

Questions & Answers

Canada's Immigration Policies as They Affect People Living with HIV/AIDS

March 2003

Canada's new Immigration and Refugee Protection Act became law on 28 June 2002.

New Immigration and Refugee Protection Regulations also came into effect on that date.

This Q&A sheet provides some general information on how the act and the regulations affect people living with HIV/AIDS.

Introduction

A brief description of the different categories of people who seek to come to Canada will assist the reader to better understand the information in this document. Foreign nationals may seek to enter Canada as *temporary residents*, a category that includes visitors, students and temporary workers (including seasonal workers). Foreign nationals may also apply for *permanent residence*, a category that includes skilled workers, business class applicants (eg, investors and entrepreneurs), family class applicants (including spouses, common law partners, dependent children and some other relatives), and refugees.

Special visas or permits are required in the following situations:

- Foreign nationals from certain countries require a visa to visit Canada or to work temporarily in Canada. (A list of the countries can be found on the website of Citizenship and Immigration Canada (CIC) via www.cic.gc.ca. Click on "to Visit.")
- Foreign nationals seeking to study in Canada require a study visa if the period of study is more than six months.
- Almost all foreign nationals seeking to work temporarily in Canada require a work permit.

Are people who seek to enter Canada required to take an HIV test?

All foreign nationals applying for permanent residence in Canada, and *certain applicants for temporary residence*, are required to undergo an immigration medical examination. The examination includes a question about whether the individual has ever tested positive for HIV. It also includes an HIV antibody test for all persons 15 years of age or over. (While the HIV antibody test is not done for most people under 15 years of age, it may be required for children who have received blood or blood products, have an HIV-positive parent or are potential adoptees.)

Applicants for temporary residence who require an immigration medical examination are:

- people who are coming to Canada for a period in excess of six consecutive months AND who have resided for a period of six or more consecutive months in a designated country in the year preceding their application; and
- people who are coming to Canada to work in an occupation where protection of public

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health is essential, regardless of country of residence or intended length of stay in Canada. (More details on the medical examination requirements for applicants for temporary residence, and on designated countries, are available on the CIC website via www.cic.gc.ca. Click on “to Visit” and then on “doctor’s examination.”)

Short-term applicants for temporary residence (ie, people planning to stay six months or less) are NOT required to undergo a medical examination unless they are very ill.

For people applying from abroad, the medical examination is performed by a local medical practitioner designated by Citizenship and Immigration Canada (CIC). For people applying from within Canada, a CIC-designated medical practitioner performs the medical examination in Canada.

The HIV antibody test is supposed to be accompanied by pre- and post-test counselling. However, in practice, this has not been happening consistently.

Are persons living with HIV/AIDS allowed to come into Canada?

The *Immigration and Refugee Protection Act* does not specifically mention HIV or AIDS. However, section 38 (1) of the *Act* says that foreign nationals can be refused entry into Canada based on their medical condition if

- they are likely to be a threat to public health or safety; or
- they would place excessive demands on government services.

Since 1991, Canada has not considered people with HIV to be a threat to public health and safety. Therefore, Canada generally only excludes people with HIV if they can be expected to place an excessive burden on publicly funded health and social services. (For a summary of the reasons why persons living with HIV/AIDS should not be considered a threat to public health and safety, see A Klein. *HIV/AIDS and Immigration: Final Report*. See “Additional Reading” at the end of this Q&A sheet for more information on this publication.)

Under section 38(2) of the *Act*, there are several categories of persons who are exempt from the excessive demand provisions, including:

- refugees, whether applying inside or outside Canada; and

- certain sponsored applicants for permanent residence in the family class – specifically spouses, common law partners and dependent children.

An applicant for permanent residence in the family class can be sponsored by a Canadian citizen or permanent resident who is at least 18 years of age and who agrees to be financially responsible for the applicant for a period of time.

A spouse is a married partner of the opposite sex. A common law partner is defined as someone of the same or opposite sex with whom the sponsor has lived in a conjugal relationship for at least a year. The requirement of living together for one year may be waived in certain circumstances. (See: *Immigration and Refugee Protection Regulations*. SOR/2002-227, s 1(1)).

Unless they are very ill, short-term applicants for temporary residence (including visitors) who are living with HIV/AIDS are not expected to place any demands on health and social services, so they are generally allowed to come into Canada. Visitors are usually not covered by provincial or territorial health insurance.

For all other foreign nationals, a case-by-case assessment is made to determine whether the individual is expected to cause excessive demands on health or social services. The *Regulations* state that demand is considered “excessive” if the estimated financial burden the individual would place on health and social services is greater than that of the average Canadian. The cost for the average Canadian is calculated based on data provided by the Canadian Institute for Health Information. In 2002, the cost was CAN\$ 3,572. The figure changes each year. The estimated financial burden is calculated over a five-year period from the date of the person’s latest medical examination. According to section 1(1)(a) of the *Regulations*, the period of time may be extended to 10 years if there is evidence that significant costs are likely to be incurred beyond five years (such as in the case of HIV infection). The contributions the individual is expected to make to Canadian society, whether economic or social, are not taken into account. A finding of excessive demand usually leads to a declaration that the individual is medically inadmissible.

In practice, what does this mean for people living with HIV/AIDS?

If you are a short-term visitor...

Unless you are very ill, your HIV status will not be a barrier to entering Canada. Most short-term visitors are not expected to place any demands on health and social services, and are not required to undergo a medical examination or take an HIV antibody test.

If you are very ill, you may be required to undergo a medical examination, including an HIV antibody test, in which case you would be treated the same as “other applicants for permanent residence” (see below, the section on “other applicants for permanent residence,” which contains a discussion of how the costs of antiretroviral medications are factored in to the estimate of the demand an applicant would place on health and social services. For visitors living with HIV/AIDS who are required to undergo a medical examination and who are on antiretroviral medication, the costs of such medication will not be included in the estimate of demand. This is due to the fact that visitors are usually not covered by provincial or territorial health insurance.)

If you are a long-term visitor...

If you have resided for six or more consecutive months in a designated country or territory (go to www.cic.gc.ca for more info on designated countries; click on “to visit” and then on “doctor’s examination”) in the year preceding the date of seeking entry to Canada, you will be required to undergo a medical examination and you will be treated the same as “other applicants for permanent residence” (see below).

If you have not resided for six or more consecutive months in a designated country or territory in the year preceding the date of seeking entry to Canada, you will be treated the same as short-term visitors (see above).

If you are entering Canada as a refugee...

Your HIV status will not be a barrier to entering Canada. You are exempt from the excessive demands provisions of the *Act*.

After their claims are acknowledged and are deemed eligible to be referred to the Immigration and Refugee Board, refugee claimants are covered under the Interim Federal Health Program. This program covers the cost of essential medical treatment and medications, including HIV med-

ications. Refugees settled from abroad and refugee claimants who are granted refugee status in Canada are eligible for provincial health coverage. For information on the applications process for refugee claims see, HIV & AIDS Legal Clinic (Ontario), *Immigration and HIV: What You Need to Know* (tentative title). See “Additional Reading” at the end of this Q&A sheet for more information about this publication.

If you are an applicant for permanent residence in the family class, and are a spouse, common law partner or dependent child of a Canadian resident, and are sponsored by that resident...

Your HIV status will not be a barrier to entering Canada. You are exempt from the excessive demands provisions of the *Act*.

However, if you are a sponsored family class applicant and are other than a spouse, common law partner or dependent child (eg, grandparent), you are NOT exempt from the excessive demand provisions of the *Act*. You will be treated the same as “other applicants for permanent residence” (see below).

For other applicants for permanent residence...

An assessment will be made to determine if you would be expected to place excessive demands on Canada’s publicly funded health and social services. If it is determined that you would do so, you will be declared medically inadmissible.

Immigration medical officials have indicated that applicants for permanent residence who are living with HIV, who are in good health and who are not currently taking antiretroviral medication would normally not be expected to place excessive demands on Canada’s health and social services. If you are in this situation, your HIV status should not be a barrier to entering Canada.

Immigration medical officials have also indicated that applicants for permanent residence who are living with HIV and who are currently taking antiretroviral medication (whether or not they are in good health) will be found to be medically inadmissible. This is because antiretroviral medications are expensive and are publicly funded in Canada (usually by provincial and territorial governments). It makes no difference if the applicant has private medical

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coverage that covers the costs of the antiretroviral medication. CIC takes the view that because publicly funded health benefits are fully available to all permanent residents, having private insurance does not guarantee that the applicant will continue to use private insurance.

If you are an applicant for permanent residence who is living with HIV and you are not in good

Note of Caution

This Q&A Sheet describes the system as it is supposed to work. It may not work this way in every case. The Immigration and Refugee Protection Act and the Regulations are new. Immigration officials have had to adjust to the changes. As well, the officials have some powers of discretion; these powers sometimes work in a person's favour, and sometimes not.

health, but you are not currently taking antiretroviral medications, it is likely that immigration medical officials will declare you medically inadmissible. The medical officers would likely conclude that because you are not in good

health, you would be expected to place excessive demands on health and social services in the five (or ten) years following your entry to Canada.

What about persons living with HIV/AIDS who are coming to Canada to study?

If you are seeking to enter Canada to study for a period of six months or less, you will most likely be treated the same as short-term visitors (see above).

If you are seeking to enter Canada to study for a period of more than six months, you are subject to the same provisions as “other applicants for permanent residence” (see above). You will be assessed to determine if you would be expected to place excessive demand on Canada’s health and social services. A finding of excessive demand would normally lead to a declaration of medical inadmissibility.

If you are taking antiretroviral drugs, there are two circumstances where the cost of the drugs would not be included in the estimate of the demand you would place on health and social services:

- if you will be studying in a province or territory that does not provide health insurance coverage for foreign students; or
- if you will be studying in a province or territory that provides health insurance coverage

for foreign students, AND the institution where you will be studying covers the costs of these drugs under an insurance plan, AND you are eligible for that plan. The rules governing the eligibility of foreign students for health insurance coverage vary from one province or territory to another. Some jurisdictions impose waiting periods during which no coverage is available.

What about persons living with HIV/AIDS who are coming to Canada temporarily to work (including seasonal workers)?

If you are seeking to enter Canada to work for a period of six months or less, you will be treated the same as short-term visitors (see above).

If you are seeking to enter Canada to work for a period longer than six months, you are subject to the same provisions as “other applicants for permanent residence” (see above). You will be assessed to determine if you would be expected to place excessive demand on Canada’s health and social services. A finding of excessive demand would normally lead to a declaration of medical inadmissibility.

If you intend to work in an occupation where protection of public health is essential, you will be required to undergo a medical examination, regardless of your country of residence or intended length of stay in Canada. (More information on what constitutes an occupation where protection of public health is essential is available on the CIC website via www.cic.gc.ca. Click on “to Visit” and “doctor’s examination.”)

If you are taking antiretroviral drugs, there are two circumstances where the cost of the drugs would not be included in the estimate of the demand you would place on health and social services:

- if you will be working in a province or territory that does not provide health insurance coverage for temporary foreign workers; or
- if you will be studying in a province or territory that provides health insurance coverage for temporary foreign workers, AND your employer has an insurance plan that would cover the costs of these drugs, AND you would be eligible to join that plan.

The rules governing the eligibility of foreign temporary workers for health insurance coverage

vary from one province or territory to another. Some jurisdictions impose waiting periods during which no coverage is available.

If people are found to be medically inadmissible, is there a way they can still enter Canada?

A finding of medical inadmissibility is made by a medical officer. The final decision is up to the immigration officer. In most cases, the immigration officer can be expected to confirm the medical officer's finding.

In exceptional circumstances, a person who has been deemed inadmissible for medical (or other) reasons may be able to obtain a Temporary Residence Permit (TRP). These permits are valid for limited periods of time. TRPs may be issued for several purposes, including:

- to facilitate family reunification;
- to bring in highly skilled workers; and
- to allow individuals into Canada for medical treatment not available in their home countries. The individuals must pay for the treatment.

Persons admitted under a TRP may or may not be covered by provincial or territorial health insurance. The rules governing eligibility vary from one province or territory to another. Furthermore, the rules within a given province or territory are not always clear. For example, in 2002, an HIV-positive man who had applied for a visa to take a two-year job assignment with an organization in Toronto, Ontario, was declared medically inadmissible but was then granted a TRP. The TRP allowed him to work in Canada. He then applied for health insurance in Ontario and his application was accepted. However, other people in Ontario in similar circumstances have been denied coverage. People admitted under a TRP who have been denied coverage will have to pay for any medical care, including emergency care, whether or not the condition is related to their HIV infection. Discussions with CIC concerning this case, and its broader implications, are continuing.

Can a finding of medical inadmissibility be appealed?

Canada's *Immigration and Refugee Protection Act* allows for some decisions to be appealed. Appeals can be complicated processes. Specific advice

should be obtained in relation to specific cases. Applicants have the right to ask for (and receive) a written explanation of why they were denied a visa and/or declared medically inadmissible.

If people need advice or assistance with respect to Canada's immigration policies, where can they go?

Depending on your situation, you may need to talk to a lawyer.

If you are in Canada, contact an immigrant- and refugee-serving organization or an AIDS service organization in your area and ask them (a) if they have anyone who is knowledgeable about immigration issues; or (b) if they can refer you to a lawyer who specializes in immigration issues.

You may have to pay for the services of the lawyer unless you are eligible for legal aid. In Ontario, contact

the HIV & AIDS Legal Clinic (Ontario), 65 Wellesley Street East, Suite 400, Toronto (Ontario) M4Y 1G7, Tel: +1-416-340-7790 (toll free +1-888-705-8889 from within Ontario), Fax: +1-416-340-7248, Email: talklaw@halco.org, Website: www.halco.org. In British Columbia, contact the B.C. Persons With AIDS Society, 2nd Floor, 1107 Seymour Street, Vancouver (B.C.) V6B 5S8, Tel: +1-604-892-2200 (toll free +1-800-994-2437 from within B.C.), Fax: +1-604-893-2251, Email: info@bcpwa.org, Website: www.bcpwa.org.

If you are outside Canada and can afford to pay a lawyer, you may be able to identify and contact a Canadian lawyer who specializes in immigration cases and who regularly represents people outside Canada.

You can also contact the Canadian HIV/AIDS Legal Network, 417, rue Saint-Pierre, suite 408,

Getting Legal Advice: Know Whom You Are Dealing With

This Q&A Sheet contains general information. It is not a substitute for getting legal advice about your particular situation. Both lawyers and consultants (also known as agents) provide advice about immigration and refugee matters. All lawyers in Canada are regulated and insured, and have professional responsibilities to their clients. Immigration consultants may or may not be regulated or insured, or have any professional obligations to their clients. Protect yourself. Make sure you know whom you are getting advice from.

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Montréal (Québec) Canada H2Y 2M4, Tel: +1-514-397-6828, Fax: +1-514-397-8570, Email: info@aidslaw.ca, Website: www.aidslaw.ca. Please note that the Legal Network cannot provide legal advice, but will attempt to provide referrals to knowledgeable lawyers.

Organizations that have questions about Canada's immigration policies and practices can contact the Canadian Council for Refugees (CCR), 6839 rue Drolet, suite 302, Montréal (Québec) Canada H2S 2T1, Tel: +1-514-277-7223, Fax: +1-514-277-1447, Email: ccr@web.net, Website: www.web.net/~ccr. Please note that the CCR is not able to respond to enquiries from individuals.

Additional reading

Publications

A Klein. *HIV/AIDS and Immigration: Final Report*. Montréal: Canadian HIV/AIDS Legal Network, 2001.

B Hoffmaster and T Schrecker. *An Ethical Analysis of the Mandatory Exclusion of Immigrants Who Test HIV-Positive*. Montréal: Canadian HIV/AIDS Legal Network, 2000.

The first publication (listed above) describes and evaluates Canada's policies with respect to immigration and HIV/AIDS and presents a series of recommendations. Both publications (listed above) oppose mandatory HIV antibody testing. Although both reports were written before the new Immigration and Refugee Protection Act and its Regulations came into effect, their analysis of the issues remains valid. Both publications are available on the Network's website via www.aidslaw.ca/Maincontent/issues/immigration.htm.

HIV & AIDS Legal Clinic (Ontario). *Immigration and HIV: What You Need to Know*.

HIV & AIDS Legal Clinic (Ontario). *Immigration and HIV: A Brief Guide for Frontline Workers*.

The titles shown above are the tentative titles of two publications being prepared by HALCO, in conjunction with the Committee for Accessible AIDS Treatment (in Toronto, Ontario). The first publication targets persons living with HIV/AIDS who are considering applying for permanent residence or refugee status in Canada. Both publications contain some information that is specific to Ontario. The publications were due to be released in April 2003, and will be available on the HALCO website via www.halco.org.

Websites

www.cic.gc.ca

The website of Citizenship and Immigration Canada provides guidance for people who want to visit Canada, to study or work temporarily in Canada, or to apply for permanent residence in Canada. It also contains copies of the *Immigration and Refugee Protection Act* and the *Immigration and Refugee Protection Regulations*.

www.aidslaw.ca/Maincontent/issues/immigration.htm

This section of the website of the Canadian HIV/AIDS Legal Network provides a comprehensive analysis of the issues related to immigration and HIV/AIDS.

www.web.net/~ccr/

The Canadian Council for Refugees is an organization committed to the rights and protection of refugees in Canada and around the world and to the settlement of refugees and immigrants in Canada.

This Q&A sheet was written by David Garmaise. The Canadian HIV/AIDS Legal Network wishes to thank the HIV & AIDS Legal Clinic (Ontario) [HALCO] for permission to use some of the information contained in a draft of its publication tentatively entitled *Immigration and HIV: What You Need to Know*.

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