public health simply because they are HIV-positive. Mandatory testing of all prospective immigrants and providing counseling and other risk-reducing interventions may prevent the transmission of the disease from a given individual to another, so there could conceivably be some marginal benefit in a relatively small number of instances. However, by fostering a false sense of security and by undermining people’s responsibility for protecting themselves, by singling out immigrants for mandatory testing in a manner that obscures other potential sources of exposure to HIV, the measure may indeed achieve the very opposite of its objective of preventing infection among Canadians. In that sense, as a measure to protect the Canadian public, mandatory testing of all prospective immigrants can be characterized as “arbitrary, unfair, and based upon irrational considerations.” In addition, even if mandatory testing of all immigrants were an effective way to prevent spread of HIV within the population, it is *not the way that least impairs* the right to be free from discrimination. Encouraging all individuals to undergo voluntary testing and to avoid risky behaviour is a less impairing and far more effective way to protect members of the public from contracting HIV. This means that mandatory HIV testing for this purpose is also unjustified.

Finally, those in favour of mandatory HIV testing argue that it would allow for the identification and exclusion of those who might pose an excessive burden on the health-care system. As shown above,³⁰⁶ excluding all

Mandatory testing of all prospective immigrants can be characterized as arbitrary, unfair, and based upon irrational considerations.

³⁰⁵ Supra, at notes 261 ff.

³⁰⁶ See supra, at pages 57-59

immigrants with HIV from immigrating to Canada on “excessive demand” grounds cannot be justified. It would fail to take into consideration the individual circumstances of each immigrant, when both our immigration tradition and fairness require that each prospective immigrant be assessed individually. Many immigrants living with HIV would make contributions to Canadian society that would far outweigh the cost they would impose on the health-care system. Mandatory HIV testing for the purpose of excluding all those testing HIV positive on excessive cost grounds could therefore also not be justified. However, if the goal simply is to identify HIV-positive immigrants, so that an individual assessment of costs (and contributions) can be undertaken, a mandatory HIV testing program could reach this goal. However, there are several drawbacks of a program of mandatory HIV testing of prospective immigrants.

Drawbacks to Mandatory Testing

Discrimination

There is concern that a policy of mandatory HIV testing would unfairly single out HIV for testing when there are other conditions that can be as expensive or more expensive than HIV that are not tested for.

Stigma

If immigrants were required to submit to mandatory HIV testing, they would be the only population in Canada that would be statutorily required to do so. This would stigmatize all prospective immigrants and those already living in Canada, who would be perceived as a group with high rates of HIV. “It would appeal to the deepest prejudices of people opposed to anyone they perceive as unlike themselves, of whom immigrants are often considered to be a prime example.”³⁰⁷ It would also stigmatize persons with HIV, reinforcing the view that persons with HIV must be targeted and identified, are dangerous, are to be blamed for the transmission of the virus, and are a burden to society.

Slippery slope to HIV testing of other populations

Most Canadians are protected from involuntary testing under the *Canadian Charter of Rights and Freedoms*.³⁰⁸ However, by endorsing the mandatory testing of all prospective immigrants, the government might encourage calls for mandatory testing of other populations, such as people in health-care professions, prisoners, or sex workers.

Slippery slope to implementing other tests

More and more tests, particularly genetic screening tools, are becoming available that “enable us, if we wish to use them, to predict with greater or lesser accuracy when and from which disease a person will likely die.”³⁰⁹ If we mandate HIV testing of immigrants, are such genetic screening tests also justified?

Cost

The costs of large-scale testing could approach or even outweigh the savings generated from excluding HIV-positive immigrants on excessive-cost grounds. In the United States, for example, US\$1 million was spent between 1990 and 1996 to detect three confirmed HIV-positive cases among all the Russian immigrants who were screened.³¹⁰

Humanitarian concerns

Mandatory HIV testing gives rise to a number of humanitarian concerns with respect to prospective immigrants.

If we mandate HIV testing of immigrants, will we soon mandate genetic screening tests?

³⁰⁷ Somerville, *supra*, note 227 at 893.

³⁰⁸ Stolz L, Shap L. *HIV Testing and Pregnancy: Medical and Legal Parameters of the Policy Debate*. Ottawa: Health Canada, 1999.

³⁰⁹ Somerville, *supra*, note 227 at 892.

³¹⁰ *AIDS Weekly* 8 September 1997.

If Canada is going to require that applicants take an HIV test, it should ensure that the testing it requires be done according to Canadian standards.

First, because testing is carried out in the country of origin, it is subject to that country's rules on consent, and pre- and post-test counseling.³¹¹ According to the International Guidelines on HIV/AIDS and Human Rights, "public health legislation should ensure that HIV testing of individuals should only be performed with the specific informed consent of the individual."³¹² The doctrine of informed consent to medical procedures has been repeatedly affirmed by the Supreme Court of Canada.³¹³ While there are slightly varying definitions of informed consent articulated in various pieces of legislation,³¹⁴ they are generally reflective of the basic principles enunciated by an Expert Working Group of the Canadian Medical Association in *Counselling Guidelines for HIV Testing*, which help define the legal standard of care that health professionals should exercise in doing HIV testing:

- Informed consent cannot be implied or presumed;
- Obtaining informed consent "involves education, disclosing advantages and disadvantages of testing for HIV, listening, answering questions and seeking permission to proceed through each step of counselling and testing"; and
- To obtain informed consent for HIV, a patient must be deemed competent, must understand the purposes, risks, harms and benefits of being tested, as well as those of not being tested, and his/her consent must be voluntary.³¹⁵

Standards of consent vary from country to country, and by requiring mandatory HIV testing from all prospective immigrants, Canada may be requiring testing that is in fact not consensual by Canadian or international standards. In addition, many countries from which prospective immigrants apply provide no or inadequate post-test counseling, which "may be even more important than pre-test counselling."³¹⁶ Post-test counseling is necessary to explain the possibility of false-negative results due to the "window period" between HIV exposure and the time when tests can detect HIV antibodies, as well as to explain care and treatment options and risk-reduction strategies.

If Canada is going to require that applicants take an HIV test, it should ensure that the testing it requires be done according to Canadian standards, whether or not the tested immigrant is eventually permitted to emigrate to Canada. "In certain circumstances, to test individuals without also offering the possibility of treatment or counselling will likely constitute cruel or inhuman or degrading treatment, especially if such testing is not necessary, is not related to a legitimate objective, or is out of proportion to the aim sought to be realized."³¹⁷

Second, people who live in countries with harsh, coercive, or punitive policies on HIV/AIDS and who want to come to Canada would have to make a difficult decision. They "would be forced to choose between losing any opportunity to do this and taking a risk of what could happen to them in their country of origin if they were rejected as immigrants on the basis of HIV antibody positivity."³¹⁸ They could pay a high price in their countries of origin for their dream of a better life in Canada.³¹⁹

Third, some might be excluded based on false-positive results in countries where they may not be offered confirmatory tests. Somerville has observed:

After having been tested [only once], some people may live their lives believing that they have a life-threatening illness

³¹¹ See *Medical Officers' Handbook*, supra, note 57.

³¹² *International Guidelines*, supra, note 19 at 12.

³¹³ *Reibl v Hughes*, [1980] 2 SCR 880; *Hopp v Lepp*, [1980] 2 SCR 192.

³¹⁴ Eg, *Health Care Consent Act, 1996*, SO 1996, c 2; *Health Care (Consent) and Care Facility (Admission) Act*, SBC 1993, c 48; *Hospitals Act*, RSNS 1989, c 208; *Health Act*, SYT 1989-90, c 36; Art 11 CCQ; *Health Care Directives Act*, SM 1992, c 33; *Dependant Adults Act*, SS 1989-90, c D-25.1.

³¹⁵ Canadian Medical Association. *Counselling Guidelines for HIV Testing*. Ottawa: The Association, 1995 at 5-6.

³¹⁶ Jürgens, supra, note 2 at 81.

³¹⁷ Goodwin-Gill, supra, note 30 at 64.

³¹⁸ Somerville, supra, note 227, at 893.

³¹⁹ Hoffmaster & Schrecker, supra, note 292, at 21.

when this is not the case. We would not want to add to the numbers of such people; therefore, if Canada were to require HIV antibody testing of prospective immigrants it would have an ethical obligation to make available confirmatory testing facilities.³²⁰

An ethical case for not testing

Finally, Somerville makes a case for the ethical values that a policy of not testing immigrants would promote:

Canada could provide an important, indeed critical, example to the rest of the world if it is prepared to state that the potential costs, in economic terms, to care for people admitted as immigrants who later develop HIV-related illness are more than compensated for by the values – humaneness, humanitarian concern and respect for human rights – that we wish to uphold in *choosing* not to test asymptomatic prospective immigrants for HIV antibodies ... [T]he benefits accruing to Canada from this approach and the example that Canada would set to the rest of the world in adopting this position ... far outweigh any cost to Canada in terms of the economic burden that asymptomatic HIV-antibody-positive immigrants would impose on our health care system.³²¹

As Hoffmaster and Schrecker put it,

[m]aking that case to committed realists is, of course, difficult because moral values are not hard enough for their tough-minded, self-interested approach. Somerville's exhortation does, however, exactly what morality is supposed to do. It gets people to think in terms that go beyond self-interest. Realists may reject Somerville's call, but then their rejection should be seen for what it is – a dismissal of the very claim of morality.³²²

Somerville makes a case for the ethical values that a policy of not testing immigrants would promote.

³²⁰ Somerville, *supra*, note 227 at 893.

³²¹ *Ibid* at 894.

³²² *Supra*, note 292 at 24.



Conclusion and Recommendations

Migrants are the perfect target group for politicians who wish to be seen as strong and effective leaders, to be “doing something” and not afraid to take “tough” measures.

Whatever general policy is adopted, international standards are most likely to be met where individuals are personally interviewed; where potential elements justifying denial or admission are evaluated clearly; and where decisions are based on the available evidence.³²³

Immigrants and people with HIV/AIDS are both groups that have historically suffered and currently suffer from stigma and discrimination. HIV continues to be associated with marginalized populations such as prostitutes, men who have sex with men, and drug users.³²⁴ Immigrants are often perceived as abusers of the social welfare system, as criminals, and as carriers of disease.³²⁵

Both groups are easy targets for legislation designed to assuage the public’s fears about disease. Politicians can appeal to people’s need to dissociate themselves from disease and from persons with disease by imposing exclusionary measures, even when those measures are irrational. Somerville and Wilson point out that:

Migrants are the perfect target group for politicians who wish to be seen as strong and effective leaders, to be “doing something” and not afraid to take “tough” measures.... At the same time, politicians are politically safe in excluding non-nationals, including on the basis of HIV status, because the persons most harmed by this (i.e., the persons excluded) do not have the right to vote, and therefore cannot retaliate against these politicians.³²⁶

³²³ Goodwin-Gill, *supra*, note 30 at 66.

³²⁴ See de Bruyn, *supra*, note 259.

³²⁵ Somerville & Wilson, *supra*, note 4 at 798.

³²⁶ *Ibid.*

CONCLUSION AND RECOMMENDATIONS

There is no reason to require all prospective immigrants to undergo HIV testing. Allowing people with HIV/AIDS into Canada would not endanger the health and safety of Canadians, nor, in many cases, would it place an excessive burden on the health-care system. Any program of mandatory testing, and any blanket exclusion of people with HIV, is discriminatory and premised on stereotypical assumptions. Canada's immigration program should recognize this. Determinations of admissibility in the immigration context ought therefore to be taken solely on the basis of information relating to the personal circumstances of the individual, not on the basis of assumptions having no scientific or other foundation.³²⁷

Canadian immigration legislation needs to be drafted in a manner that best protects applicants against all forms of discrimination and unfair treatment. The implementation of that legislation, whether through regulations, policy directives, or otherwise, must be equally protective of the fundamental rights and freedoms reflected in the Charter, which should be guaranteed to all those who come in contact with the Canadian legal system.

The Medical Inadmissibility Provision

Stereotypes and assumptions about persons with HIV/AIDS should not form the basis of Canadian immigration law and policy; the provisions of our immigration law must always be worded to clearly require individualized assessments as a matter of basic fairness.

It is well established that the medical inadmissibility provision in the current *Immigration Act* requires a case-by-case analysis that takes into account the individual circumstances of each applicant. It does not allow for blanket exclusions of those with HIV on public health grounds: any assumption that a given individual with HIV *would* engage in such behaviours that risk the public's health, in addition to being discriminatory, is mere speculation. Under the current legislation, exclusion of a person with HIV on public health grounds is only justified when it is demonstrated that the person will in fact be *likely* to engage in risk-producing behaviours. The exclusion based on "excessive demands" also requires an individualized, case-by-case assessment under the current legislation; the mere fact that a person has a particular illness or disability should not suffice to make that person medically inadmissible on excessive-cost grounds.

The draft wording of the proposed *Immigration and Refugee Protection Act*, with its simple reference to "health condition," could be (mis)interpreted as allowing the exclusion of a person as a danger to public health or on excessive-cost grounds simply because of their condition. However, this should not happen, in light of the principles articulated in the case law interpreting the current provision and the stated intent of the government with respect to its new provision. But erring on the side of caution is warranted.

Recommendation 1

Citizenship and Immigration Canada must ensure, including through clear written policy direction to all medical and immigration/visa officers, that any assessment of medical (in)admissibility (if required) is done on an individual, case-by-case assessment, under existing or new legislation.

A decision to include an HIV test in the medical examination that all prospective immigrants and certain visitors have to undergo should be made only if clinically indicated.

³²⁷ Goodwin-Gill, *supra*, note 30 at 64.

Medical Examinations and HIV Testing

For the many reasons discussed in this report, Citizenship and Immigration Canada should not introduce mandatory HIV testing of prospective immigrants and of those visitors required to undergo a medical examination. Rather, a decision to include an HIV test in the medical examination that all prospective immigrants and certain visitors have to undergo should be made only if clinically indicated.³²⁸

Whenever HIV testing is undertaken, Citizenship and Immigration Canada should ensure that the standards of consent and pre- and post-test counseling conform with those in Canada.³²⁹ As discussed above, testing without providing adequate pre-and post-test counseling can constitute cruel, inhuman, or degrading treatment. Canada has at least a moral responsibility to ensure that examining physicians appointed by Canada do HIV testing only with informed consent, and with adequate pre- and post-test counseling.

Even if mandatory HIV testing of prospective immigrants was introduced, Citizenship and Immigration Canada should not require mandatory HIV testing of refugees in Canada or at Canada's borders. Canada is precluded under its international obligations from turning away a Convention refugee. Therefore, Convention refugees in Canada or at its borders have the right to remain in Canada no matter what their medical condition is – they could not be excluded on the basis of a positive test result. Because of this, because HIV testing is not required to protect the health of Canadians, and because refugees often are in a very stressful situation, they should not have to undergo HIV testing and the added stress related to it unless they voluntarily choose to be tested. Therefore, all refugees should receive counseling about HIV and should be offered the HIV test, but should not be forced to take the test. HIV testing should be voluntary also for Convention refugees outside Canada. Even though Canada is not required under international law to accept all Convention refugees who are outside Canada, it is submitted that once Canada recognizes that a Convention refugee is in need of protection, that person should not have to undergo mandatory HIV testing, but should receive counseling about HIV and should be offered the test, but not forced to take it.

Even if mandatory HIV testing of prospective immigrants was introduced, Citizenship and Immigration Canada should not require mandatory HIV testing of refugees.

Recommendation 2

Citizenship and Immigration Canada should not introduce mandatory HIV testing of applicants for permanent residence and of those visitors required to undergo a medical examination.

Recommendation 3

A decision to include an HIV test in the medical examination that applicants for permanent residence and certain visitors have to undergo should be made only if clinically indicated.

Recommendation 4

Citizenship and Immigration Canada should provide examining physicians with a checklist of possible clinical indications that would indicate that HIV testing is warranted. Physicians should be required to check off the particular reason(s) why the test

³²⁸ See *supra*, note 47.

³²⁹ *Counselling Guidelines for HIV Testing*, *supra*, note 315.

was ordered, or to provide the clinical reason if it is not included in the checklist. These checklists should be forwarded to the visa officer or the immigration officer, and a copy provided to the applicant. Physicians and visa/immigration officers should be required by Citizenship and Immigration Canada to keep these reports confidential.

Recommendation 5

Citizenship and Immigration Canada should ensure that examining physicians in Canada and outside Canada observe appropriate standards for HIV testing with regard to specific informed consent, and pre- and post-test counseling, as articulated in the *Counselling Guidelines for HIV Testing* prepared under the auspices of the Canadian Medical Association.

Visitors with HIV/AIDS do not constitute a threat to public health during short-term travel to Canada, and should be treated like any other visitor to Canada.

Recommendation 6

Even if Citizenship and Immigration Canada introduces mandatory testing of all applicants for permanent residence, it should not mandate HIV testing for refugees in Canada or at Canada's borders, as well as for Convention refugees seeking resettlement, members of the Humanitarian Designated Classes, and Post-Determination Refugee Claimants in Canada. Rather, all refugees should be provided with counseling about HIV/AIDS and should be offered voluntary HIV testing.

Canada's Policy toward Short-Term Visitors with HIV

Canada should maintain its current policy with regard to short-term visitors with HIV, according to which visitors with HIV/AIDS do not constitute a threat to public health during short-term travel to Canada, and should be treated like any other visitor to Canada. This policy recognizes that people with HIV cannot justifiably be considered threats to public health simply because of their HIV status. In addition, unless they are likely to require emergency medical care that Canada would have to pay for, short-term visitors to Canada (whether HIV-positive or not) cannot be expected to place any demands on health and social services.

Visa officers and immigration officers should receive regular training on HIV/AIDS to ensure that visitors with HIV are not denied entry to Canada.

Recommendation 7

Citizenship and Immigration Canada should maintain and reaffirm its current policy according to which visitors with HIV/AIDS do not constitute a threat to public health during short-term travel to Canada, and shall be treated like any other visitor to Canada.

In order to ensure uniform application of this policy, visa officers and immigration officers should regularly receive training and information on the policy.

Canada's Policy toward HIV-Positive Applicants for Permanent Residence

Exclusion of People with HIV on Public Health Grounds

As demonstrated above, excluding people with HIV from becoming permanent residents in Canada based on public health grounds is not justified, for many reasons. Most importantly, HIV is not transmitted through casual contact. The exclusion of immigrants with HIV is therefore not necessary for the protection of local populations.

Recommendation 8

Citizenship and Immigration Canada should not exclude persons with HIV or AIDS, including applicants for permanent residence, from Canada on public health grounds, since they do not constitute a threat to public health and safety solely because they are HIV-positive.

Exclusion of People with HIV on "Excessive Cost" Grounds

Any exclusion on the grounds of excessive cost must never be automatic, based solely on HIV infection. The determination of excessive costs should be made with reference to the specific treatments that the individual in question would be expected to require.

Because of the difficulty of predicting costs far into the future, the applicant's projected demands on health or social services should be assessed for a period of a few years at most, rather than for five or even ten years, as planned for the regulations accompanying Bill C-11.

Contrary to current (and proposed future) practice, the projected costs should be compared to the potential contribution that the applicant can reasonably be expected to make to Canadian society in both monetary and non-monetary terms. Therefore, the definition of "excessive demand" under the regulations accompanying Bill C-11 should include a consideration of the benefit or contribution a person is expected to make to Canada.

Many immigrants with HIV will make a greater net financial contribution to the economy of the state to which they are destined than the costs they will impose on its health-care system. Furthermore, people with HIV can make important non-economic contributions to society that should be considered when determining whether the costs they will impose on society are "excessive." There is no question that it is difficult to measure non-economic contributions, as these cannot be quantified. However, this does not mean it is impossible for such factors to be considered. Canadian courts and tribunals are called upon daily to interpret qualitative requirements or factors set out in statutes, and to weigh non-quantifiable evidence in the balance in attempting to do justice. In the context of immigration and refugee cases, they currently already engage in such a task when assessing humanitarian and compassionate considerations for landing an otherwise inadmissible person, or when assessing the risk of persecution to which a refugee claimant may be subjected if removed from Canada.

How would expected contributions be measured? First of all, if medical costs can be projected, then it should also be possible to project financial

CONCLUSION AND RECOMMENDATIONS

contributions, for example by looking at the kind of employment a person may be able to get and hence estimating what contributions to tax revenues the person would make. (After all, independent applicants, including business applicants, are already judged on such criteria, at least in part). As for intangible, non-financial contributions, a list of factors to be considered in determining whether the costs required for care of a particular individual would be “excessive” should be developed, including factors such as (1) expected contributions to domestic work supporting a household, caring for dependents (children, elders, family member with disability or special needs); (2) expected contributions to community services; (3) meeting a particular need for skilled/trained workers in a particular area (a factor already considered for independent applicants); (4) expected contribution to Canada’s educational, scientific, or cultural life; and (5) compassionate and humanitarian factors, such as the need for reunification with loved ones and the suffering that could result from being returned to the applicant’s country of origin.

By considering these contributions as well as compassionate and humanitarian factors at the stage of determining excessive costs, some of the difficulties associated with the appeals process as well as with Minister’s Permits can be avoided. If this is not done, then at least section 25 of the proposed new *Immigration and Refugee Protection Act* would facilitate considering compassionate and humanitarian reasons for allowing a medically inadmissible person to immigrate to Canada nonetheless.

Recommendation 9

Citizenship and Immigration Canada should not automatically exclude people with HIV or AIDS from immigrating on the basis of “excessive demands” on health or social services. Assessments of the reasonably expected demand on health or social services must take each person’s individual circumstances into account.

Recommendation 10

Citizenship and Immigration Canada should clearly define, by regulation, what constitutes “excessive demand” on health or social services.

Contrary to what is currently planned, demands should be considered “excessive” only when the expected cost of government services estimated over a short period (of a few years at most) exceeds the estimated financial contribution that the applicant will make over the same period, and also outweighs the potential social contributions that the individual is expected to make.

Factors to be considered in determining whether the costs required for care of a particular individual would be “excessive” should include, but not be limited to: (1) expected contributions to domestic work supporting a household, caring for dependents (children, elders, family member with disability or special needs); (2) expected contributions to community services; (3) meeting a particular need for skilled/trained workers in a particular area; (4) expected contribution to Canada’s educational, scientific, or cultural life; and (5) compassionate and humanitarian factors.

Recommendation 11

If compassionate and humanitarian factors are not taken into account at the stage of determining what constitutes excessive costs, visa and immigration officers should *always* consider granting landing on the basis of compassionate and humanitarian grounds despite medical inadmissibility.

Case Codes

It is neither appropriate nor legal to use case codes such as the ones in the *Medical Officers' Handbook* to automatically label persons with particular diseases as medically inadmissible. Although the codes are meant to be used as examples, they can fetter the discretion of the medical officer and preclude a medical officer from conducting a complete analysis of the demands a person with a given condition is expected to make. As an alternative, several examples of possible case codes that might be assigned to persons with HIV could be provided in the Handbook in order to ensure that medical officers realize that a given medical condition might lead to more than one classification. Requiring examining physicians to provide an accounting indicating the demands that the individual applicant is expected to make on health or social services, as well as the expected contributions, will reduce the danger that examining physicians will automatically exclude all persons with particular illnesses (regardless of individual circumstances).

Recommendation 12

Citizenship and Immigration Canada should update its *Medical Officers' Handbook* and other similar guidance documents to clarify that case codes given are examples only, and give multiple examples of how a person with HIV could be assigned a code depending on varying circumstances.

Recommendation 13

Citizenship and Immigration Canada should require, by regulation or policy directive, that persons who are excluded from Canada as medically inadmissible on the grounds of excessive costs shall receive an accounting in writing of how and why they are expected to place excessive demands on health or social services.

Appeals

Recommendation 14

If compassionate and humanitarian considerations are not taken into account in determining what constitutes excessive demand, it should be open to *all* applicants for permanent residence to appeal on humanitarian and compassionate considerations. Furthermore, those who make and lose appeals on compassionate and humanitarian grounds should not be precluded from any other forms of redress.

Exemptions

The proposed exemption of family class–sponsored spouses, common-law partners, and dependent children from inadmissibility based on excessive demands is a welcome relief from the unpredictable and lengthy appeals process that family class–sponsored immigrants currently must go through.

However, as explained above, some concerns remain for same-sex common law partners.

Recommendation 15

The proposed exemption of class–sponsored spouses, common-law partners, and dependent children from inadmissibility based on excessive demands is welcome.

However, the term “common law partner” in section 12(2) of Bill C-11 should be replaced by the phrase “common-law partner (same-sex or opposite-sex). In addition, in regulations accompanying Bill C-11, a common-law partner should be defined to include a person who has maintained a *bona fide* conjugal relationship with another person for a period of one year, and care must be taken to ensure that every provision applicable to opposite-sex “spouses” and fiancé(e)s is equally available to “common-law partners.”

Minister’s Permits and Health or Social Services

Persons with HIV who are permitted to enter or remain in Canada on Minister’s Permits are often ineligible for provincial health insurance even if they meet all the other requirements for health insurance coverage. If there are compelling compassionate or humanitarian reasons to allow a person to remain in Canada, it reflects a weak commitment to these principles to keep that person in limbo with little or no access to such services.

Recommendation 16

Citizenship and Immigration Canada should extend the coverage of essential health services provided by the Interim Federal Health Program to those persons who are in Canada on Minister’s Permits under the current *Immigration Act*, given that such permits are issued to otherwise inadmissible persons on the basis of humanitarian and compassionate reasons.

Recommendation 17

Under a new *Immigration and Refugee Protection Act*, the Minister of Citizenship and Immigration should grant permanent residence to those who are permitted to enter into and/or remain in Canada, based on a finding of sufficient compassionate and humanitarian reasons to do so.

Recommendation 18

In exercising discretion to grant permanent resident status to a person found medically inadmissible on humanitarian and

compassionate grounds, the Minister of Citizenship and Immigration should base the decision solely on humanitarian and compassionate factors and not on the possible health-care demands of that person.

Canada's Policy toward HIV-Positive Refugees

Canada is precluded under its international obligations from turning away a Convention refugee. Therefore, Convention refugees in Canada or at its borders have a right to remain in Canada no matter what their medical condition is.

Canada should change its policy with regard to refugees outside the country. Once Canada recognizes that a person is in need of protection, that person should not be excluded on "excessive cost" grounds. For that reason, the proposed exemption of Convention refugees outside Canada and other persons in need of protection from medical inadmissibility based on excessive cost is welcome. At the same time, refugees outside Canada should also be exempted from inadmissibility based on threats to public health. Like Convention refugees in Canada, refugees outside Canada should be protected no matter their medical condition.

Recommendation 19

In addition to the proposed exemption of Convention refugees outside Canada and other persons in need of protection from medical inadmissibility based on excessive cost, Citizenship and Immigration Canada should exempt all refugees and persons in need of protection, whether in Canada or outside Canada, from legislative provisions excluding persons as medically inadmissible to Canada based on threats to public health.



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Appendix

Provincial and Territorial Policies on Granting Public Health Insurance to Minister's Permit Holders

The information in this Appendix was compiled in the summer of 2000 based on information provided by the provinces and territories.

"Type of case" codes

Every Minister's Permit has a "type of case" code on it, indicating the circumstances under which the Minister's Permit was granted. The type of case codes are as follows.

For "early admission" or "under application" cases

- 89 – Member of Family Class
- 88 – Convention Refugee, member of designated class
- 87 – National Interest (entrepreneur, self-employed, urgent labour-market need)
- 86 – Other, NES

"Refused" Applicant for Permanent Residence

- 95 – Criminal/Security/Other inadmissibility – Member of Family Class'
- 94 – Criminal/Security/Other inadmissibility – National Interest (entrepreneur, self-employed, urgent labour-market need)
- 93 – Criminal/Security/Other inadmissibility – Other, NES
- 92 – Medical Inadmissibility – Member of Family Class
- 91 – Medical Inadmissibility – National Interest (entrepreneur, self-employed, urgent labour-market need)
- 90 – Medical Inadmissibility – Other, NES

Visitor Cases

- 96 – Verification of departure required
- 85 – Medical treatment
- 84 – Student
- 81 – Worker
- 80 – Inadmissible person, NES

Applicants for permanent residence who are denied entry as a result of their HIV status will be assigned case codes 90, 91 or 92.

Provinces and Territories' Policies on Granting Health Insurance to Medically Inadmissible Persons on Minister's Permits

Newfoundland and Labrador

When Citizenship and Immigration Canada considers granting a Minister's Permit to an applicant for permanent residence who is found medically inadmissible, it consults with a committee within the provincial department of health and community services. The committee considers whether or not to recommend the granting of a Minister's Permit in light of potential costs to publicly funded services, availability of services, as well as the compassionate and humanitarian considerations that may warrant the granting of a permit.

If a Minister's Permit is obtained, the applicant is entitled to coverage under provincial health care if they meet the usual residency requirements.

New Brunswick

Minister's Permit holders who are legally married to, or dependants of, eligible New Brunswick residents are eligible for provincial health insurance. Therefore, of medically inadmissible permit holders, only those who are members of the family class (case code 92) are eligible for provincial health insurance.

Nova Scotia

Minister's Permit holders are not eligible for provincial health insurance based on the permit alone. They may be eligible, however, if they also have or have had an employment or student authorization. Exceptions may be made to this policy on a case-by-case basis.

Prince Edward Island

Minister's Permit holders are not eligible for provincial health insurance based on the permit alone. They are eligible, however, if they also have an employment or student authorization.

Québec

When Citizenship and Immigration Canada finds an applicant medically inadmissible, it consults with the Québec Ministry of Immigration. The Ministry determines whether the province would accept the applicant.

If a Minister's Permit is obtained and the applicant accepted into Québec, the applicant is entitled to coverage under provincial health care if they meet the usual residency requirements.

Manitoba

Minister's Permit holders with case codes 90, 91, and 92 are not eligible for provincial health insurance based on the Minister's Permit alone. They are eligible, however, if they also have an employment authorization.

Ontario

Minister's Permit holders with case codes 90, 91, and 92 are not eligible for provincial health insurance based on the Minister's Permit alone. They are eligible, however, if they also have an employment authorization.

Saskatchewan

When Citizenship and Immigration Canada considers granting a Minister's Permit to an applicant for permanent residence who is found medically inadmissible, it consults with a committee within the provincial health authorities. The committee considers whether or not to recommend the granting of a Minister's Permit in light of potential costs to publicly funded services, availability of services, as well as the compassionate and humanitarian considerations that may warrant the granting of a permit.

If a Minister's Permit is obtained, the applicant is entitled to coverage under provincial health care if they meet the usual residency requirements.

Alberta

When Citizenship and Immigration Canada considers granting a Minister's Permit to an applicant for permanent residence who is found medically inadmissible, it consults with the Alberta Immigration Review Panel. The Panel considers whether or not to recommend the granting of a Minister's permit in light of potential costs to publicly funded services, availability of services, as well as the compassionate and humanitarian considerations that may warrant the granting of a permit.

If a Minister's Permit is obtained, the applicant is entitled to coverage under provincial health care if he or she meets the usual residency requirements.

British Columbia

When Citizenship and Immigration Canada considers granting a Minister's Permit to an applicant for permanent residence who is found medically inadmissible, it consults with a committee within the provincial ministry of health. The committee considers whether or not to recommend the granting of a Minister's Permit in light of potential costs to publicly funded services, availability of services, as well as the compassionate and humanitarian considerations that may warrant the granting of a permit. When the committee makes its recommendation to Citizenship and Immigration Canada, it will also include directives regarding whether or not the applicant should receive coverage under provincial health insurance.

Permit holders will only receive provincial health coverage if a recommendation that the person receive provincial health insurance has been made by the provincial Ministry of Health.

Yukon

No information was obtained from Yukon.

APPENDIX

NWT

Only those permit holders who are legally married to, or dependants of, eligible Northwest Territory residents are eligible for provincial health insurance. Therefore, of medically inadmissible permit holders, only those who are members of the family class (case code 92) are eligible for territorial health insurance.

Nunavut

Only those permit holders who are legally married to, or dependants of, eligible Nunavut residents are eligible for provincial health insurance. Therefore, of medically inadmissible permit holders, only those who are members of the family class (case code 92) are eligible for territorial health insurance.