



SAMUEL CENTRE
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Rethinking DisABILITY
Health Discrimination in Canadian Immigration
Law

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Table of Contents

ABSTRACT	3
PROPOSAL	3
INTRODUCTION	5
HISTORY	6
Excessive demand and HIV	9
Processing excessive demand	11
The case for repealing excessive demand	12
I. Excessive demand is discriminatory and violates the charter	
II. Excessive demand causes operational problems	
III. Excessive demand undermines the objective of the <i>Immigration and Refugee Protection Act (IRPA)</i>	
IV. Excessive demand violates International Human Rights Law	
V. Excessive demand regime is not in line with other countries practices	
CONCLUSION	22
APPENDIX	24
I. Canada’s New Accessibility Law	
II. The Genetic Non-Discrimination Act	
III. Outreach Contacts	
BIBLIOGRAPHY	27

ABSTRACT

In this report, I seek to draw attention to the issues of disability and immigration, and shed light on health discrimination in Canada's immigration laws. I hope to pressure the Federal Government to consider the situation of poverty and distress suffered by displaced persons with disabilities and help them realize that it is in their interest to integrate these persons in the best way possible. This way, these persons can contribute their fair share to society.

I hope to provide concerned groups with a complete and updated report to aid them in creating awareness. This awareness will stimulate host countries to consider needs about integration and the adaptation of essential services for this group of persons. I focus on immigration legislation. Canada's long-standing medical inadmissibility rules prevent sick and disabled individuals from settling in Canada by claiming they would cause excessive demand on health and social services. A designated medical doctor estimates the cost of treatment and if it surpasses the average of a regular Canadian's per capita health services and social services over a period of five consecutive years' costs, the individual is denied entry.

The most recent changes federal Immigration Minister Ahmed Hussen passed, which increased the financial threshold from about \$6,500 to \$19,965¹ shows just how strong international and national networks to protect the right of persons with disabilities have become. However, this still discriminates against numerous applicants. Article 38 (1)(c) should be completely repealed.

PROPOSAL

We must recognize:

- There are a growing number of people with disabilities who are victim to situations that force them to leave their country of origin, such as wars, ethnic conflicts, natural disasters, poverty, political or religious persecution.²
- That these people have generally been victims of discrimination based on their "difference" and are prone to becoming socially isolated.
- That these people are vulnerable and/or affected by multiple types of discrimination based on race, ethnic origin, gender, age and impairment.

¹ Smith, Stephen. "Canada revises controversial medical inadmissibility rules for immigrants." Canadian Immigration News. 2018. <https://www.cicnews.com/2018/04/canada-revises-controversial-medical-inadmissibility-rules-for-immigrants-0410513.html#gs.OIPKblc>.

² Penafiel, Teresa. "Disability + Immigration" – A new planetary reality." Durban: Multi-Ethnic Association for the Integration of Persons with Disabilities, 2001. <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5multiethnic.doc>.

- That these people are particularly affected by restrictive laws and guidelines, which drive them to the margins of societies and corner them in a place of isolation, where they may become more prone to mental-health issues.
- That Canada and other countries can and should amend their restrictive laws regarding immigration and other public policy areas, such as employment, housing, health services, education, etc.

INTRODUCTION

The issue at the core of my research is health discrimination in Canadian immigration law. My main objective is to challenge Article 38 (1) (c) of Canada's Immigration and Refugee Protection Act, which has been in place for more than 40 years and creates a systemic barrier for people with serious illnesses or disabilities from settling in Canada.

Asylum seekers are obliged to take a medical exam by a panel physician. Their own doctor cannot do the medical exam. The panel physician will do a complete medical exam and send it to Immigration, Refugees and Citizenship Canada, which will make the final decision. If the appointed doctor decides the individual is likely to incur costs greater than the current threshold (\$19,812 per year) than they could be denied entry. This is referred to as excessive demand. The individual is then given a chance to give a credible plan to explain how they will offset the increased costs to Canada's healthcare system.

If admitted, in addition to the anticipated health and social costs, consideration must be given to the future prognosis of the medical condition and its impact on hospital waiting lists. It helps if the individual has a high net worth, an employer and/or a large extended family already living in Canada. Once a decision is rendered, a negative decision can be challenged in federal court, a process which can take about two years. Therefore, those suffering from high-cost illnesses such as advanced diabetes, HIV, certain autisms and Down Syndrome face low chances of approval.

In December 2017, the parliamentary Standing Committee on Citizenship and Immigration recommended a full repeal of the excessive demand provision. In April, federal Immigration Minister Ahmed Hussen announced that he would update the policy. The improvement raised the cost threshold for medical inadmissibility from \$6,655 to \$19,812 and removed references to special education, social and vocational services.

While the threshold costs relating to medical inadmissibility were significantly increased, the medical inadmissibility provision is still not in line with Canadian values, since it violates several national and international human right treaties and is contrary to the practices of many other countries that do not have similar provisions. Moreover, the provisions undermine the ultimate objective of the *Immigration and Refugee Protection Act* (IRPA) and creates a cumbersome and inefficient process that ultimately does little to reduce healthcare costs.

Change is needed, as Article 38 (1) discriminates against people with disabilities and HIV by labelling them as a burden on society and overlooking what they and their family can contribute to Canada.

To conduct my research, I contacted stakeholders who provided me with the information that I could not find through online resources. The deeper I delved into the issue, the more arguments I found to support the fight to fully repeal Article 38 (1) (c). I contacted journalists, academics, legal experts, community organizations, non-profits and politically involved individuals to give me a 360-degree view of health discrimination in Canada.

I first review the legislative evolution of “excessive demand” and the current state of the law. Next, I review the administrative process for a migrant who wishes to apply for Canadian residency and how one could challenge a negative decision in federal court with relevant cases to highlight applicable examples. In the second half of this report, I state the four main arguments *against* health discrimination.

It is important to define some of the specific terms used in this report. Firstly, this report focuses on asylum seekers rather than refugees, because refugees are exempted from medical inadmissibility based on humanitarian and compassionate grounds. Until

determination is made, it is impossible to say whether the asylum-seeker is a refugee or not.³ Secondly, I use the definition of persons with disabilities from Article 1 of the Convention on the Rights of Persons with Disabilities (CRPD), which defines persons with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁴

HISTORY

Canada’s exclusion of persons with disabilities has evolved since pre-confederation times; exclusion has transitioned from direct to indirect. For instance, the 1859 *Quarantine Act* stated that medical officers who find “any Lunatic, Idiotic, Deaf and Dumb, Blind or Infirm Person, not belonging to any Emigrant family”⁵ who may become a public charge, were within their rights to return them to their country of origin. The same is true of the 1869 *Act Respecting Immigration and Immigrants* and the *Immigration Act* of 1886. These federal statutes were often mirrored by provincial legislation. For example, the Ontario Act of 1897 which “made it a crime to bring into the province any child of ‘defective’ intellect or physique.”⁶ In the 1906 *Immigration Act* the words “reportable” and “inadmissible” are used, which captures how Canadian society at the time viewed persons with disabilities. Persons with disabilities were seen as unable to contribute to their communities and an

³“Migration and International Human Rights Law”. Switzerland: International Commission of Jurists. 2014. <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>.

⁴ Article 2. Department of Economics and Social Affairs Division for Inclusive Social Development. *Convention on the Rights of Persons with Disabilities*. United Nations. <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-2-definitions.html>.

⁵ Chadha, Ena. “‘Mentally Defectives’ Not Welcome: Mental Disability in Canadian Immigration Law, 1859-1927.” *Disability Studies Quarterly* 28, no.1 (2008): 22. <http://www.dsq-sds.org/>

⁶ Chadha, *Mentally Defectives*, 22.

unproductive burden to their families. Direct discrimination endured in the catalogue of immigration acts spanning pre-confederation until 1976. In that year, alongside a major transformation of the entire immigration regime, the rejection of persons with mental and physical disabilities was replaced with the language of “excessive demand.” Passed in 2002, the IRPA does not specifically list “disability” in the excessive demand provision.

Excessive demand is defined in Section 1(1) of the IRPA as:

- a) A demand on health services or social services for which the anticipated costs would likely exceed the average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the medical examination, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than ten consecutive years; or
- b) A demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada because of the denial of or delay in the provision of those services to Canadian citizens or permanent residents.⁷

This is a shift from prejudicial legislative language that directly discriminates, to language that excludes based on rationalized public-cost arguments. Throughout the history of humanity, persons with disabilities have often been discriminated against participating fully in public life, and often pushed aside, to avoid judgment, disapproval or cruelty of those around them. Persons with disabilities were also excluded from migration

⁷ *Hilewitz v. Canada* (Minister of Citizenship and Immigration); *De Jong v. Canada* (Minister of Citizenship and Immigration). Supreme Court Judgements. 2005. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2291/index.do>.

ever since large-scale migration because they were “invalid” and excluded from eligible immigrants.

In 1900, immigration as a worldwide phenomenon began to diversify and intensify, due mainly to enhanced transportation, technology and communications which decreased travelling time and removed the fear of the unknown. This change of mentality and of seeing opportunities to change one’s life also applied to persons with disabilities.

Furthermore, violence and wars increased the number of persons with disabilities, due to persecution, torture, clashes among ethnic groups, mine explosions, etc. The emergence of this new “Disability and Immigration” situation was a consequence of many changes, and needs to be considered in decision-making, protected and integrated in societal activities.

Over the past two decades, the Canadian government has created more pathways for applicants to be granted an exemption from medical inadmissibility. For instance, in *Hilewitz v. Canada* (2005), the Supreme Court of Canada determined that immigration officers must consider the ability and intent of an individual to offset the excessive demand with their own financial resources. The immigration officer must also consider an individual’s likely demands on public services rather than a remote possibility.⁸

However, in *Deol v. Canada* (2002), the Federal Court of Appeal held that an applicant’s willingness and ability to pay for health services is not relevant to the “excessive demand analysis” as they are unenforceable.⁹ Then in *Campanioni v. Canada* (2009), the

⁸ *Charanjit Kaur Deol v. The Minister of Citizenship and Immigration*. Court of Appeal, Linden, Evans and Malone JJ.A. Toronto, May 7, 2002; Ottawa, June 21, 2002.
<http://reports.fja.gc.ca/eng/2002/2002fca271/2002fca271.html>.

⁹ *Ricardo Companioni v. The Minister of Citizenship and Immigration and HIV & Aids Legal Clinic* (Ontario). Federal Court, Harrington J. Toronto, December 17, 2009; Ottawa, December 31, 2009.
<http://reports.fja.gc.ca/eng/2011/2009fc1315.html>.

Federal Court concluded that the excessive demand assessment includes consideration of whether an applicant has a viable private insurance plan.¹⁰

The second “excessive demand” exemption is IRPA’s grant of ministerial discretion based on humanitarian and compassionate (H&C) grounds. Courts can also exercise equitable discretion to allow exceptions based on H&C considerations that warrant granting of special relief. While a vital procedure for applicants, pleading an H&C exemption is a highly-demanding process in what is an already complex immigration regime. It requires that persons with disabilities plead their vulnerability and appeal to the compassion of decision makers, rather than highlight their talents and value to society, further entrenching the image of persons with disabilities as objects of charity.¹¹

Excessive demand and HIV

The immigration medical examination also requires an HIV test for all applicants aged 15 years of age and older, and children younger than 15 years of age if certain risk factors are present, such as being born to an HIV positive mother.¹² Canada Immigration and Citizenship’s (CIC) policy of partner notifications requires that an HIV positive applicant in the family or refugee-dependent categories sign a document allowing the sponsor or partner to be notified of the applicant’s HIV status. Those who test positive for HIV are

¹⁰ Battista, Michael and Battista, Jordan. “HIV and Medical Inadmissibility in Canadian Immigration Law.” Canadian Bar Association. May 2013: 4. http://www.cba.org/CBA/cle/PDF/IMM13_paper_battista.pdf.

¹¹ Battista, HIV and Medical Inadmissibility, 4.

¹² Battista, HIV and Medical Inadmissibility, 4.

allowed 60 days to withdraw their application or voluntarily disclose their HIV status to their partner or spouse living in Canada.¹³

For those who are not receiving treatment for HIV, the policy instructs officers to assess an applicant's admissibility based upon their eligibility for anti-retroviral (ARV) treatment. For example, applicants with CD4 counts less than 350¹⁴ and applicants with a viral load of more than 55,000, are deemed inadmissible due to their eligibility for ARV treatment in Canada.¹⁵

People living with HIV should not face discriminatory or unnecessary barriers to their freedom of movement. States that erect entry barriers for people with HIV justify their policies as necessary to protect public health, but today HIV is known not to be communicable through casual contact. Thus, the United Nation has stated that "there is no public health rationale for restricting liberty of movement or choice of residence on the grounds of HIV status."¹⁶

While the individual assessment aspect that the Supreme Court of Canada determined, is a step in the right direction, the policy is still challenging for those with HIV. It's important to note that the immigration system provides a steady source of income for professionals inside and outside Canada. Doctors, lawyers and administrators benefit from a system that is opaque and structured to depend on their professions. Removing this law

¹³ Canadian HIV/AIDS Legal Network. Immigration and Travel – Overview. <http://www.aidslaw.ca/site/our-work/immigration-and-travel/?lang=en>.

¹⁴ CD4: The CD4 count is a test that measures how many CD4 cells you have in your blood. These are a type of white blood cell, called T-cells, that move throughout your body to find and destroy bacteria, viruses, and other invading germs.

¹⁵ Bisaillon, Laura. "Finally, some changes to health discrimination in Canadian Immigration law." *The Conversation*, March 13, 2018. <https://theconversation.com/finally-some-changes-to-health-based-discrimination-in-canadian-immigration-law-93340>.

¹⁶ Gomberg, Avi and Gomberg Dalfen. "A Healthy Debate: Medical Inadmissibility." 2011 Canadian Bar Association National Citizenship and Immigration Law Conference. Quebec 2011. http://www.cba.org/cba/cle/PDF/IMM11_Gomberg_Paper.pdf.

would curtail sizeable legal, medical and administrative costs. If people are concerned about the costs of caring for and treating people with HIV, whether they are immigrants or not, we must remember to see who the current law benefits.¹⁷

Also, note that Canada's immigration policy has been called "anti-poor," as those who can afford an immigration consultant or a lawyer can challenge these administrative decisions in court, and those who cannot afford to go to court can neither challenge the assessments nor propose mitigation plans.

Processing excessive demand

In total, approximately 450,000 Canadian Immigration medical examinations are performed each year. Of the 450,000 medical examinations 1,500-2,000 foreign nationals are determined to have a health condition that would make them inadmissible to Canada under Article 38 of the IRPA, almost all under Paragraph 38 (1) (c) of the IRPA for a health condition that "might reasonably be expected to cause excessive demand on health or social services."¹⁸

The Immigration, Refugees and Citizenship Canada website outlines a process for medical refusals, which includes conditions that mark an applicant as a danger to public health and safety. Please take a few minutes to review the web page before reading further.

19

¹⁷ Government of Canada. Process for Medical Refusals. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/refusals-inadmissibility/process-medical-refusals.html>.

¹⁸ Government of Canada. Danger to Public Health or Public Safety. Accessed July 2, 2018. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/refusals-inadmissibility/danger-public-health-public-safety.html>.

¹⁹ This section is taken from the Government' of Canada webpage. Immigration, Refugees and Citizenship Canada. *Process for medical refusals*. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/refusals-inadmissibility/process-medical-refusals.html>.

The case for repealing excessive demand

I. Excessive demand is discriminatory and violates the charter

In theory, developed nations guarantee equal conditions for all persons living inside their borders. The Canadian Charter of Rights and Freedoms is one of the documents that persons with disabilities can rely on when their rights and freedoms are ignored. However, the Charter applies to every person physically present in Canada, and therefore it is out of reach for applicants outside the country. As found in the *Deol v. Canada* case, Deol could not raise a charter challenge after his visa application was denied, because he was not physically in Canada.

Countries that have a charter generally base it on the Universal Declaration of Human Rights, the first element of the United Nations Charter, which was ratified by Member States when signing the covenants that give the declaration the strength of a treaty. The Universal Declaration recognizes civil and political rights, as well as economic, social and cultural rights. The first category includes, among other things: the right to equality and non-discrimination (article 2 and 7); the right to life, liberty and safety of one's persons (article 3); the right to freedom of expression (article 19); the right to freedom of thought, of conscience and of religion (article 11).²⁰ Signatory states are forced to respect the human rights mentioned in their internal legal system.

Section 3 of the IRPA mandates that decisions taken under the Act must be consistent with the Charter, including its principles of equality and freedom from

²⁰ European Convention on Human Rights. Council of Europe. Strasbourg.
https://www.echr.coe.int/Documents/Convention_ENG.pdf.

discrimination. The excessive demand regime violates the Charter by discriminating against people with disabilities, including people with HIV.

Note that the excessive demand regime does not discriminate directly, as it does not mention HIV or any other disability. Rather it focuses on the cost of an applicant's medical condition which is not a neutral factor. It appears that Immigration, Refugees and Citizenship Canada (IRCC) does not consider the cost of integrating a non-disabled immigrant into Canada, such as the cost of language classes, settlement services and the education of newcomer children. However, the IRCC rejects residence applicants from people living with HIV solely due to the cost of their life-saving medications. By assessing the applicants based solely on their medication costs, Canada overlooks the many contributions that people with HIV make to Canadian society. In *Hilewitz*, the Supreme Court recognized that "most immigrants, regardless of the state of their resources when they come to Canada, eventually contribute to this country in a variety of ways."²¹

Furthermore, having a discretionary policy makes it difficult for a court to clearly interpret that the law as discriminatory. The legal doctrine that countries have absolute discretion in immigration matters reaches back to the late nineteenth century. In Canada, it was affirmed in the 1906 decision of *Attorney-General for Canada v Cain* in which the Privy Council held that "one of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter the State, to annex what conditions it pleases to the permission to enter it."²²

²¹ *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*. Supreme Court Judgements. 2005. Accessed May 24, 2018. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2291/index.do>.

²² Lester, Eve. "Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia. Cambridge. 2018.

II. Excessive demand causes operational problems

First, the excessive demand regime imposes a costly and cumbersome process for both the federal government and applicants. The government is required to obtain opinions from medical officers and produce procedural fairness letters. The applicants may need to provide extensive evidence of why they merit a waiver of medical inadmissibility on H&C grounds. After this, immigration officers may need to obtain more medical opinions and seek further evidence from applicants. This process requires a lot of money and time which has a significant impact on applicants' lives.

Secondly, there is skepticism over whether the excessive demand regime lowers healthcare costs. Per the figures reported to the Committee on the Rights of Persons with Disabilities, only 27 million dollars per year are saved from the 900-1,000 economic immigrants turned down.²³ These statistics don't consider applicants who might switch to generic medication, who may have private insurance or who might ultimately receive a waiver from IRCC for their inadmissibility. Not to mention that healthcare costs are unpredictable; an applicant may suffer an accident or fall ill after becoming a permanent resident of Canada or an applicant could obtain a job who offers private health insurance once they become permanent residents.

Furthermore, the use of the word "excessive" isn't a statistically appropriate term. As mentioned above, the excessive demand threshold is set annually by multiplying the per capita cost of Canadian health and social services by the number of years used in the medical assessment for the individual applicant. The test captures an anticipated healthcare

²³ Lester, Eve. "Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia. Cambridge. 2018.

cost of even one dollar more than the average per capita health cost. Therefore, it measures “above average” not “excessive” (which means significantly greater).

I am not suggesting that the solution is to increase the excessive demand threshold, which would neither prevent applicants from being required to undergo the lengthy medical inadmissibility procedure nor address the underlying human rights concerns.

The truth is that the excessive demand provision places arbitrary focus on the use of healthcare services while ignoring other costs. All potential immigrants to Canada will access publicly-funded services to varying degrees. For instance, children who attend public schools or retirees entering a home for the elderly. My key point is that the benefits these individuals bring to Canadian society can outweigh any burden they may pose through their handicaps.

III. Excessive demand undermines the objective of the IRPA

The objectives, as set out in Section 3 of the Act, are as follows:

- (a) To permit Canada to pursue the maximum social, cultural, and economic benefits of immigration.
- (b) To enrich and strengthen the social and cultural fabric of Canadian society.
- (c) To support the development of a strong and prosperous Canadian society.
- (d) To see the families are reunited in Canada.
- (e) To promote the successful integration of permanent residents in Canada.
- (f) To support, by means of consistent standards and prompt processing, the attainment of immigration goals.²⁴

²⁴ Immigration and Refugee Protection Act (S.C. 2001, c. 27). Accessed May 17, 2018. <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/section-3.html?wbdisable=true>.

Immigrants must fulfill one of these programs to immigrate to Canada whether it's through the economic class, family sponsorship or a H&C application.

Economic-class applicants

Canada realizes the economic benefits of immigration and seeks to attract talent through the economic class. If Article 38 would be repealed, economic-class applicants would still need to demonstrate that they have skills that are in demand in Canada. Often, international students who become infected with HIV during their studies in Canada will be refused residency even though they would eventually contribute to Canadian society through jobs, taxes and other inputs.

Family-class applicants

Family-class applicants, such as parents, grandparents, orphaned nieces and nephews are also subject to the excessive demand inadmissibility, as they are depicted as drains on Canadian society. However, reuniting families improves the mental health of lonely Canadians and the elders provide free childcare allowing parents to go back to work instead of relying on social assistance.

The "lonely Canadian" sponsorship refers to sponsorships under Section 117(1)(h) of the *Immigration and Refugee Protection Regulations*. Under 117(1)(h), Canadian citizens or permanent residents with (i) no close family members in Canada, and (ii) no family members eligible to be sponsored as members of the family class can sponsor a relative who would not otherwise be eligible to be sponsored.

Humanitarian and compassionate (H&C) applicants

Applicants who can prove that they would suffer undue, undeserved or disproportionate hardship in their country of citizenship are exempted from the excessive demand clause under H&C grounds, however they must obtain a waiver to do so, which adds at least one year to the processing time of their immigration application but does not reduce healthcare costs.

IV. Excessive demand violates International Human Rights Law

In 2011, the UN General Assembly encouraged member states to eliminate HIV-related restrictions on entry, stay and residence.²⁵ UNAIDS reiterated this in 2014, highlighting that these calls were in line with international law, which prohibits member states from discriminating against a person in the enjoyment and exercise of their human rights based on their health status.

In 2010, Canada ratified the Convention on the Rights of Persons with Disabilities. The Convention obligates member state parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities” and to “refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention.”²⁶

²⁵ UN General Assembly, *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, A/RES/65/277, July 8, 2011, para. 79.

http://www.unaids.org/sites/default/files/sub_landing/files/20110610_UN_A-RES-65-277_en.pdf

²⁶ Article 4. Department of Economics and Social Affairs Division for Inclusive Social Development, *Convention on the Rights of Persons with Disabilities (CRPD)* United Nations. Accessed May 23, 2018.

The convention is based on the social model, which posits that disabilities result from the interaction between a person with an impairment and their exclusion from an ableist society rather than medical or social-welfare models, which see persons with disabilities as “objects of charity, medical treatment and social protection.” The CRPD’s Article 1 definition of disability is distinctly social, describing it as an “evolving concept” that results from the “interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on a equal basis with others.”²⁷ In fact, the convention emphasizes the value and contributions of these individuals. The following articles of the CRPD are incompatible with the IRPA’s exclusion based on health grounds.

Article 18: Liberty of Movement and Nationality

This Article 18 of the Convention specifically calls on member state parties to “recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others.”²⁸ While at first glance this seems like a guaranteed equality protection for migrants with disabilities, if one closely reviews the language, it says otherwise.

The first phrase of Article 18(a) reiterates that persons with a disability have a right to *a* nationality, not the right to immigrate to a country, saying that they have “the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability.”²⁹ The second phrase means that *once they have a nationality* they

²⁷ Convention on the Rights of Persons with Disabilities and Optional Protocol. United Nations. <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

²⁸ Article 18. Department of Economics and Social Affairs Division for Inclusive Social Development, *Convention on the Rights of Persons with Disabilities (CRPD)* United Nations. Accessed May 23, 2018. <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-2-definitions.html>.

²⁹ Article 18. CRPD.

cannot lose it due to a disability, since they are not allowed to be “deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement.”³⁰ It does not, however, help someone *who has yet to acquire* Canadian citizenship if they are deprived of it on the basis of disability. Article 18(c) gives the right of persons with disabilities to leave any country, including their own, saying that they are “free to leave any country, including their own.”³¹ Lastly, Article 18(d) sets out that individuals may not be deprived of the right to enter their own country. Again, this speaks to the rights of citizens vis-à-vis their own country, rather than the rights of migrants, as they are “not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.”³²

Article 2: Definition of Discrimination on the Basis of Disability

Applicants with a disability fall under the below definition: “Distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”³³

³⁰ Article 18. CRPD.

³¹ Article 18. CRPD.

³² Article 18. CRPD.

³³ Article 2. Department of Economics and Social Affairs Division for Inclusive Social Development, *Convention on the Rights of Persons with Disabilities (CRPD)* United Nations. Accessed May 23, 2018. <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-2-definitions.html>.

Article 5: Equality and Non-Discrimination

Article 5 (1) states that “all persons are equal before the law and are entitled without any discrimination to the equal protection and benefit of the law.”³⁴ Further, Article 5(2) prohibits discrimination on the basis of disability and guarantees persons with disabilities equal and effective legal protection against discrimination on all grounds.

In international jurisprudence, a violation of equal protection rights may be allowed if, judged considering the objectives and purposes of the convention, they (1) pursue a legitimate public policy aim and are (2) proportional to achieving that aim.

Legitimate public policy aim

Does medical inadmissibility pursue legitimate public policy objectives? The Canadian government claims that the excessive demand clause is in place to protect Canadians’ health and social services. Firstly, if this is the case, then economists, not doctors, should oversee making these determinations as the latter has no training, experience or expertise in the subject of economics. Secondly, many other categories of prospective immigrants could be a burden on healthcare and social service systems, for instance, cigarette smokers and careless drivers.

V. The excessive demand regime is not in line with other countries practices

Numerous countries do not have any laws, policies or known practices that deny migration based on health status. It is concerning that a country like Canada will provide

³⁴ Article 5. Department of Economics and Social Affairs Division for Inclusive Social Development, *Convention on the Rights of Persons with Disabilities (CRPD)* United Nations. Accessed May 23, 2018. <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-2-definitions.html>.

humanitarian aid to increase access to healthcare in developing countries, yet discriminate against individuals with disabilities or health issues such as HIV. Indeed, many countries that do not practice this form of health discrimination include Austria, Belgium, Finland, France, Ireland, Italy, Lithuania, Norway and Switzerland.

The Australian and Canadian approaches to disability are quite similar. Both systems exclude applicants who may cause excessive demand on social and health services. This is because both Canada and Australia offer universal health care and significant social programs for residents. Immigration controls are in place to ensure that these services are not overburdened. However, the Australian system differs from the Canadian one by not automatically exempting children and spouses.

The Australian system requires costs to be 50 percent above average over five years to be considered excessive, the excessive cost threshold in Canada is much lower and anything above average can be considered excessive if caused by a health condition.³⁵

On the other hand, the U.S. immigration system has historically been more accepting and open regarding disability than the Canadian system. This might change Applicants with disabilities are only excluded if they are at risk of harmful behaviour, pose a threat to either themselves or society and/or are likely to become a public charge. This is because social and medical services are generally privatized in the U.S., therefore the American system is not as concerned about immigrants creating excessive demand.

³⁵ Council of Canadians with Disabilities. "Disability & Immigration law in Australia". Accessed July 1, 2018.

Conclusion

The excessive demand regime represents a continuing history of discriminatory laws targeting people with disabilities. Article 38 of the IRPA perpetuates negative stereotypes of persons with disability and persons with HIV, by depicting them as a burden on society and ignoring the many contributions they give to Canadian society.

The excessive demand regime violates the Canadian Charter and international human rights law, is contrary to the practices of many other countries, causes operational problems and undermines IRPA's objectives. Therefore, this regime should be changed. Any change is the responsibility of the federal government, and the immigration minister Ahmed Hussein.

Throughout my research, I highlight the work of different stakeholders who contributed to this issue by applying their expertise, whether law, social work, academic research or personal experience, to the issue. I contacted them either in person, through email or on the phone and noticed they all had one thing in common, which is that they found interpreting Article 38 of the IRPA challenging. Legal language is arcane and convoluted because there are certain terms that lawyers must use to comply with regulations, and the legalese can be hard for others to understand. I read all legal writing on health discrimination in Canada on the government's website and tried to and tried to simplify it for the reader.

The aim of this report was to provide a guide on how the process of health discrimination truly works. The information on this matter proved to be very confusing, as it would also be for an applicant who does not speak English, has limited internet access or has never dealt with immigration issues before.

I urge any stakeholder in a position of influence to use this report as a source of information to further their research, spread awareness and press the Canadian government to face the truth. I also want to give hope to those who have directly or indirectly been discriminated against by reinforcing that they are not alone in this fight and that we seek change. Concerned groups have successfully pressured the immigration minister to increase the cost threshold, which is a step in the right direction and shows that politicians recognize the issue.

Due to the time restrictions of my research, I was unable to explore all the questions I had originally hoped to answer. With this being said, the following questions should be considered in the future:

1. Who does the new threshold still discriminate against? What health conditions do these individuals have?
2. Are those who have been granted entry adequately cared for? What are the actual current costs and expected costs over the next decade for these individuals? What the expected net cost-benefit to the government for these individuals over their lifetimes in Canada?
3. Consider the four main policy areas: education, housing, the work place and healthcare.
4. Is the coverage under the Interim Federal Health Program adequate to meet the needs of refugee claimants, government-assisted refugees and others in humanitarian need?

Appendix

I. Canada's New Accessibility Law

While it does not relate to immigration policies, Canada passed a new accessibility law that will increase accessibility nationwide. The governing Liberal Party will remove barriers in federally-regulated sectors such as banking, interprovincial transportation, telecommunications and government-run services such as Canada Post. These changes are supposed to alleviate the hardships disabled people face daily. Some examples include:

- **Transport:** In the Spring 2017 the Canadian Transportation Agency ordered to double the number of wheelchair users Via Rail could accommodate.
- **Banking:** Most branch counters or bank machine keypads are located too high for someone using a mobility aid to reach, more wheelchair-accessible counters are needed.

A legislative change is needed in order to ensure companies uphold their promises of creating a more accessible and inclusive environment.

Although Bill C-81 is not final, it appears that Canada is finally implementing policy changes that people have demanded for over a century. Disabled individuals need to be treated as citizens and elected officials need to realize that accessible and disability rights are the responsibility of elected officials.

II. The Genetic Non-Discrimination Act

Another Act recently passed by the Liberal Party which is relevant to my research topic is the Genetic Non-Discrimination Act, or Bill S-201, passed May 4, 2017.³⁶ It was a big step for privacy and human rights in Canada. The act prohibits genetic discrimination across

³⁶ Association Canadienne Des Libertes Civiles. "The genetic non-discrimination act – an overview". April 2018. Accessed June 4, 2018. <https://ccla.org/genetic-non-discrimination-act-overview/>.

Canada by barring any person from requiring individuals to undergo, or disclose the results of, a genetic test as a condition of providing goods or services, or entering a contract.

In the past, genetic testing has resulted in possible discrimination at some point in the future. Characteristics identified in the genetic testing have been used to assess if a person is predisposed to a medical condition that may manifest later in life. These tests could be vital to ensure early intervention preventing or mitigating the onset of a medical condition. However, without legislation, results of genetic testing could limit a person's ability to receive life and/or disability insurance.

We must rethink disABILITY; society's attitude toward people with disabilities has drastically changed in the past 40 to 50 years; however, it must keep evolving. Terms like "mentally retarded" have been replaced by "disabled" and it is important to emphasize the individual, not the person's disability – it's now time to recognize their abilities, not their disabilities. Public policy must also reflect this change in attitude: transportation, education, employment, community living, health care and immigration must be accessible and inclusive to all. Vulnerability is often seen as fragility or weakness, but it may also be conceptualized as openness, susceptibility and receptiveness. In today's globalized world, multiculturalism is one of Canada's greatest assets. Disability awareness is the next great leap in human rights and Canada must be part of this, and should ideally be a leader.

III. Outreach Contacts

Organization	Name	Email	Topic
Policy Options Politiques	Bruno Dupeyron		Article: Instead of Maintaining Disgraceful Medical Inadmissibility Immigration Rules....
Journalist from The Star	Nicholas Keung		Article: Ottawa to relax restrictions on Immigration applicants with disabilities
Assistant Professor at the Uni of Toronto	Laura Bisailon		Article: Finally, some changes to health-based discrimination in Canadian Immigration law
Association multiethnique pour l'integration des personnes handicapees	Miruna Nica		Coordonnatrice des Services
Association multiethnique pour l'integration des personnes handicapees	Chloe Naud		Intervenante psychosociale
Action Refugies Montreal	Paul Clarke		
<u>Further people to contact:</u>			
DisABLED Women's Network			
First Immigration Law Firm			
Canada Immigration Centre			
Federation Internationale des Droits de la Personne Handicapee			
The Council of Canadians with Disabilities			Paper: HIV and Medical Inadmissibility in Canadian Immigration Law
Immigration and Refugee Board	Michael Battista		Advocates for disability rights
	Jenny Kwan		Focus on systematic discrimination, equality rights and mental health in workplace
NDP MP for Vancouver	Colleen Sheppard		
Professor of Law at McGill University	Pablo Altamirano	mouna.khankan@caci-bc.org	
ALAC	Mouna Khankan		
CACI	Marjolaine Granger	mberry@ccrweb.ca	
CANA	Marisa Berry Mendez		
Canadian Council for Refugees		luz@centrecsa.org	
Canadian HIV/AIDS Legal Network	Muz Elena Caceres		
CSAI	Sebastien Bliin	carine.chateau-ntchameni@laisonnee.org	
PRAIDA	Carine Chateau Ntchamen	delfino.campanile@promis.qc.ca	
La Maisonee	Delfino Campanile		
PROMIS			University professor who moved to Canada from Poland - fears her family will be forced to leave
The Coalition Migrant Worker Alliance for Change	Karolina Krystniak		
Affected Individual			

Bibliography

- Association Canadienne Des Libertes Civiles. "The genetic non-discrimination act – an overview". April 2018. <https://ccla.org/genetic-non-discrimination-act-overview/>.
- Battista, Michael and Jordan Battista. "HIV and Medical Inadmissibility in Canadian Immigration Law." *Canadian Bar Association*, 2013: 4. http://www.cba.org/CBA/cle/PDF/IMM13_paper_battista.pdf.
- Bisaillon, Laura. "Finally, some changes to health discrimination in Canadian Immigration law." *The Conversation*, 2018. <https://theconversation.com/finally-some-changes-to-health-based-discrimination-in-canadian-immigration-law-93340>.
- Canadian HIV/AIDS Legal Network. Immigration and Travel – Overview. <http://www.aidslaw.ca/site/our-work/immigration-and-travel/?lang=en>.
- Chadha, Ena. "Mentally Defectives" Not Welcome: Mental Disability in Canadian Immigration Law, 1859-1927. *Disability Studies Quarterly* 28, no.1, 2008: 22. <http://www.dsqsds.org/>.
- Charanjit Kaur Deol v. The Minister of Citizenship and Immigration. Court of Appeal, Linden, Evans and Malone JJ.A. Toronto, May 7, 2002; Ottawa, June 21, 2002. <http://reports.fja.gc.ca/eng/2002/2002fca271/2002fca271.html>.
- Council of Canadians with Disabilities. "Disability & Immigration law in Australia". <http://www.ccdonline.ca/en/socialpolicy/access-inclusion/disability-and-immigration-law-in-australia>.
- Department of Economics and Social Affairs Division for Inclusive Social Development. *Convention on the Rights of Persons with Disabilities*. United Nations. <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-2-definitions.html>.
- Gomberg, Avi and Gomberg Dalfen. "A Healthy Debate: Medical Inadmissibility." Canadian Bar Association National Citizenship and Immigration Law Conference. Quebec, 2011.
- Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration). Supreme Court Judgements. 2005. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2291/index.do>.
- International Commission of Jurists. "Migration and International Human Rights Law". Switzerland, 2014. <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>.

- Immigration, Refugees and Citizenship Canada. *Immigration and Refugee Protection Act*. Government of Canada, 2002. <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/section-3.html?wbdisable=true>.
- Immigration, Refugees and Citizenship Canada. *Operational instructions and guidelines*. Government of Canada, 2018. <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements.html>.
- Mcquigge, Michelle. "Federal government tables Canada's first national accessibility law". The Canadian Press, 2018. <https://www.theglobeandmail.com/politics/article-federal-government-tables-canadas-first-national-accessibility-law/>.
- Lester, Eve. "Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia." Cambridge, 2018. <https://books.google.it/books?id=t1LDwAAQBAJ&pg=PA207&lpg=PA207&dq=#v=onepage&q&f=false>.
- Penafiel, Teresa. "Disability + Immigration" – A new planetary reality. Durban: Multi-Ethnic Association for the Integration of Persons with Disabilities, 2001. <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5multiethnic.doc>.
- Ricardo Companioni v. The Minister of Citizenship and Immigration and HIV & Aids Legal Clinic (Ontario). Federal Court, Harrington J. Toronto, December 17, 2009; Ottawa, 2009. <http://reports.fja.gc.ca/eng/2011/2009fc1315.html>.
- Smith, Stephen. "Canada revises controversial medical inadmissibility rules for immigrants." Canadian Immigration Newsletter, 2018. <https://www.cicnews.com/2018/04/canada-revises-controversial-medical-inadmissibility-rules-for-immigrants-0410513.html#gs.OIPKblc>.
- United Nations General Assembly. *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, A/RES/65/277, July 8, 2011, para. 79. http://www.unaids.org/sites/default/files/sub_landing/files/20110610_UN_A-RES-65-277_en.pdf.
- Wagner, Gillian. *Children of the Empire*. London: Wiedenfeld and Nicolson, 1982. <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/>.