

November 15, 2017

Submission to the Standing Committee on Citizenship and Immigration regarding “Medical Inadmissibility” in the *Immigrant and Refugee Protection Act*

Submitted by A.J. Withers with Alex Tufford

Thank you for considering this submission regarding the medical inadmissibility of immigrants.

We commend the Standing Committee for holding hearings on this issue as it is an important issue and has significant implications on the lives of many immigrants, their families, and Canada as a whole.

We are scholars at York University’s School of Social Work in Toronto, Ontario and social justice activists. A.J. Withers has a MA in Critical Disability Studies (York, 2013), a Court and Tribunal Agent Diploma, including the academic requirements for an Immigration Consultant (Humber, 2006) and is currently a PhD Candidate. A.J. Withers is also a prominent disabled scholar and activist, the author of *Disability Politics and Theory* (Fernwood, 2012) and *A Violent History of Benevolence: Interlocking Oppressions in the Moral Economies of Social Working* (co-authored with Chris Chapman, University of Toronto Press, forthcoming). A.J. Withers has worked with low-income, disabled and migrant communities for over 15 years. Alex Tufford currently works with recent immigrants and refugees providing settlement services.

For the reasons outlined below, we respectfully ask that you repeal Section 38(1) of the *Immigrant and Refugee Protection Act* (IRPA) and implement procedures such that all permanent resident applicants denied because of this section of the *Act* in the past 10 years be granted permanent residency.

Section 38(1) (c) of the *IRPA* labels certain immigrants as medically inadmissible due to the “excessive demand” it is perceived they will place on social and health care service systems.

Part 1. Discrimination

Federal Government’s Stated Values

There is a considerable gap between the stated values of the Federal Government and the IRPA.

The Canadian Government and Prime Minister Justin Trudeau claim to be committed to the rights of disabled people. Disabled people are a protected group under the *Charter of Rights and Freedoms* and Canada is a signatory to, a number of international human rights conventions, including the *United Nations Convention on the Rights Of Persons With Disabilities*.

On the 2016 International Day of Persons with Disabilities, Prime Minister Justin Trudeau’s officially stated: “let us take action to break down the barriers that exclude Canadians with disabilities. We cannot rest until persons with disabilities have the same opportunities as everyone else.”

However, the “excessive demand” clause is a barrier that keeps many disabled people from having “the same opportunities.”

Discrimination Against Disabled People

a. Negative and Stereotypical Depiction of Disabled People

The *Immigration and Refugee Protection Act* wholly depicts disability in negative terms. Disabled people are constructed as a threat to Canadian resources, as needy, as an “excessive demand.”

This is far from how disabled people experience themselves – as complex, multifaceted people. Like all people, disabled people benefit from society and they give back to it. Further, many disabled people view their disabilities as integral parts of their identities that provide valuable insight and experience. For example, many caregivers, who would be denied permanent residency because of their disabilities, excel at their jobs precisely because of their lived experience with a disability (and/or their experience providing care to their disabled children). In other words, disabled people do not view their disabilities solely in negative terms, if they view their disabilities in negative terms at all.

For the Canadian Government to continue to portray disabled people as drains on resources and in negative terms works to legitimize negative stereotypes of disabled people and undermine its stated goals of removing barriers and increasing equality.

b. “Excessive Demand” as a Disability Tax

The “excessive demand” clause triggers additional medical testing for many disabled people, including those who will be deemed admissible. We therefore submit that “excessive demand” acts as a tax on all disabled people and is discriminatory.

c. Punitiveness of “Excessive Demand”

“Excessive demand” punishes disabled people for being disabled. It punishes families for having disabled members.

Unlike other punitive laws that are supposed to punish people for what they do, this clause excludes people from Canada, sometimes forcing them out of the country and away from their loved ones and homes for being who they are.

d. Anticipatory Nature of “Excessive Demand”

With this clause in the IRPA, applicants must respond to and are rejected for something that has not yet occurred. This section is, therefore, patently unfair as it requires people to defend against an imagined future rather than deal with material facts.

e. Arbitrariness of the “Excessive Demand” Amount

Further, the designation of ‘excessive burden’ is determined if an applicant’s estimated health and social service costs exceed \$6,655 per year. We submit that this number is flawed as it unduly devalues human life, including life-saving and sustaining care. Further, and without undermining the previous point, Citizenship and Immigration Canada has been found to undervalue the cost of social services by an estimated \$40 billion a year, deflating this amount.

Furthermore, there is no way to put a number on the costs of caring: everyone in society engages in unpaid caring in some respects, and everyone gets support from their community in one form or another; whether the costs are recognized in official public service delivery systems, or not.

Discriminates Against Poor People

“Excessive demand” is prohibitively expensive for low-income people, regardless of the ultimate finding with respect to the permanent residency application. Therefore, we submit that it is discriminatory.

Many of the applicants are migrant workers and caregivers who are very low wage workers. Caregivers often come to Canada, accept low wages on the promise of a pathway to immigrate, and find that they cannot afford to navigate the immigration system because of the “excessive demand clause” if they or one or more of their dependants are disabled.

This additional medical testing that is triggered by an “excessive demand” concern is very costly. For applicants or their family members in the Global South, the number of Citizenship and Immigration Canada approved doctors is quite small, requiring some applicants and/or their dependents to travel long distances – sometimes even to go to another country.

If an applicant is able to successfully prepare a mitigation plan to offset estimated future health and social services costs, the applicant can overcome the “excessive demand” clause and be granted permanent residency. A mitigation plan is a complex legal document that typically requires significant legal assistance which many people cannot afford. Additionally, the mitigation plan itself may require access to significant financial resources that many migrants simply do not have - particularly migrant workers and caregivers.

Mitigation plans, as they are applied today, were introduced in response to the Supreme Court’s ruling in *Hilewitz and De Jong* which, essentially, created a pathway for families with wealth to privately pay for social services. Not only does this exclude many migrant workers, caregivers and other low income people, but also it creates a two-tiered system for permanent residents to access social services. Canada has a meaningful (although inadequate) social safety-net. It is a Canadian value to provide benefits to all citizens and permanent residents who need them. The way that well-to-do applicants can get around the “excessive demand” clause undermines this principle and sets a dangerous precedent for Canada as a whole. By allowing this two-tiered system to remain, Parliament is asserting that one’s economic, immigration and disability status are all grounds for lesser treatment.

Should an applicant be denied permanent residency, an applicant can then attempt a Humanitarian and Compassionate Grounds claim (H&C) which is also legally complex and typically requires substantial legal assistance.

Combined, many low-income people who make valuable contributions to Canadian society in myriad ways cannot afford to navigate onerous legal processes because of the additional and unnecessary expenses due to the “excessive demand” clause.

Racial Discrimination

Disproportionately, it is people of colour who are negatively impacted by the “excessive demand” clause.

Immigrants, in general, and the majority of migrants under the Temporary Foreign Worker Program, in particular, are racialized. Additionally, globally, disabled people are mostly people of colour and, nationally, they are disproportionately people of colour. Further, in Canada, poor people are disproportionately people of colour.

Public policy, regardless of its original intention, can be discriminatory against a particular group in its application. The “excessive demand” clause of the IRPA, compounded with other systemic injustices including racism, poverty and war will result in disproportionate expenses associated with the clause and, almost certainly, disproportionate permanent residency denials.

Discrimination Against Migrant workers & Caregivers

Migrant workers often have difficult and precarious work conditions. They are inconsistently covered under basic labour rights: each worker is subject to variable provincial and territorial labour laws. Additionally, under the current employer-specific (“closed”) work permit system, Temporary Foreign Workers must apply for new work permits to change workplaces. Worker precarity and closed work permits may result in the inability for workers to refuse unsafe work.

Up until recently, migrant Caregivers were required to live in the homes of their employers. The government has indicated that they recognize that these work conditions led to unfair working conditions, and abuse, and annulled the live-in requirement. However, abusive working conditions for Caregivers continue.

Because Caregivers and migrant workers are already often subjected to substandard work conditions, labour rules, and oversight, it is particularly troubling that the “excessive demand” clause will be used against them if they try to permanently immigrate, even if they are injured at or sick from work. The Canadian government appears to be forging a disposable workforce.

Part 2. Historic Discrimination and its Contemporary Legacy

Canada’s 1869 *An Act Respecting Immigration and Immigrants* was Canada’s first major immigration legislation. It carried forth principles in British immigration law implemented over the previous decade. The *Act* stated that if a “Lunatic, Idiotic, Deaf and Dumb, Blind or Infirm person, not belonging to any Immigrant family, and such person is, in the opinion of the Medical Superintendent, likely to become permanently a public charge” was on a vessel, a bond could be ordered to be paid. This bond – which required three Canadian resident sureties, coupled with significant penalties for ship captains who transported people in these categories who did not have the bond, would have acted as a significant deterrent for both disabled people from immigrating and ship captains from allowing them to travel to Canada. The act also permitted the reconveyance to the port of departure if the bond could not be paid. The list of disabled people expanded in 1902 and 1906.

Eugenic discourse became increasingly popular and influential on public policy as the twentieth century progressed. Eugenics is the belief that human evolution can be guided by increasing the number of “fit”

people through selective reproduction and decreasing the number of “unfit” people, typically through sterilization and segregation (institutionalization and immigration bans). Eugenacists argue that ‘unfitness’ is genetic and, therefore, runs in families. Historically, it was held that immigration was a significant eugenic tool to promote the ‘fitness’ of a national population and; therefore, it should be used to exclude entire family lines that were deemed ‘unfit.’

The 1910 *Immigration Act* appears to advance eugenic principles as it, for the first time, fully banned: “idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous”.

The Government of Canada also barred the immigration of:

immigrants who are dumb, blind, or otherwise physically defective, unless in the opinion of a Board of Inquiry or officer acting as such they have sufficient money, or have such profession, occupation, trade, employment or other legitimate mode of earning a living that they are not liable to become a public charge or unless they belong to a family accompanying them or already in Canada and which gives security satisfactory to the Minister against such immigrants becoming a public charge

This section of the *Act*, for the first time, created the “otherwise physically defective” category which could be a catchment for any “medically” undesirable group.

The category of “otherwise physically defective” was also used to exclude particular groups who were deemed unfit in order to prevent them from immigrating to Canada. For example, as Black people sought refuge in Canada from the racist anti-Black legislation in the United States, the Canadian government frequently used “excessive demand” to bar entry. “Excessive demand” was employed to prevent Black people from coming to Canada on the grounds of “arthritis, asthma, cellulitis, curvature of the spine, diabetes, defective sight, eczema, hookworm, goiter, gout, hare lip, lameness, melancholia, opium habit, poor physique, varicose veins, and pregnancy.” “Excessive demand” was used alongside the overtly racist Chinese Head Tax (which the Canadian Government has apologized for) to exclude people it considered undesirable.

The contemporary *Immigrant and Refugee Protection Act* does not name specific conditions as its predecessors did. however, it continues to discriminate against certain disabled people, depicting them as burdens on Canadian society.

One disqualified member on the grounds of excessive demand will disqualify an entire family group. Whether intentional or not, the immigration system continues to be used to exclude some family lines with disabled members. Renowned eugenicist Frederick Osborn once said: “Eugenic goals are most likely to be attained under a name other than eugenics.”

Part 3: Legal Issues

International Convention of the Rights of Persons with Disabilities

Canada’s history of denying that immigration law has involved infringement’s on *Charter* rights (see *Hilewitz and De Jong* above) dovetails with it’s disappointing engagement with the *Convention of the Rights of Persons with Disabilities* (CRPD).

The Supreme Court of Canada has not heard a case with respect to the “excessive demand” clause of the IRPA since Canada ratified the CRPD in 2010. Many of the articles in the convention impart upon states the necessity to provide appropriate services and associated costs to fulfil their duties of complying with the convention.

Canada is shamefully degrading all disabled people as it has failed to create *any* corresponding legislation to make the convention enforceable, as other signatory countries have done internationally . Canada has also neglected to ratify the “Optional Protocol” of the CRPD “which authorizes the Committee on the Rights of Persons with Disabilities to consider complaints by individuals against State Parties regarding perceived violations of the CRPD” This is notable, as the protocol would likely lead to disabled people’s ability to contest the “excessive demand” clause in the IRPA.

Canada’s use of the “excessive demand” clause is a contravention the CRPD, and of Article 9, and 24 under the UN Convention on the Rights of the Child. Article 24 has provisions for states to seek to provide “the highest attainable standard of health” for children. Canada’s refusal to allow disabled children to immigrate with their families because they are considered an “excessive demand” when they could attain better health care in Canada is, we submit, a violation of this Article.

Immigration and Refugee Protection Act: Objectives

The IRPA seeks to “ensur[e] that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination”, which is informed by the *United Nations Universal Declaration on Human Rights*, and, amongst other rights, includes the right to health and medical care. Section 38(1) (c) is in direct contravention of this declaration.

Charter of Rights and Freedoms

It is also our submission that the imposition of family separation under the IRPA violates sections 7, and 15 of the *Charter* and is not saved by section 1. Section 7 of the *Charter* recognizes the rights of all persons to “life, liberty and security of the person.” This includes “when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity.”

The additional delays that the “excessive demand” clause add to an immigration application, too, can lead to a *Charter* breach. Writing for the majority in *Chaoulli*, Supreme Court Chief Justice McLachlin found: “delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the Charter.” The exhaustive medical examining for “excessive demand” cases can take months for applicants and/or their dependants. Recently, The backlog to process PR applications for caregivers *without* excessive demand was documented at 50 months. The lengthy separation causes undue stressors on separated families, especially for members of a family with a disability who rely on other family members for care. If the person being examined is out of the country, superior medical treatment in Canada could be significantly delayed - threatening the security of the person.

Section 15. (1) of the Charter of Rights and Freedoms guarantees equal protection “equal before and under the law” without discrimination on the grounds of disability. As we have demonstrated, the “excessive demand” clause, S. 38 (1)(c) of the *Immigrant and Refugee Protection Act* is discriminatory

on the grounds of disability. It is also discriminatory on the grounds of race, another protected class. This discrimination is not reasonably justifiable in a democratic society and, therefore, it is not saved by section 1. of the *Charter*.

Conclusion

The “excessive demand” clause has a detrimental impact on disabled individuals and families. It discriminates against disabled people, poor people and people of colour and is the legacy of Canada’s eugenic immigration policy. “Excessive demand” is incongruous with a government that claims to value the contributions of disabled people and oppose barriers for disabled communities.

This submission has outlined clearly the discriminatory aspects of S. 38 (1) of the *Immigration and Refugee Act*, the “excessive burden” clause which unfairly restricts migrants with disabilities, and their family members. Canada’s adherence to “excessive burden” as a determination of ability to obtain PR status is a continuation of Canadian immigration’s disableist, and racist history.

Recommendations

We urge the Standing Committee to recommend the repeal of S. 38 (1) of the *Immigration and Refugee Act* immediately, and immediately and automatically bestow Permanent Residency upon all Permanent Resident applicants who were denied on the grounds of “excessive demand” over the past ten years.

One or both of us would be pleased to address these issues in person before the Standing Committee should you wish to discuss them further.