# Choosing Citizens:
# Canada's Obligations to Migrants with Disabilities

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## OVERVIEW

Disability is the last immutable characteristic that remains a barrier to settling and building a life in Canada.[1] The medical inadmissibility provision of Canada's *Immigration and Refugee Protection Act* (IRPA) excludes persons who would create an "excessive demand" on social and health services from landing as permanent residents. Scholars, citizen groups, and litigants have challenged the provision on the basis that it discriminates against persons with disabilities. While the provision remains codified in the IRPA,[2] in recent years various reforms have loosened its grip. Modifications to the "excessive demand" provision have produced uneven results: currently, persons with disabilities in more affluent families are positioned to overcome medical inadmissibility, while those in poorer families are not. At the same time, reforms to "excessive demand" have created a procedure of superfluous complexity (and likely administrative cost); applicants undergo medical assessments and administrative reviews, file reports on "ability and intent," and more application reviews follow. Moreover, when all is said and done, the purpose of these measures is undermined by the fact that an accepted individual's intent to pay for health and social services is not actually an enforceable undertaking.[3] Despite the apparent economic objectives of the "excessive demand" provision, the state of the law with regards to this provision is anything but efficient.

Underpinning the evolution of this provision is Canadian lawmakers' desire to find middle ground between unqualified state sovereignty in defining immigration policy, and the

[1] Other immutable characteristics, such as race and ethnicity, were removed from Canadian immigration criteria in
[2] *Immigration and Refugee Protection Act*, SC 2001, c 27 s. 38(1)(c) [*IRPA*].
[3] *Charanjit Kaur Deol v Minister of Citizenship and Immigration,* 2002 FCA 271 at para 54, [2002] FCJ No 949 [*Deol*]; *Choi v Canada (Minister of Citizenship and Immigration)* (1995), 98 FTR 308 at para 30, 29 Imm LR (2d) 85 (FCTD); *Cabaldon v Canada (Minister of Citizenship and Immigration)*,140 FTR 296 at para 8, [1998] FCJ No 26; *Poon v Canada (Minister of Citizenship and Immigration)*, 198 FTR 56 at paras 18–19 (FCTD), 2000 CanLII 16766 (FC).

growing recognition of the equality rights of persons with disabilities. Canada's recent ratification of the groundbreaking *Convention on the Rights of Persons with Disabilities* (CRPD) offers a coherent and principled instrument for finding this middle ground.[4] Canadian courts have already shown a desire to change the posture of the law towards migrants with disabilities. I argue that they are right to do so, but a coherent normative framework should guide these reforms. The CRPD provides just that.

My analysis proceeds in four parts. In part one, I describe the legislative evolution of "excessive demand" and the current state of the law. Part two examines systemic barriers to equality protections in the context of immigration: the discretionary doctrine and the limited applicability of the *Canadian Charter of Rights and Freedoms*.[5] Part three introduces the CRPD and canvasses the protections it provides to migrants with disabilities, focusing on equality guarantees in Article 5. Finally, part four looks at the potential interpretative influence of the CRPD in Canadian courts.

From the outset, several terms demand precision. First, this essay focuses on migrants *other than* refugees and asylum-seekers because medical inadmissibility does not apply to refugees seeking resettlement in Canada.[6] Further, the international and domestic legal regimes applicable to these two groups differ in important ways.[7] In what follows, I will refer to this residual category of non-refugees and asylum-seekers simply as "migrants." This category is no small piece of the global migration pie. In fact, economically active migrants and their families

[4] *Convention on the Rights of Persons with Disabilities*, 6 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) [*CRPD*].
[5] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].
[6] *IRPA*, *supra* note 2, s 38(2).
[7] The main difference is that refugee resettlement is governed by the 1951 *Convention Relating to the Status of Refugees* which has no bearing on economic migration.

make up ninety percent of migration flows.[8] Having said that, refugees are some of the most vulnerable migrants, and new scholarship is beginning to examine the particular experiences of refugees with disabilities.[9] As important as those questions are, they are outside the parameters of the current paper.

Second, I adopt the definition of persons with disabilities as expressed in Article 1 of the CRPD. The convention 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."[10] A year after Canada ratified the convention, this definition was cited with approval by a Federal Court judge.[11] Some Canadian courts and provincial human rights legislation have gone further, affirming that a temporary physical condition may still be considered a disability.[12] While it may be possible to bring a disability claim for impairments of a more temporary nature, considering my focus on obligations flowing from the CRPD, I will confine my analysis to the Article 1 definition.

## I. MEDICAL INADMISSIBILITY

Canada's exclusion of persons with disabilities has evolved in important ways since pre-confederation immigration laws. First, the exclusion has transitioned from direct to indirect discrimination. Second, medical inadmissibility applies to an increasingly narrow class of

[8] *ILC Practitioner's Guide: Migration and International Human Rights Law* (Geneva, Switzerland: International Commission of Jurists, 2014) at 38.
[9] See generally, Mary Crock, Christine Ernst & Ron McCallum Ao, "Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities" (2013) 24:4 Intl J Refugee L 735.
[10] *CRPD*, *supra* note 4, art 1.
[11] *Saporsantos Leobrera v Canada (Citizenship and Immigration)*, 2010 FC 587 at para 2, [2011] 4 FCR 290.
[12] *Hinze v Great Blue Heron Casino*, 2011 HRTO 93 at para 14; *Mississauga (City) v ATU Local 1572* (2005), LAC (4th) 84 (Ont Arb Bd).

immigrants. Third, exemptions from medical inadmissibility have increased. Overall, these are positive, if piecemeal reforms. Still, the "excessive demand" exclusion is codified in the IRPA and remains an insurmountable barrier for a small number of otherwise qualified applicants seeking to build a life in Canada.

Early Canadian immigration statutes directly discriminated against persons with disabilities. The 1859 *Quarantine Act* set out that medical officers who find "any Lunatic, Idiotic, Deaf and Dumb, Blind or Infirm Person, not belonging to any Emigrant family" who might become a public charge were within their rights to return them to their country of origin.[13] The 1869 *Act Respecting Immigration and Immigrants* re-affirmed this approach.[14] The *Immigration Act* of 1886 brought more of the same, establishing a "highly developed medical and legal structure for excluding prospective immigrants with disabilities."[15] These federal statutes were sometimes mirrored by provincial legislation. For example, the *Ontario Act* of 1897 "made it a crime to bring into the province any child of 'defective' intellect or physique."[16]

Far from a rational exclusion based on public cost, Ena Chadha's study of the history of mental disability in Canadian immigration policy reveals the way in which these provisions mirrored medical and social prejudices about disability. Chadha writes that "the addition of 'epileptic' and 'dumb' to the list of 'reportable' and 'inadmissible' classes in the 1906 *Act* was intended to capture the newest forms of mental disorder diagnoses available to the medical and psychiatric communities."[17] Underpinning these policies was the entrenched belief that "persons with mental disabilities are incapable of contributing to their communities" and that they are

[13] Edna Chadha, "'Mentally Defectives' Not Welcome: Mental Disability in Canadian Immigration Law, 1859-1927" (2008) 28:1 Disability Studies Q (source not paginated).
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid*.
[17] *Ibid*.

"weak, unproductive, in need of family and public support" and a "liability for society as a whole." [18] These laws, which rejected persons with disabilities, were grounded in the "fundamental stereotype that immigrants with disabilities will not be worthwhile members of Canadian society." [19] Direct discrimination against persons with disabilities endured in the catalogue of immigration acts spanning pre-confederation until 1976.[20] In that year, alongside a major transformation of the entire immigration regime, the "the wholesale rejection" of persons with mental and physical disabilities was replaced with the language of "excessive demand."[21]

Passed in 2002, for the first time, the IRPA does not specifically list "disability" in the "excessive demand" provision. Section 38(1)(c) sets out that a foreign national is inadmissible on health grounds if their health condition might reasonably be expected to cause excessive demand on health or social services.[22]

"Excessive demand" is defined in s. 1(1) IRPA as:

> *a)* a demand on health services or social services for which the anticipated costs would likely exceed 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 10 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 as a result of the denial of or delay in the provision of those services to Canadian citizens or permanent residents.

Because immigration and medical officers will often find that individuals with impairments require expensive health and social services, they are disproportionately captured by this provision. A detailed discussion of the extent to which this constitutes indirect

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[18] *Ibid*.
[19] Judith Mosoff, "Excessive Demand on the Canadian Conscience: Disability, Family and Immigration" (1998-1999) 26 Man LJ 149 at 150.
[20] *Hilewitz v Canada (Minister of Citizenship and Immigration)*; *De Jong v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57 at paras 41–53, [2005] 2 SCR 706 [*Hilewitz*]; Constance MacIntosh, "Wealth Meets Health: Disabled Immigrants and Calculations of 'Excessive Demand'" in Jocelyn Downie & Elaine Gibson, eds, *Health Law at the Supreme Court of Canada* (Toronto: Irwin Law, 2007) at 302–05.
[21] *Hilewitz*, *supra* note 20 at para 49.
[22] *IRPA*, *supra* note 2.

discrimination is addressed below; however, at this juncture, I simply wish to emphasize the major shift from prejudicial legislative language that directly excludes persons with disabilities to language that excludes based on rationalized public cost arguments.

The second important trend in the evolution of medical inadmissibility in Canadian immigration law is that it applies to an increasingly narrow class of applicants. "Excessive demand" does not apply to spouses or children applying in the family class category or to refugees or protected persons.[23] It does, however, apply to the remaining categories of economic migrants – notably, skilled workers, caregivers, self-employed, and investor class. Even if an individual satisfies Canadian immigration criteria in terms of skills, language fluency, and financial assets, they may still be denied landing if they or a member of their family is inadmissible on health grounds.

Third, the current regime includes more pathways for applicants to be granted an exemption from medical inadmissibility. As a result of the 2005 Supreme Court decision in *Hilewitz v Canada; De Jong v Canada* applicants can now provide an "ability and intent" statement detailing how they will offset the "excessive demand" with their own financial and other resources.[24] In *Hilewitz* the claimants argued that their financial resources should be taken into account in determining whether their children would impose an "excessive demand" on Canadian services. Both applicants met the requirements for permanent residency as "investor" and "self-employed" classes but were denied admission because they had a child with an intellectual disability.[25]

[23] *IRPA*, *supra* note 2, s 38(2).
[24] Canada, Citizenship and Immigration Canada, "Assessing Excessive Demand on Social Services", Operational Bulletin 063 (Ottawa: CIC, 24 September 2008).
[25] *Hilewitz*, *supra* note 20 at paras 1–2.

In the case of Mr. Hilewitz, a medical officer who met with his son Gavin determined that he had a developmental delay and, at age seventeen, was "functioning at the level of a child aged [eight] years." Based on his assessment, the officer determined that Gavin would be eligible for and require special education and vocational training, which would be "far in excess of those of an average Canadian" and would place an "excessive demand on Canadian social services."[26] Mr. Hilewitz had informed the visa officer that he would pay for Gavin to attend a private school so that he would never require public social services and that he intended to purchase a business in Canada where Gavin would be employed. Still, his application was still denied.[27]

At the Supreme Court, Abella J. held that immigration and medical officers have an obligation to assess a family's "ability and intent" statement. If a family is found to include an individual who will impose an "excessive demand" on services, they may present evidence that they have found private care or other alternatives (such as a properly trained family member willing to care for the individual) so that the person will not use public resources. The immigration officer evaluates the plan's financial viability, detail of planning, and whether the family has relied on public services in the past. Interestingly, an applicant must overcome this hurdle in order to be accepted to Canada, however, if they become permanent residents, the "ability and intent to pay" statement is not an enforceable undertaking.[28] If applicants are not bound by intent statements, one has to wonder if this onerous administrative process is not completely redundant.

While *Hilewitz* was a victory for the claimants in the case, for applicants without considerable financial means, the exemption is completely out of reach. Further, when we examine the arguments advanced by citizen groups intervening in the case, it is clear that many

[26] *Hilewitz, supra* note 20 at para 11.
[27] *Ibid* at para 16.
[28] See sources at *supra* note 3.

concerns with the legislation are not resolved by this exemption.[29] As interveners in *Hilewitz*, the Canadian Association for Community Living (CACL) and the Ethno-Racial People with Disability Coalition of Ontario (ERDCO) argued that the "excessive demand" provision:

> (a) is based on a medical model of disability that is rooted in prejudices and stereotypes about persons with disabilities that reinforce their historical marginalization and exclusion;
> (b) is premised on unfair and artificial comparisons that adversely impact persons with disabilities;
> (c) has an adverse impact by imposing additional burdens on persons with disabilities and their families that are not imposed on families with non-disabled dependents who are seeking to immigrate to Canada;
> (d) fails to take into account non-medical factors, including the positive contributions and individual characteristics of persons with disabilities, and the family and community supports available to them; and
> (e) fails to adhere to a social model of disability and accommodate the individual circumstances of persons with disabilities.[30]

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.[31] While a vital procedure for applicants, pleading an H&C exemption is a highly demanding process embedded is 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.[32]

Canadian lawmakers should be recognized for reforming the "excessive demand" provision and opening avenues whereby applicants may overcome medical admissibility. It is important to acknowledge that the posture of Canadian immigration law is not what it was in

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[29] MacIntosh critiqued the case, concluding that overall the tone of *Hilewitz* is "extremely troubling, suggesting that disabled persons' basic social rights remain extremely vulnerable in Canada" (*supra* note 20 at 316).
[30] *Hilewitz v Canada (Minister of Citizenship and Immigration)*; *De Jong v Canada (Minister of Citizenship and Immigration)*; 2005 SCC 57, [2005] 2 SCR 706 (Factum of the Interveners: Canadian Association for Community Living and Ethno-Racial People with Disabilities Coalition of Ontario) at para 4 [*Interveners*] [emphasis added].
[31] Mosoff, *supra* note 19 at 161.
[32] *Interveners*, *supra* note 30 at para 54.

1859. However despite these important modifications and the narrower application of "excessive demand," the default position of Canadian immigration law remains that persons with disabilities are not desirable members of society. As the case of Karen Talosig demonstrates below, the current regime falls short of recognizing the inherent worth of persons with disabilities.

A young Filipina, Karen Talosig came to Canada as a live-in caregiver in 2007. Three years later she applied for permanent residency and included her young daughter Jazmine in her application as a dependent. She was eventually rejected on the basis that the cost of educating her deaf daughter would place an "excessive demand" on Canadian health and social services.[33] Despite the fact that the Canadian economy depends on workers like Talosig, Jazmine was decidedly unwelcome. Talosig challenged the decision publicly and launched an online petition that made waves in Ottawa. The story ricocheted through Parliament where Liberal MP Hedy Fry criticized the government's "discriminatory immigration policy."[34]

When interviewed about Talosig's case, the director of a civil society organization, the Western Institute for the Deaf and Hard of Hearing, asserted the government's decision was clearly discriminatory and could violate the CRPD.[35] Similarly, the Canadian Council of Canadian with Disabilities (CCD) argued that the "excessive demand" provision is in violation of Canada's obligations under the CRPD. The CCD has spoken out publicly about families whose immigration applications were rejected due to having a child with a disability and has called on the Canadian government to eliminate s. 38(1)(c) of IRPA, arguing that "Canada's immigration policy is based upon a negative and outdated understanding of disability that fails to

[33] Casey Tolan, "Canada denied this Filipina immigrant residency because her daughter is deaf", *Fusion News* (10 June 2015), online: <fusion.net/story/146103/canada-denied-this-filipina-immigrant-residency-because-her-daughter-is-deaf/>.
[34] Jon Azpiri, "Case of deaf teenage denied immigration to Canada discussed in House of Commons", *Global News* (27 May 2010), online: <globalnews.ca/news/2019602/case-of-deaf-teenager-denied-immigration-to-canada-discussed-in-house-of-commons/>.
[35] Tolan, *supra* note 33.

recognize the contribution that people with disabilities can, and do, make."[36] These concerns echo the numerous critiques by scholars and litigants of the "excessive demand" provision.[37] Considering these critiques, the question remains: how do we explain the stubborn endurance of the "excessive demand" provision in Canadian immigration law?

## II. SYSTEMIC BARRIERS: DISCRETIONARY DOCTRINE & CHARTER LIMITS

It is difficult to evaluate the "excessive demand" provision without placing it in a broader legal and historical landscape. Migration captures a fundamental tension between state sovereignty and universal human rights. On the one hand is the position that states have a broad discretionary power to exclude foreigners.[38] On the other is the claim that human rights are universal and spring from personhood, not citizenship. Immigration law therefore sits uncomfortably between the "irresolvable contradiction between the expansive and inclusionary principles of moral and political universalism, as anchored in universal human rights, and the particularistic and exclusionary conception of democratic closure" of modern states.[39]

This contradiction is evident in the foundational human rights treaties. As Professor Benhabib points out, the *Universal Declaration of Human Rights* recognizes freedom of movement,[40] the right to asylum,[41] nationality,[42] and the right not to be deprived of nationality.[43]

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[36] Council of Canadians with Disabilities, "CCD Dismayed with family of disabled child ordered deported" (13 April 2011), online: <www.ccdonline.ca/en/socialpolicy/access-inclusion/press-release-immigration-13april2011>.
[37] See generally, Yahya El-Lahib, "Immigration and Disability: Ableism in the Policies of the Canadian State" (2011) 5:1 Intl Social Work 95; Roy Hanes, "None is Still Too Many: An Historical Exploration of Canadian Immigration Legislation As It Pertains to People with Disabilities" (2009) 37:1&2 Developmental Disabilities Bulletin 91; Yoonmee Han, "Human Rights Violations Against People with Disabilities" (2015) 1 Knots 45; MacIntosh, *supra* note 20; Mosoff, *supra* note 19.
[38] Colin Grey, *Justice and Authority in Immigration Law* (Portland: Hart Publishing, 2015) at 44.
[39] Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge, Mass: Cambridge University Press, 2004) at 19.
[40] *Universal Declaration of Human Rights,* GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) art 13.
[41] *Ibid*, art 14.
[42] *Ibid*, art 1.

However it is silent on *states' obligations* to grant entry to migrants, to uphold the right of asylum, and to grant citizenship to foreigners.[44] These internal contradictions between universal human rights and territorial sovereignty are therefore "built into the logic of the most comprehensive international law documents in our world."[45] This ambivalence is reflected states' commitment to the most important global treaty on immigration, the *International Convention on the Protection on the Rights of All Migrants Workers and Their Families.*[46] Despite the fact that it came into force in 2003, as of 2015, it has only been ratified by forty-eight states, most of which are in the global south.[47] Canada, like many countries that are destinations for immigrants, has not signed the convention.[48]

Two major premises of the human rights system are therefore at odds. The first is the aspiration that all persons enjoy full legal equality. The second is the acceptance that states may discriminate between citizens and non-citizens. This tension is a source of dynamism in international law; at times the global political environment favours nativism and watertight national boundaries; at others, universal human rights instruments push toward a more porous understanding of state sovereignty and obligations toward non-citizens. When viewed from this vantage point, it becomes clear that Canadian courts' evolving attitude toward migrants with disabilities reflects and reproduces this same contradiction.

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[43] *Ibid*, art 15.
[44] Benhabib, *supra* note 39 at page 11.
[45] *Ibid.*
[46] *International Convention on the Protection on the Rights of All Migrants Workers and Their Families,* 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).
[47] *Ibid.*
[48] *Ibid*. Canada is not listed as a ratifying nation.

**a)** ***The Discretionary Doctrine***

The legal doctrine that states have absolute discretion in immigration matters reaches back to the late nineteenth century. In its original formulation, the discretionary doctrine was absolute. In the 1889 United States Supreme Court decision of *Chae Chan Ping v United States*, the Court asserted that the right to exclude foreigners may be exercised "at any time when, in the judgment of the government, the interests of the country require it."[49] The Court further stated that it "cannot be granted away or restrained on behalf of anyone." In Canada, this doctrine 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 that State, to annex what conditions it pleases to the permission to enter it."[50] The discretionary doctrine makes it difficult, if not impossible, for a court to interfere with immigration policy, even if it smacks of discrimination.

This staunch position is exemplified in Prime Minister Mackenzie King's 1947 speech:

> With regard to the selection of immigrants, much has been said about discrimination. I wish to make quite clear that Canada is perfectly within her rights in selecting the persons whom we regard as desirable future citizens. It is not a "fundamental human right" of any alien to enter Canada. It is a privilege. It is a matter of domestic policy. [...] [T]he people of Canada do not wish, as a result of mass immigration, to make a fundamental alteration in the character of our population. Large-scale immigration from the Orient would change the fundamental composition of the Canadian population. Any considerable Oriental immigration would, moreover, be certain to give rise to social and economic problems of a character that might lead to serious difficulties in the field of international relations.[51]

In the years following this speech, the postwar revolution in human rights invited a more porous approach to state sovereignty. Parliament transformed the Canadian immigration system, removing immutable characteristics such as race, nationality, and ethnicity from selection

[49] *Chae Chan Ping v United States* (*The Chinese Exclusion Case*) (1889), 130 US 581, 9 S Ct 623, 32 LEd 1068 at 609.
[50] *Attorney-General for the Dominion of Canada v Cain*, [1906] AC 542 at 546.
[51] *House of Commons Debates* (1 May 1947) at 2644–46 (Hon Mackenzie King).

criteria.[52] Despite the fact that Canada was not legally bound to carry out these amendments, the global "normative context" had shifted.[53] Being a part of a community of nations required some intrusions on state sovereignty; blatant racial discrimination was no longer acceptable. Disability, however, endured as a barrier to Canadian citizenship.

In today's economically globalized world, neither of these poles – King's vision of unqualified state sovereignty nor borderless human rights entitlements – is satisfactory. Clearly we do not want to live in a world in which countries reject any norm governing their discretion to exclude foreigners from their territories. And yet, "as long as the state order exists, it seems that citizen/non-citizen distinctions cannot be entirely put aside."[54] Scholars, jurists, and citizens are alive to this tension and are searching for middle ground between these two poles. For instance, Di Pascale proposes that civic/political rights might be guaranteed to all persons, while social and economic rights would only be owed to citizens.[55] Others point out that this is a coarse distinction, especially as socio-economic rights are increasingly gaining recognition.[56] For instance, regarding the right to education, the UN Committee on Economic, Social and Cultural Rights holds that immigration status does not justify discrimination.[57]

The IRPA's exclusion of persons with disabilities is particularly fertile ground for examining these questions. In *Hilewitz,* almost sixty years after King's speech, Abella J. made a pronouncement that embraced the discretionary doctrine *and* the countervailing desire to uphold equality protections:

> The issue is not whether Canada can design its immigration policy in a way that reduces its exposure to undue burdens caused by potential immigrants. Clearly it can.

[52] Triadafilopoulos, *supra* note 1.
[53] *Ibid* at 16.
[54] Ruth Rubio-Marin, *Human Rights and Immigration* (Oxford: Oxford University Press, 2014) at 10.
[55] *Ibid* at 11.
[56] *Ibid.*
[57] Committee on Economic, Social and Cultural Rights, "*General Comment 13, The right to education*" (1999) UN Doc. E/C.12/1999/10 at para 34.

> But here the legislation is being interpreted in a way that impedes entry for all persons who are intellectually disabled, regardless of family support or assistance, and regardless of whether they pose a reasonable likelihood of excessively burdening Canada's social services.[58]

Even though a *Charter* challenge was not addressed head-on in the judgment, Abella J. seems to close the door on a section 15 equality claim in stating that "clearly" Canada can design its immigration policy to exclude certain people on the basis of public cost. This is consistent with Professor Dauvergne's comment that "once discretionary space is asserted, a rights claim cannot gain any traction. It becomes irrelevant."[59] It explains in part why Abella J. makes no direct mention of the potential incompatibility of medical admissibility in the IRPA and equality guarantees in the *Charter*. Despite the fact that citizen group interveners argued that the provision should be interpreted in light of *Charter* values and Canada's international human rights obligations,[60] the word "discrimination" does not appear in her judgment.

At the same time, Abella J.'s decision shows a discomfort with rejecting equality principles, emphasizing that immigration and medical officers are required to avoid stereotypes and carry out individualized, rather than generalized, assessments. This is the kind of language we might see if the Court were applying a section 15 test for discrimination. Abella J. therefore seems to be staking out her own middle ground; on the one hand affirming the government's prerogative to design immigration policy and on the other hand speaking in *Charter* rights language.

[58] *Hilewitz*, *supra* note 18 at para 57.
[59] *Ibid* at para 66.
[60] *Interveners*, *supra* note 30 at para 4.

***b) Charter Limits***

In addition to the discretionary doctrine, a second barrier to challenging the "excessive demand" provision is the limited applicability of the *Charter*. In *Singh*, the Supreme Court held that the *Charter* applies to every person physically present in Canada.[61] The first and most basic problem with relying on the *Charter* is that it is out of reach for applicants outside the country. This was precisely the problem in *Deol v Canada,*[62] the leading authority on discrimination and medical inadmissability. At issue in *Deol* was the question of whether the "excessive demand" provision violates section 15 of the *Charter*.[63] Mr. Deol's visa application was denied due to advanced degenerative osteoarthritis in both knees. Mr. Deol conceded that he could not directly raise a *Charter* challenge because he was not physically in Canada. His daughter therefore raised a section 15 challenge on that grounds that she was discriminated against as the daughter of a father with a disability.[64] Ms. Deol's indirect claim rendered her discrimination arguments more remote and less potent, and ultimately failed to persuade the Federal Court of Appeal.[65]

In *Deol* the court applied the test for discrimination in *Law v Canada* accepting that the first two prongs of the test (1) differential treatment and (2) presence of an enumerated ground were satisfied. The third step of *Law* asks:

> Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?[66]

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[61] *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at para 3, [1985] SCJ No 11 (QL).
[62] *Deol*, *supra* note 3.
[63] *Ibid.*
[64] *Ibid* at para 50.
[65] *Ibid* at para 64.
[66] *Law v* Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 3, 170 DLR (4th) 1 [*Law*].

The court found that it did not. Evans and Malone JJ.A reasoned that Ms. Deol, as the child of a parent who was denied a visa based on an expensive medical condition, was not touched in a way that would go to her individual worth or violate her human dignity.[67] This conclusion was further supported by the *individualized* nature of the medical assessments.[68] Evans and Malone JJ.A. held that "Parliament has not written off all individuals with disabilities by attributing to them as a class stereotypical characteristics, but has attempted to draw distinctions on the basis of the actual circumstances of each visa applicant."[69] The court's line of reasoning seems to assume that so long as cost assessments are based on *individualized* rather than *generalized* calculations there can be no claim of discrimination. The problem with this logic is that it fails to question the nature of the criteria used to apply these assessments or to take into account evidence of indirect discrimination. Whether or not the assessments are individualized, if persons with disabilities are denied entry nine times out of ten, then the test bears re-examination.

For example, had Mr. Deol been physically present in Canada, it seems possible that the *Law* analysis could have resulted in a successful claim of discrimination. The third prong of the *Law* test asks whether the action has the effect of perpetuating or promoting the view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society.[70] When Canadian immigration officials systematically treat individuals with impairments as burdens on society, they perpetuate the view that those individuals are less capable or less valued as members of Canadian society.

[67] *Deol*, *supra* note 3 at para 56.
[68] *Ibid* at para 60.
[69] *Ibid*.
[70] *Law*, *supra* note 59.

Cost assessments mask what are in fact value-laden choices. For instance, a family with an able-bodied teenager might immigrate to Canada and settle as permanent residents.[71] Their son may decide to study literature at a Canadian university and therefore receive a government subsidy of $20,000 per year.[72] The social services assessment of that individual would not include this government expenditure. Contrastingly, a family with a son with an intellectual disability who requires vocational training would trigger a "social services" cost assessment and likely be determined an "excessive demand" despite the fact that he may way well go on to work and contribute to society in important ways. The differential treatment of these two families exposes the fact that these are not value-neutral assessments. *Deol* therefore should not be seen as standing for the principle that a section 15 *Charter* claim will fail, but rather that the limitation of the *Charter* to the physical territory of Canada is a critical barrier in challenging the "excessive demand" provision.

For applicants physically present in Canada, a second obstacle to *Charter* protections is the Canadian judiciary's posture towards non-citizens. As Professor Dauvergne's survey of thirty years of *Charter* jurisprudence reveals, "non-citizens have had few victories at the Supreme Court of Canada."[73] Dauvergne points out that the early decisions in *Singh* and *Law* were actually the "high-water mark" of non-citizen rights protections in Canada.[74] Since then, in the contest between human rights and citizen rights, the latter has definitively won.[75] Dauvergne's work suggests that even if an equality claim against the "excessive demand" provision were

[71] The hypothetical that follows is inspired by Cara Wilkie, Bakerlaw Accessible Justice, *Immigration Research Project* (31 August 2009) [On file with author].
[72] The estimated annual government subsidy given to Canadian postsecondary students, see Josh Dehass, "Think your tuition bill is too high? Check out the government's", *Macleans* (20 June 2011), online: <www.macleans.ca/education/uniandcollege/think-your-tuition-bill-is-too-high-check-out-the-governments/>.
[73] Catherine Dauvergne, "How the Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill LJ 663 at para 88.
[74] *Ibid* at para 16.
[75] Dauvergne writes that the "trend toward human rights overwhelming citizen rights has ended or…was never observable in Canada, *Singh* and *Andrews* notwithstanding" (*ibid* at para 58).

brought by an applicant in Canada, a non-citizen would have difficulty in advancing a *Charter* argument.

Presenting this legal landscape goes a long way in explaining the endurance of the "excessive demand" provision. The discretionary doctrine and the limits of *Charter* protection are powerful barriers to courts recognizing discrimination in the context of immigration. Unsurprisingly, the major transformation of the Canadian immigration regime that removed all other immutable characteristics from selection criteria was carried out by Parliament, not the courts.[76] However these are not the only forces at play. Scholarly critiques, demands by citizens groups, society's growing understanding of disability rights, have chipped away at a once resolute exclusion of persons with disabilities. Going forward, the next question is what role the CRPD can play in shaping this ongoing evolution.

## III. THE VISION OF THE CRPD

In this section I examine what guidance the CRPD can offer to Canadian courts (and Parliament) in their efforts to ensure that the medical inadmissibility provisions are consistent with disability equality protections. I begin with the general normative framework of the convention before examining specific provisions.

The CRPD is the first global convention dedicated exclusively to the rights of persons with disabilities. Presented to the United Nations General Assembly in 2006, within two years it was widely ratified and came into force in 2008. The convention's innovative approach to disability rights is captured in its ambitious preamble which emphasizes the "universality,

[76] Triadafilopoulos describes this historical period, including the tabling of 1966 *White Paper* on Immigration in Parliament and the policy reforms that followed (*supra* note 1 at 29–30).

indivisibility, interdependence and interrelatedness of human rights."[77] Scholars have interpreted this language as a signal of the universal applicability of these obligations both to states' citizens and non-citizens alike.[78]

The rights enumerated throughout the convention are informed by a social approach to disability.[79] The "social model" posits that disability results from the interaction between a person with an impairment and their exclusion from an ableist society.[80] The "social model" calls on citizens, policy-makers, disability rights activists, and others to come together in addressing the social inclusion of persons with disabilities. In contrast the "medical" or "social welfare model," sees persons with disabilities as "objects of charity, medical treatment and social protection."[81] For many scholars, the preamble's affirmation of the social model signals a sea change in dominant conceptions of disability.[82]

The "social model" is also reflected in the convention's affirmation of the value and contributions of persons with disabilities to society and the benefits of social inclusion. The text turns the idea of persons with disabilities as "public charges" on its head, instead emphasizing that the empowerment and participation of persons with disabilities can produce an "enhanced

[77] *CRPD*, *supra* note 4*,* Preamble (c).
[78] Crock, *supra* note 9 at 740; Ben Saul, "Migrating to Australia with Disabilities: Non-Discrimination and the Convention on the Rights of Persons with Disabilities" (2010) Sydney Law School Legal Studies Research Paper No 10/109 at page 7.
[79] The CRPD 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." See also Paul Harpur, "Embracing the New Disability Rights Paradigm: The Importance of the Convention on the Rights of Persons with Disabilities" (2012) 27:1 Disability & Society 1.
[80] See Harpur, *supra* note 79.
[81] Crock, *supra* note 9 at page 737.
[82] See e.g. Harpur, *supra* note 79; Ravi Malhotra & Robin F Handsen, "The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education" (2011) 29 Windsor YB Access Just 73.

sense of belonging and significant advances in the human, social and economic development of society and the eradication of poverty."[83]

Finally, the preamble embraces an "intersectional" understanding of oppression, recognizing the "aggravated forms of discrimination" faced by individuals who experience discrimination based on race, sex, language, religion, indigenous or social origin and other grounds in combination with disability.[84]

These framing principles should be kept in mind as I canvass the specific obligations relevant to the "excessive demand" provision.

***a) CRPD obligations relevant to "excessive demand"***

Article 1 of the CRPD describes persons with disabilities as those who have long-term impairments which in interaction with various barriers may hinder their full and effective participation in society. The CRPD does not, therefore, offer equality protections to migrants with short terms medical conditions captured by the "excessive demand" provision.

From the outset, there is a fundamental incompatibility between the IRPA and the CRPD: the "medical model" of disability. The IRPA tasks "medical officers" with determining the destinies of applicants with disabilities. Section 38(1)(c) invites medical officers to "evaluate the extent of the damage" and "estimate the extent of services that will be necessary."[85] In allowing medical officers to be the "gatekeepers" of Canadian citizenship,[86] IRPA is at odds with the social model, unequivocally endorsed in the CRPD.

[83] *CRPD*, *supra* note 4, Preamble (m).
[84] *Ibid*, Preamble (p).
[85] Mosoff, *supra* note 19 at 165.
[86] *Ibid* at 166.

In addition to this basic discord, three other articles in CRPD are particularly relevant to migrants with disabilities: liberty of movement and nationality, discrimination, and equal protection. In what follows, I explore the implications for each of these obligations and the extent to they are incompatible with the IRPA's exclusion based on health grounds. My analysis builds on the work of Professor Saul at the University of Sydney who carried out a similar analysis in the context of the Australian immigration regime.[87]

***b) Article 18: Liberty of Movement and Nationality***

There is no right to Canadian citizenship, or to that of any other country, under international law.[88] Article 18, which sets out that persons with disabilities have a right to liberty of movement and freedom to choose their residence and nationality on an equal basis with others, does not alter this basic fact.[89] Ultimately, Article 18 reflects states' on-going sensitivity to the discretionary doctrine in the immigration context.[90]

Article 18(a) sets out persons with disabilities have a right to acquire and change a nationality and may not be deprived of their nationality arbitrarily or on the basis of disability. While this seems like a promising equality protection for migrants with disabilities at first blush, a careful parsing of the language reveals otherwise. The first phrase of article 18(a) reiterates that persons with a disability have a right to *a* nationality, not a right to immigrate to a particular country. The second phrase means that *once they have a nationality* they cannot lose it on the basis of disability. It does not, however, assist in a claim that someone *who has yet to acquire* Canadian citizenship should not be deprived of it on the basis of disability.

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[87] Saul concludes that the Australian health test likely imposes indirect discrimination on migrants or refugees with disabilities and infringes the article 5 equal protection obligation of the CRPD (*supra* note 78 at 3).
[88] *Ibid* at 5, citing the *UN Human Rights Committee* (1986).
[89] *CRPD*, *supra* note 4, art 18.
[90] Saul, *supra* note 78 at 5.

Article 18(b), sets out that persons with disabilities cannot be deprived of the ability to obtain and use documentation of their nationality and participate in immigration proceedings. This right goes to the *accessibility* of the immigration process rather than substantive rights to enter or remain in a country. Article 18(c) enshrines the right of persons with disabilities to leave any country, including their own and 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.

Viewed globally, article 18 affirms existing rights and emphasizes some level of reasonable accommodation in the immigration administrative process but falls short of offering new rights to migrants with disabilities. Professor Saul explains that when this article was discussed at the drafting stage there was a proposal to include a right to "enjoy on an equal basis with others the right to enter and immigrate to a country other than their state of origin."[91] That proposal was rejected. Considering the text of the article and its drafting history, article 18 does not seem to provide additional equality protections to migrants with disabilities.

***c) Article 2: Discrimination***

The issues at play when migrants with disabilities are targeted by the "excessive demand" provision do not engage the CRPD's definition of "discrimination on the basis of disability." This term is defined in article 2, as any

> [D]istinction, 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.[92]

[91] Saul, *supra* note 78 at 5.
[92] *CRPD*, *supra* note 4, art 2 [emphasis added].

To satisfy this definition a claimant would therefore need to show that a right was engaged and that they were excluded or restricted on the basis of disability.[93] As was stated, immigrating to Canada is not a human right or fundamental freedom. Like Professor Saul, I conclude that immigrants discriminated against on the basis of their disability would not meet the definition of discrimination article 2.

***d) Article 5: Equality and non-discrimination***

While the preceding analysis underscored that individuals do not have a right to immigrate to a particular country, this does not mean that *all* government action relating to the immigration processes is immune from being impugned on the basis of human rights. Professor Saul points out that the CRPD "contains no express or implied territorial limitation on its scope of application."[94] This point is buttressed by the preamble of the CRPD, which stresses the universality of human rights obligations.[95] This analysis suggests that once an applicant engages with, for instance, the Canadian immigration process and is taken up for consideration, even if outside the territory of Canada, the actions of the Canadian government in evaluating and deciding the eligibility of the applicant are still subject to the CRPD.

With this in mind, there is an important incompatibility between the "excessive demand" provision and the CRPD's obligations of 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." Further article 5(2) prohibits discrimination on the basis of

[93] Saul writes that a literal reading of article 2 "might suggest that discrimination on the basis of disability only occurs where such discrimination is connected with impairing some other existing human right or freedom. The similarly-worded provision in article 14 of the European Convention on Human Rights has been interpreted as providing protection against discrimination only in relation to the exercise or enjoyment of other human rights enumerated in that treaty" (*supra* note 78 at 6).
[94] Saul, *supra* note 67 at 6.
[95] *CRPD*, *supra* note 4, Preamble.

disability and guarantees persons with disabilities equal and effective legal protection *against discrimination on all grounds.* This provision is more expansive than article 2, prohibiting discrimination in the broad context of *protection before the law*. Professor Saul observes that unlike the *Convention on the Elimination of All Forms of Racial Discrimination,* the CRPD does not include a clause stating that discrimination does not apply to "distinctions, exclusions, restrictions or preferences between citizens and non-citizens."[96] There is therefore no evidence that the CRPD obligations were not intended to apply to discrimination against non-citizens. This interpretation of the convention suggests that article 5 applies to states who discriminate against non-citizens on the basis of disability.[97]

Before turning to how Canadian courts might engage with article 5 of the CRPD, I will first flesh out the content of this obligation under international law.[98] In drafting article 5, we can assume that the obligation was intended to be interpreted similarly to other anti-discrimination protections under international law.[99] In international jurisprudence, a violation of equal protection rights may be allowed if, judged in light of the objectives and purposes of the convention, they (1) pursue a legitimate public policy aim and are (2) proportional to achieving that aim.[100]

### *a) Prima facie discrimination*

Article 5 has been interpreted as protecting against direct and indirect discrimination.[101] Indirect discrimination occurs where a law is "neutral on its face but impacts disproportionately

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[96] For a full discussion on this point, see Saul, *supra* note 78 at 7.
[97] *Ibid.*
[98] Gib Van Ert points out that "case law establishes that Canadian courts should interpret international treaties using international not domestic interpretative rules" (*Using International Law in Canadian Courts* (Toronto: Irwin Law, 2008) at 273).
[99] *Non-discrimination in International Law: A Handbook for Practitioners* (London, UK: Interights, 2011) at 19 [*Discrimination Handbook*].
[100] *Ibid.*
[101] Saul, *supra* note 78 at 8.

upon particular groups" unless the practice is justified.[102] Canadian discrimination jurisprudence also recognizes indirect discrimination as a violation of equality guarantees.[103]

The current version of the IRPA does not explicitly name persons with disabilities in the "excessive demand" provision. However, they are indirectly captured through the assessment of cost. Scholars have pointed out that if the government were looking beyond an ableist lens,[104] disability is not the only characteristic that would trigger a public cost assessment.[105] Professor Mosoff argues that, "on an actuarial basis, various categories of prospective immigrants could be expected to draw disproportionately on health care and social service systems."[106] Cigarette smokers, careless drivers, individuals who intend to attend a public university, and other profiles might be considered in an even-handed evaluation of anticipated public cost.[107]

It might be argued that the "individualized" approach to "excessive demand" affirmed in *Hilewitz* is not discriminatory. The Court suggested in that case that because decision makers take into account a family's ability to offset the social cost of the individual, they are not relying on stereotypes. While Professor Saul sees this as a measure that increases the provision's compatibility with the CRPD, other scholars argue that it only compounds the discrimination, attenuating the effects on the basis of class privileges. Writing before *Hilewitz*, Professor Mosoff warned that a test for admissibility based on whether a family could opt out of public services due to their financial means would "allow wealthy families to bring their disabled family members when poorer families could not."[108] If an improvement, it is surely not sufficient to harmonize the provision with principles of equality in the CRPD. Considering the CRPD's

[102] *Discrimination Handbook*, *supra* note 99 at 18.
[103] Mosoff, *supra* note 19 at 171; *Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, [1989] SCJ No 42; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, [1997] SCJ No 86.
[104] See generally El-Lahib, *supra* note 37.
[105] Mosoff, *supra* note 19 at 171; MacIntosh, *supra* note 20 at 301.
[106] Mosoff, *supra* note 19 at 171.
[107] MacIntosh, *supra* note 20 at 304–05.
[108] Mosoff, *supra* note 19 at 169.

recognition of intersectional discrimination, allowing more affluent applicants to be exempted from an otherwise discriminatory provision is at odds with the spirit of the convention.

The case for indirect discrimination would be strengthened by statistics on the number of persons with disabilities who are able to overcome the "excessive demand" provision compared with the number who are captured by it. There may be individuals whose impairments are minimal and therefore are not deemed to pose additional costs on health or social services. However, it clear that a range of disabilities of varying severity – hearing impairments, intellectual disabilities, HIV, autism, down syndrome, schizophrenia, and others – are captured by the provision.[109] There is therefore a strong case that the "excessive demand" provision indirectly discriminates against persons with disabilities.

***b. Legitimate public policy aim***

The next question is whether section medical inadmissibility pursues of a legitimate public policy objective. The Canadian government might describe the policy objective as safeguarding Canadians' health and social services. Parliament may argue that it seeks to protect vital services for persons with disabilities *already* landed in Canada. While these are real concerns, there are several problems with this stated policy objective.

First, if economic and budgetary considerations are the paramount legislative aim, economists rather than doctors should be tasked with analyzing "excessive demand."[110] Professor Mosoff argues that "medical officers have no special training, experience or expertise in the

[109] See e.g. Tolan, *supra* note 33 (hearing impairment); *Hilewitz*, *supra* note 20 (intellectual disability); *Choi*, *supra* note 3 (HIV); *Ijaz v Canada (Minister of Citizenship and Immigration)* [2014] FCJ No 934, [2014] ACF no 934 (autism); *Davidovitch v Canada (Minister of Citizenship and Immigration*, [2013] IADD No 1082, [2013] DSAI no 1082 CA Imm Ref Bd 2013/10/11 (developmental delay); *Li v Canada (Minister of Citizenship and Immigration)* [2012] IADD No 1554, [2012] DSAI no 1554 CA Imm Ref Bd 2012/7/9 (down syndrome); *Dutt v Canada (Minister of Citizenship and Immigration)*[2012] IADD No 1444, [2012] DSAI no 1444 CA Imm Ref Bd 2012/6/22 (schizophrenia).

[110] Mosoff, *supra* note 19 at page 166.

subject of economics" and therefore are not equipped to make these determinations.[111] Further, provisions that exclude persons with disabilities cannot logically have always been based on the legislative objective of conserving public funds when in fact these provisions preceded universal healthcare and social services.[112]

An additional policy objective in the IRPA, and emphasized in case law, is the monolithic concept of the Canadian economy. Contrary to refugees or family class immigrants, the "investor" and "self-employed" immigration categories at issue in *Hilewitz* looked for individuals who would make an immediate and substantial contribution to the country.[113] Abella J. reasoned that the same economic logic that establishes the category of immigration should govern questions of admissibility. If this were the case, the "excessive demand" analysis should be interested in the relationship between disability, social services, and labour market integration.[114] And yet, these issues are not contemplated by medical officers carrying out an "excessive demand" assessment.

What's more, unequivocally accepting cost arguments as a legitimate policy objective in the context of disability discrimination ignores the purpose of the CRPD. Governments must always weigh budgetary choices. A state might argue that creating accessible schools will starve the education system from vital funds and result in increased rates of illiteracy. Cost justifications for discrimination are not accepted by Canadian courts in other realms.[115] If a

[111] *Ibid.*
[112] *Ibid* at 157.
[113] *Hilewitz*, *supra* note 20 at para 39.
[114] *Ibid*.
[115] Mosoff, *supra* note 19, citing the following authorities: *R v Askov*, [1990] 2SCT 1119 at 1124 (lack of institutional resources not a justification for unreasonable postponement of trials); *Singh v Canada*, *supra* note 61 at 218 (rejection of the government's argument that the cost of hearings was too expensive); *Eldridge*, *supra* note 102 (cost of providing interpreters not a sufficient justification for failing to provide signing interpreters which violated equality rights of persons with disabilities).

government can discriminate against persons with disabilities and unfailingly justify their decisions on the basis of cost, the radical ambition of the CRPD will surely go unrealized.

### *c. Proportional to achieving the aim*

The strongest case against the "excessive demand" provision is that it is not proportional to achieving the stated legislative objective. First, the percentage of applicants with disabilities present a minute fraction of the future users of social and health services. Every year approximately 450,000 medical assessments are carried out for prospective immigrants to Canada.[116] Between 1993 and 2001 the percentage of medical assessments that were rejected was between 0.31 and 0.96.[117] Of those, an even smaller fraction would likely meet the CRPD definition of persons with disabilities. Denying admission to a minute number of individuals with disabilities cannot be expected to significantly impact provincial or federal wait times and morbidity rates. The Canadian healthcare system faces tremendous challenges that will not be solved simply by excluding persons with disabilities from landing as permanent residents.

Based on this assessment it seems likely that Canada's exclusion of persons with disabilities under the "excessive demand" provision is incompatible with article 5 of the CRPD. The provision indirectly discriminates against persons with disabilities. Even if it is supported by a legitimate objective, it is not proportional to achieving that aim. The next issue is the status of the CRPD in domestic law and how Canadian courts can draw on the convention for guidance in adjudicating the rights of migrants with disabilities.

[116]Kevin Elmwood, "Immigration medicals: what's the point?", *BC Medical Journal* (8 October 2009), online: <www.bcmj.org/bc-centre-disease-control/immigration-medicals-what's-point>.
[117] Wilkie, *supra* note 71 at 10, table 4. To ascertain the current percentage of applicants who are refused based on excessive demand and the percentage of those who have disabilities it would be necessary to file an ATIP.

## IV. THE CRPD IN CANADIAN COURTS

On November 3, 2010 Canada ratified the CRPD.[118] A year earlier, the government tabled an *Explanatory Memorandum* indicating their intent regarding the CRPD obligations. The document set out that the CRPD "would not form part of domestic law but could have an interpretative influence, including in human rights cases brought before Canadian courts."[119] Further, the *Memorandum* explained that equality and non-discrimination obligations in the convention would be complied with by relying on the *Charter* and the *Canadian Human Rights Act* and equivalent provincial and territorial legislation.[120]

Canada is a dualist system in which customary law is incorporated directly into domestic law and conventional law requires implementing legislation.[121] If unimplemented, treaties have an interpretative effect. The question of whether a treaty had been implemented in Canadian law is not straightforward because there is no requirement that a law specifically state that it is implementing a particular treaty.[122] In this case, Parliament may be relying on "existing legislation to discharge the new international obligation, effectively turning ordinary legislation into implementing legislation after the fact."[123] If so, the treaty might be partially implemented. On the other hand, in the five years since ratifying the convention, Canada has not announced a major bill implementing the CRPD. Considering the clear language of the *Memorandum* that the CRPD will have an "interpretative influence," the government likely considers it an unimplemented treaty.

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[118] Canada submitted two reservations: to article 12 (equal recognition before the law) and article 33(2) (pertaining to monitoring of the convention), neither of which have an impact on this analysis (see Canada, Parliament, "Explanatory Memorandum on the United Nations *Convention on the Rights of Persons with Disabilities*" in Sessional Papers, No 8532-402-57 (2009) [*Explanatory Memo*] [On file with author] [source not paginated]).
[119] *Ibid*.
[120] *Ibid.*
[121] Van Ert, *supra* note 98 at 5.
[122] *Ibid* at 246.
[123] *Ibid.*

In fact, since ratification, Canadian courts have treated the CRPD as an unimplemented treaty. In *Saporsantos Leobrera v. Canada* the court drew on the CRPD's definition of disability in interpreting the IRPA. In *R. v. Myette* the court accepted the presumption that domestic legislation should be interpreted consistently with the CRPD, but rejected the "direct importation" of its obligations into domestic law.[124] In *Hinze v. Great Blue Heron Casino* the CRPD was used to explain the social model of disability.[125]

The interpretative influence of treaties that Canada has ratified but not implemented flows from the common law presumption that Canadian law conforms to our international obligations.[126] In the case of the CRPD, the presumption of conformity is buttressed by the IRPA's statutory objectives. Section 3(f) sets out that the *Act* should be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory. Further, section 3(d) of the IRPA sets out that decisions taken under the *Act* should be consistent with the *Charter* "including its principles of equality and freedom of discrimination." The Federal Court of Appeal has clarified how this presumption should operate:

> On its face, the directive…that the IRPA "is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory", is quite clear: the IRPA must be interpreted and applied consistently with an instrument to which paragraph 3(3)(*f*) applies, unless, on the modern approach to statutory interpretation, this is impossible.[127] [Emphasis added].

In other words, in interpreting a statute, a court might identify two or more ways of interpreting the law. If one of those options is consistent with an international obligation while another is not, the presumption of conformity would favour the former.[128]

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[124] *R v Myette*, 2013 ABCA 371 at para 34, [2013] AWLD 5305.
[125] *Hinze v Great Blue Heron Casino*, 2011 HRTO 93 at para 21.
[126] Van Ert, *supra* note 98 at 223.
[127] *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para 83, [2006] 3 FCR 655.
[128] Van Ert, *supra* note 98 at 303.

For the purposes of this paper, the question is how the CRPD's interpretative influence could guide a reading of the "excessive demand" provision. Drawing on the CRPD, a court might ask whether tasking medical officers with evaluating "excessive demand" is consistent with the social model of disability.[129] Judges might question biases embedded in "excessive demand" criteria that disproportionately and systematically exclude persons with disabilities. They might require that "excessive demand" take into account the dreams, ambitions, and career plans of migrants with disabilities. These concepts – the social model of disability, inclusion, and indirect discrimination – are anything but new to Canadian jurisprudence. However, extending these concepts to non-citizens is a novel venture.[130] The CRPD can provide a vital normative framework in an area historically in the penumbra of the human rights order.

Ultimately, for those who would like to the see the "excessive demand" provision done away with altogether, the interpretative influence of the CRPD will not be satisfying. The CRPD can, however, ground the courts' interpretation of "excessive demand" and other aspects the immigration regime in the logic, concerns, and aspirations of the new global consensus on disability rights. I do not mean to suggest that this will be an easy or straightforward process. Canadian courts' reluctance to interfere in immigration policy and judicial attitudes towards non-citizens are stubborn and important barriers. But as the evolution of the "excessive demand" provision reveals, change – if slow – is possible. In the words of a great Canadian poet, "[t]here is a crack, a crack in everything. That's how the light gets in."[131]

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[129] This was argued by the interveners in *Hilewitz* (but without the benefit of the CRPD) (see especially *Interveners*, *supra* note 30 at paras 15, 57).
[130] MacIntosh argues that although prejudicial conceptions of persons with disabilities have been rejected by Canadian courts and Parliament, "disabled non-citizens appear to have been left behind" (*supra* note 20 at 294).
[131] Leonard Cohen, "Anthem", online: <genius.com/Leonard-cohen-anthem-lyrics>.

## CONCLUSION

The arc of the moral universe is long, but in Canadian society it bends towards pluralism. Re-imagining persons with disabilities as desirable new Canadians is the opposite of charity: it is about recognizing the value of a diverse society and looking toward a more inclusive future. Canada's ratification of the CRPD on November 3, 2010 marks the country's recognition of a sea change in the global consensus on discrimination. There was a time when opening Canada's borders to non-Europeans was characterized as controversial and dangerous. Today, in a globalized world, multiculturalism is one of Canada's greatest assets. Disability awareness is the next great leap in human rights. Canada must take steps to be a part of this leap.

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