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Into the Wasteland: Applying Equality Principles to Medical Inadmissibility in Canadian Immigration Law

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INTO THE WASTELAND: APPLYING EQUALITY PRINCIPLES TO MEDICAL INADMISSIBILITY IN CANADIAN IMMIGRATION LAW

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RÉSUMÉ

Le principe bien ancré qui ressort des lois et de la jurisprudence et fait que des privilèges et non des droits sont accordés aux étrangers concourt, avec les éléments sociaux, biomédicaux et économiques rattachés aux handicaps, à former un mur quasi insurmontable pour les personnes handicapées qui tentent de s'installer au Canada. L'auteur étudie l'opportunité d'une analyse poussée en matière d'équité afin que le terrain hostile qu'est le droit de l'immigration au Canada devienne accessible aux personnes handicapées et conclut que les injustices du droit doivent faire l'objet d'un examen beaucoup plus minutieux par toutes les couches de la société pour qu'un changement soit possible.

INTRODUCTION

Recent Canadian jurisprudence appears to signal a growing respect for the differences of disability and a retreat from the use of difference as a means to justify exclusion. The implications of such an approach for immigration law, and specifically its "medical inadmissibility" criteria, however, are uncertain, due both to the absence of political will to adapt the legislation to a more flexible, inclusive standard, and the profound deference with which decision making in relation to immigration is treated by the courts.

In this paper, I will examine the issue of disability as a bar to immigration from a substantive-equality perspective. It is my contention that, just as the norms underlying certain rules that unfairly exclude persons with disabilities from other areas of society have been held to be discriminatory, so should be discriminatory immigration rules, which may unfairly exclude persons with disabilities from Canadian society itself. The fact that this has not occurred to date suggests that governmental and judicial reliance upon principles of state sovereignty, which invest foreign non-residents and

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1. I will use the terms *foreign non-residents* and *aliens* interchangeably in this discussion to describe persons who lack the protected status accorded to citizens.

permanent residents with "rights" as opposed to "privileges," must also be overcome in order to give equality and human rights law its intended scope.

I will begin by discussing substantive equality, as informed by disability-rights theory, and consider the particular challenges inherent in bringing such an analysis to immigration law, which is inherently exclusionary. I will then attempt to apply this theory to the "medical inadmissibility" criteria, in order to demonstrate that they are discriminatory. I will conclude by proposing a rights-based law-reform strategy to eradicate discrimination against persons with disabilities who seek entry and admission to Canada.

I. THEORIES OF DISCRIMINATION

Since the middle of the twentieth century, Canadian law has slowly begun to afford mechanisms with which to confront discrimination. The introduction of human-rights legislation and the entrenchment of the *Charter of Rights and Freedoms* have responded to a growing social and legal consciousness of the linkage between the inequality stemming from "difference" and the harm of injustice and unfairness.

Human-rights awareness grew in Canada with the unanimous adoption by the international community of the *Universal Declaration of Human Rights*[2]—a statement of basic rights and fundamental freedoms to which all people are entitled—in 1948. Subsequently, Canada became a signatory to additional legally binding international human-rights instruments such as the *International Covenant on Civil and Political Rights*[3] and the *International Covenant on Economic, Social and Cultural Rights*.[4] Canada's resulting international human-rights obligations inspired and shaped the human-rights protections provided domestically, including the *Canadian Bill of Rights,* as an expression of the egalitarian values embodied in these international instruments.[5]

Domestic human-rights legislation enacted provincially and federally also reflected these principles and provided a framework from which to analyze the social, political

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2. Adopted 10 December 1948, GA Res. 2174 III0, UN Doc. A/810 (1948) 71. Article 25 states, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control."

3. Adopted 16 December 1966, in force for Canada 19 August 1976, GA Res. 220(XXI), UN GAOR, Supp. No. 16, UN Doc. A/6316 (1966); article 26 provides for equality before the law and equal protection and that the law shall "guarantee to all persons equal and effective protection against discrimination," based on enumerated grounds, which are "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The concept of *status* is considered to be inclusive of disability.

4. Adopted 16 December 1966, in force for Canada 19 August 1976, GA Res. 220(XXI), 21 UN GAOR, Supp. No.16, 49, UN Doc.A/6316 (1966).

5. See Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 28-30.

and economic inequities experienced by persons with disabilities as individuals. The preamble to the Ontario *Human Rights Code*, for example, harkens back to the *Universal Declaration of Human Rights* in stating, "recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[6]

Cases decided under Canada's domestic anti-discrimination statutes reflect a growing commitment to these egalitarian values, particularly in relation to the meaning of *discrimination* and the variety of remedies that might be appropriate. Tribunals and courts now display a sophisticated understanding of *discrimination,* which need not be intentional, and may be group based and systemic, and may call for remedies that "reach to and reverse conditions of inequality."[7]

The proclamation of the *Charter* and its constitutional guarantee of equality further expanded the potential for rights-based litigation strategies predicated upon a substantive theory of equality and continued the trend to enact human-rights protections into law.

According to section 15 of the *Charter*,

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[8]

However, progress toward the goal of equality articulated by section 15 has been distressingly slow for seekers of equality, as evidence of the transformative potential of equality-rights law continues to appear only "at the margins" of judicial decisions, with some notable exceptions.[9]

Among the first cases heard by the Supreme Court of Canada after the equality rights provisions of the *Charter* came into effect was *Andrews* v. *Law Society of British Columbia*.[10] Significantly, in that case, it was noted that "the accommodation of differences . . . is the essence of true equality."[11] Discrimination was described as

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6. R.S.O. 1990, c. H.19.
7. *Supra* note 5 at 35.
8. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.
9. See for example, M. David Lepofsky, "A Report Card on the *Charter*'s Guarantee of Equality to Persons with Disabilities after 10 Years: What Progress? What Prospects?" (1996-97) 7 National J. Constitutional Litigation at 263, also M. Young, "Change at the Margins: *Eldridge* v. *British Columbia (A.G.)* and *Vriend* v. *Alberta*" (1998) 10 Cdn. J.Women & Law at 244; and *BCGSEU* v. *B.C.* [1999] S.C.J. 219, to be discussed *infra.*
10. [1989] 1 S.C.R. 143. In this case, a non-citizen lawyer seeking admission to the British Columbia bar complained that the burden of having to wait three years until eligible to obtain citizenship, which was imposed by the legislated requirement of citizenship, was unfair and discriminatory, under section 15 of the *Charter.*
11. *Ibid.* at 169.

> a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society.[12]

The Court held that

> [t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration . . .
>
> The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes behind the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

McIntyre, J. also found that facially neutral laws may be discriminatory:

> It must be recognized at once . . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.[13]

This case has been hailed as a "more comprehensive and dynamic vision of equality than that offered by formal equality doctrine" found in cases decided under the *Canadian Bill of Rights*.[14] Similarity of treatment does not promote the full inclusion of *all* individuals in society, and often has the effect of *creating* barriers when "likes are treated alike," as noted in the passage quoted from *Andrews*, above, and as the recent Supreme Court of Canada decision in *BCGSEU* v. *BC*[15] amply demonstrates.

In *BCGSEU*, the Court explicitly accepted criticisms of formal equality on the grounds that it enables systemic discrimination: the Court held that exclusionary rules must take the existence of entrenched norms—which militate against equality—into account in purporting to treat all applicants "equally," so that reasonable accommodation of

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12. *Ibid.* at 44.

13. *Ibid.* at 164.

14. Sandra A. Goundry and Yvonne Peters, *Litigating for Disability Equality Rights: The Promises and the Pitfalls* (Winnipeg: The Canadian Disability Rights Council, 1994) at 19. Formal equality doctrine, which posits that equality means equality in the form of the law and requires treating everyone the same, rather than changing the conditions of those who are disadvantaged, is criticized for being incapable of recognizing that different treatment may be warranted where the same treatment will produce unequal effects for members of disadvantaged groups.

15. *Supra* note 9. This case considered whether a minimum physical-fitness standard imposed on candidates for Initial Attack forest firefighter positions discriminated against a woman who failed an aerobic capacity test that, while neutral on its face, was met differently by women and men.

differences may be provided.[16] Through its recognition of the profound, systemic effects of exclusionary rules, this caselaw signals a dramatic shift towards emerging standards of inclusivity of differences and an unequivocal rejection of formal equality theory.

Substantive-equality theory, which requires same treatment in some instances and differential treatment in others, takes a contextual, "effects-based approach," thereby addressing the failure of formal equality doctrine to comprehend that the *form* a distinction takes is irrelevant, since discrimination can often be identified only by looking to the *effects* of a law, policy or practice.

An *effects-based* approach is evident in other section 15 cases, such as *Eldridge* v. *British Columbia (A.G.)*,[17] in which the Supreme Court of Canada explicitly recognized the "unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization."[18] In that case, the failure of the British Columbia Medical Services Commission and provincial hospitals to provide sign-language interpreters for deaf patients, where necessary for effective communication, was found to be discriminatory under section 15. After noting that the objective of Canadian health-care policy is to "protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers," the Court determined that deaf patients were prevented from benefiting equally from the provision of medical services in comparison to hearing patients, a distinction that is illegal. The Court found that the distinction

> is based on a personal characteristic that is irrelevant to the functional values underlying the health care system. Those values consist of the promotion of health and the prevention and treatment of illness and disease, and the realization of those values through the vehicle of a publicly funded health care system. There could be no personal characteristic less relevant to these values than an individual's physical disability.

This approach to constitutional equality claims is also *contextual*, in that it allows facially neutral rules to be placed in a context that exposes the discriminatory norms underlying the rules, as well as their effects.[19] These norms may be invisible to

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16. This decision adopts a central criticism of the formal theory of equality: its failure to "challenge the imbalance of power . . . [or] go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be challenged in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed," at para. 41.

17. (1997) 151 D.L.R. (4th) 577.

18. *Ibid.* at para. 56.

19. In *Vriend* v. *Alberta (A.G.)*, Mr. Justice Cory stated, "If equality rights for minorities had been recognized, the all too frequent tragedies of history might have been avoided." It was held in that case that the omission of sexual orientation as a prohibited ground of discrimination under the *Individual's Rights Protection Act* was discriminatory because "the effect of the decision to deny homosexuals recognition under the legislation is to reinforce negative stereotyping and prejudice thereby perpetuating and implicitly condoning its occurrence": (1998), 156 D.L.R. (4th) 385, at 417.

everyone except the individual or group that does not fit them; for example, in a disability context, norms found in public policies and social practices that treat persons with disabilities exactly the same as their able-bodied counterparts "usually result in the exclusion of the person with a disability."[20]

A contextual approach is made possible through the judicial consideration of the historical, social, economic and political dimensions of discrimination. For example, in the *Eldridge* case, LaForest, J. created a context within which to analyze the complaint of disability-based discrimination by setting out a number of "facts" related to disability. These "facts" are explicitly derived from disability-rights theory advanced by advocates and critics such as M. David Lepofsky, Sandra A. Goundry, and Yvonne Peters. Included in this theory is a perspective upon the genesis of the harm of disability-based discrimination, chiefly outdated societal norms through which disability continues to be understood generally in modern Canadian society.[21]

Because the appellants in the *Eldridge* case were deaf, LaForest, J. then examined the specific nature of the disadvantages faced by that population and concluded that they derived "from barriers to communication with the hearing population."[22]

In this new jurisprudence, the "context" in which enumerated groups find themselves, including the existence of societal norms that operate as barriers to participation, is explored before the rule that is alleged to be discriminatory in the particular case is tested. Therefore, in order to strategize a contextual approach to immigration rules that may discriminate against persons with disabilities, it is necessary to identify the context in which legal problems arise, such as the existence of any societal norms that may result in disadvantageous effects, before turning to the specific elements of the medical inadmissibility rules. In addition to norms that are common to disability-based discrimination, it is also necessary to look at any discriminatory norms that may be identified in relation to immigration law and policy.

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20. Goundry and Peters, *supra* note 14 at 23.

21. These models, which are discussed more fully in the next section of this paper, are encapsulated in this judgement by LaForest, J.: "Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions . . . This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the 'equal concern, respect and consideration' that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms . . . One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled," described by statistical information to be that "persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale while employed," at para. 56.

22. *Ibid.* para. 57.

A. Disability-rights theory

Modern disability-rights theory offers a richly contextualized approach to discrimination through the exploration of the norms arising from several notorious "models of disablement" in Canadian society.

In the latter part of the twentieth century, the disability-rights movement began to focus attention upon stereotypes and prejudice against persons with disabilities. Challenges were launched against exclusionary rules and practices that operate as barriers to accessibility of services and therefore limit full participation in many areas of society, from education to employment.

Much work has been done to shift the focus away from "impairment" to the social environment in which persons with disabilities function. In this way, exclusionary rules may be tested for evidence of discrimination through the application of disability-rights theory that takes a contextual look at their substantive effect.

This theory has been developed through deconstructing disability itself to account for the historical exclusion and marginalization of persons with disabilities. Several models of thought that have operated to inform discriminatory law, policies, and practices have been identified: the "socio-political" model, the "biomedical model" and the "economic model" of disability.

I will briefly review these models, and then consider their implications for immigration law as a foundation for my claim that persons with disabilities face institutionalized inequality in the law relating to entry and admission of aliens to Canada.

1. *The socio-political model of disability as a social construct*

The model that disability-rights activists consider to hold the most promise for full participation by persons with disabilities encompasses the "social-political"[23] aspects of disability. Discrimination is viewed as the result of society's constructing environments in which people with disabilities are disadvantaged, or "handicapped."[24] For example, people who use wheelchairs would not be restricted in their mobility if the social environment within which they move were accessible; in other words, if barriers to mobility did not exist, individuals who use wheelchairs would not be considered

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23. Ian B. McKenna, "Legal Rights for Persons with Disabilities in Canada: Can the Impasse be Resolved?" (1997-98) 29 Ottawa L. Rev. 153 at 163. Other writers have used the term *social model of disability*: see Liz Crow, "Including All of Our Lives: Renewing the Social Model of Disability," in Jenny Morris, ed., *Encounters with Strangers: Feminism and Disability* (London: The Women's Press Ltd., 1996).

24. The origins of the term *handicap* (cap-in-hand) are said to derive from old English laws that required people with disabilities "to engage in the vocation of begging for charity to relieve them from their poverty": Ian B. McKenna, *ibid.*, note 178, citing C.H. Cohen and D.A. Ravensdale, *Discovering Abilities* (Yellowknife: Yukon Public Service Commission, Employment Equity Branch, 1990) at 2. Unfortunately, this term continues to be used in human-rights legislation. David Lepofsky notes that the term *disability* is better than *handicap*, since it "neutrally characterizes a physical or mental condition without prejudging its impact upon the individual's capacity to effectively function in society," and the "preferred, current usage of 'persons with disabilities' has major advantages" over terms such as *handicapped persons, disabled persons,* and *the disabled*, *supra* note 9 at 278.

"disabled" for purposes of mobility.[25] This viewpoint shifts the focus from the limitations present in the person to the social environment itself that *creates* the limitations.[26]

Such a viewpoint locates the problems facing persons with disabilities in the barriers that they confront, rather than in the persons themselves, and has given rise to the legal concept and duty to accommodate as a means of redressing discriminatory rules and practices.

2. *Focus on impairment: the biomedical perspective*

The biomedical model of disablement focuses attention on "impairment" and "locates the problem firmly in the person who is, in some way, defective, different and incapable, in relation to medically defined norms upon which the biomedical model of disablement is built."[27]

Jerome Bickenbach views this model as predominant in traditional Canadian social policy, and therefore problematic for attempts to encourage the "reasonable accommodation" approach. He notes that it is impossible to recognize the abilities of persons identified as having disabilities, in order to design more accommodating environments, when people with disabilities are seen as having

> a defect, deficiency, dysfunction, abnormality, failing or medical "problem" that is located in an individual. We think it is so obvious as to be beyond serious dispute that disablement is a characteristic of a *defective person*; someone who is functionally limited or anatomically abnormal, diseased, or pathoanatomical; someone who is neither whole nor healthy, fit nor flourishing, someone who is biologically inferior or subnormal.[28]

Bickenbach notes that this model leads to a predisposition to seek solutions in medical treatment, rather than in changing the social environment, and "tends to suggest a charity or needs-based normative basis for disablement theory."[29] He also observes

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25. This example is taken from Peters and Goundry, *supra* note 14 at 3.

26. Liz Crow writes, "The social model . . . shifts the focus from impairment onto disability, using this term to refer to disabling social, environmental and attitudinal barriers rather than lack of ability," *supra* note 23 at 208. See also M. David Lepofsky and Jerome E. Bickenbach, "Equality Rights and the Physically Handicapped" in Bayefsky and Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985).

27. McKenna, *supra* note 23 at 162.

28. Jerome Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) at 61. Liz Crow writes that "the medical model makes the removal of disadvantage contingent upon the removal or 'overcoming' of impairment—full participation in society is only to be found through cure or fortitude," *supra* note 23 at 208.

29. Bickenbach, *ibid.* at 96. Ian B. McKenna observes that an example of this model in the reasoning of Sopinka, J. in *Eaton* v. *Brant County Board of Education* [1997] 1 S.C.R. 241, (1997) 142 D.L.R. (4th) 385, which avoided any consideration of equality rights under the *Charter*, and focused instead upon the assessment of the "needs" of a child with cerebral palsy in deciding that these needs could not be met in a regular classroom, requiring her segregation in a "special" class.

that this perspective underpins the "economic" model of disability, which shares the emphasis of the biomedical model upon the condition of the individual.[30]

3. *"Ablebodism" vs. "disability": An economic perspective on the dichotomy*

Michael Oliver traces the way in which an individual's social worth came to be measured in relation to his or her attachment to the labour force to the historical period surrounding the Industrial Revolution, which saw the rise of industrial capitalism and the development of liberal individualism.[31]

Oliver identifies the cause of the systemic exclusion of people with disabilities from the mainstream world of work as the society's shift away from community production to individual wage labour, which made "non-productive" members become part of an underclass of society that is marginalized, isolated, and devalued.[32]

In this century, programs that focus on disability and work, such as workers' compensation, social security, and vocational rehabilitation, have become "pillars of contemporary Canadian disablement policy" within the economic model.[33] These programs focus on the physical or mental condition of the individual "worker" when assessing the economic efficiency of assisting those with disabilities to make necessary adjustments to allow their participation in the labour force.

In many cases, when an economic assessment is actually conducted, the cost of such accommodation is minimal.[34] Nevertheless, many employers have sought to resist what they perceive as a threat to their traditional privileges by alleging that accommodating "different" workers (including those with disabilities) would represent "undue hardship."[35]

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30. Bickenbach, *ibid.* at 90.

31. Michael Oliver, *The Politics of Disablement: A Sociological Approach* (New York: Saint Martin's Press, 1990). Prior to this time, Oliver notes that work was principally agrarian, and did not exclude the majority of people with disabilities from participation in some aspect of production, notwithstanding a societal regard for them as "unfortunate" (at 27-28).

32. Goundry and Peters observe that Oliver identifies a societal response to the "burden" of disability as the removal of individuals with disabilities from the community and into institutions of all kinds, including workhouses, asylums, hospitals, prisons, and special schools. They later comment that "the forces of discrimination and paternalism continue to operate effectively to preserve this second-class status. It is discriminatory attitudes and paternalism which are largely responsible for the warehousing of people with disabilities into institutions, sheltered workshops and segregated 'special' educational facilities," *supra* note 14 at 5.

33. McKenna, *supra* note 23 at 162.

34. Laurie Robertson, executive director of the Toronto-based group Transportation Action Now, suggests that "many employers are terrified that accommodation will cost them a fortune, when, in fact, on average it costs less than $500." "The Daily Chore of Disability" *The Globe and Mail* (29 February 2000) C9.

35. The "duty to accommodate" has traditionally been viewed as a defence to a *prima facie* case of discrimination (i.e., that discrimination *had* to occur because the person's needs could not be accommodated without undue hardship). The *BCGSEU* case suggests that the concept of accommodation is more akin to a right or entitlement, as opposed to a burden for employers and others from whom equality-seekers seek services.

Bickenbach contends that disablement policy in general must resolve its "impasse" by a synthesis of the traditional biomedical and economic models and the new socio-political model of disablement, which underlies the duty of accommodation embodied in federal and provincial human-rights legislation.[36]

4. *Models of disablement in an immigration context*

It will be argued in the next section of this paper that both the biomedical model and the economic model of disablement have been solidly integrated into the "medical inadmissibility" criteria in immigration law, to the detriment of potential immigrants and visitors with disabilities. These criteria may be seen to reflect a widely accepted and long-standing belief that persons with disabilities cannot be valuable contributors to Canadian society and, indeed, are more likely to pose a threat to either public health through exposure to contagious disease carried by immigrants, or to health and welfare systems, through excessive demands made by such immigrants for treatment and care.

It is suggested that the introduction of a new way of looking at immigration admissibility, which is sensitive to disability, would resist the application of discriminatory norms and allow for a more accurate assessment of the interests, needs, and abilities of persons with disabilities, in order to suggest possible methods to accommodate differences. A synthesis of the "socio-political model" within a flexible, non-discriminatory system of admission would reflect principles emerging in other areas of law, for example, in Supreme Court of Canada judgements in *Eldridge* and *BCGSEU*.[37]

Before developing the argument that the immigration rules are discriminatory, I will first examine a major source of difficulty that must be considered in strategizing equality litigation in immigration law. This relates to the legal status, or more accurately, the lack thereof, accorded to aliens, which in turn determines the types of protections and remedies afforded by Canadian law.

B. Rights or privileges: The alien and equality theory

In this section of the paper, I will attempt to assess the possibilities for the application of equality and human-rights law to immigration rules treating the admission and entry to Canada of persons with disabilities. Several observations seem relevant at the outset of this task: First, there is relatively little caselaw in which claims based in either equality or human rights have been brought in an immigration context,[38] and almost

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36. *Supra* note 28. McKenna, *supra* note 23, takes Bickenbach's notion of the "impasse" and examines pre-*BCGSEU* jurisprudence and attendant social policy to assess whether this impasse may be resolved. Like Bickenbach, he concludes that a synthesized model that respects basic human rights would realize this objective.

37. I have argued elsewhere that the *BCGSEU* holds significant promise for persons with disabilities, even though it does not treat disability-based discrimination, because it clarifies the law with respect to accommodation, and deals with systemic discrimination. See Rose Voyvodic, "*BCGSEU* v. *British Columbia*": Rescuing the Idea of Accommodation" [unpublished].

38. A Quicklaw search of the heading *Charter* in the "Immigration and Refugee" database revealed only a total of 1027 possibly relevant citations (some of which are counted more than once) in the caselaw recorded since 1986. On the other hand, a search of *Charter* in the "Criminal" database (admittedly a source of far more caselaw) listed 21445 possible citations.

all of those cases have resisted the application of "foundational human rights instruments and generally held notions of due process"[39] to immigration rules. Second, while it is true that a body of literature exists on the subject of "historical" discrimination in Canadian immigration law and policy, scholarly writing has not addressed either disability-based discrimination[40] or equality rights within this context.[41]

This lack of legal discourse might suggest that there are few problems with discrimination exist in immigration and refugee law. I will argue here that this is not the case; rather, the exclusivity imbedded in this area of law, together with the deference given to its decision makers by most courts and tribunals charged with enforcing human-rights legislation and the *Charter*, have shielded it from scrutiny. There is a paradox found in the stark contrast between the protections found elsewhere in the legal system to guard against the harm of discrimination, on the one hand, and the refusal of that same system to extend protections against this harm to non-citizens, on the other.[42] I will attempt to demonstrate that this ongoing reluctance to allow federal human-rights legislation and the *Charter* their intended scope within immigration law arises either from a judicial unwillingness to consider these norms to be discriminatory because they are applied to aliens, or a refusal to extend *rights*, as opposed to *privileges*, to aliens.[43]

I would assert, however, that either basis for this reluctance is untenable, in view of emerging principles of substantive equality that consider, in the words of Madame Justice McLachlin in the *BCGSEU* case, "the way institutions and relations must be

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39. Virginia Bartley, Book Review of *Immigration Law* by Donald Galloway" (1998) 24 Queen's L.J. 345 at 349.

40. However, an article by Ian Dowbiggin called "Keeping This Young Country Sane: C.K. Clarke, Immigration Restriction, and Canadian Psychiatry, 1890-1925" (1995) 76 Can. Historical Rev. 598 brings a historical approach to disability-based discrimination, while Margaret Somerville and Sarah Wilson engage in a modern analysis of HIV and AIDS-based discrimination in "Crossing Boundaries: Travel, Immigration, Human Rights and AIDS" (1998) 43 McGill L.J. at 781.

41. But see, for example, Chantal Tie, "Immigrant Selection and the *Canadian Human Rights Act*" (1994) 20 J. L. & Soc. Pol'y 81, Phillip L. Bryden, "Fundamental Justice and Family Class Immigration: The Example of *Pangli* v. *Canada (Minister of Employment and Immigration)*" (1991) 41 U.T.L.J. 484, and Lissett Barsallo, "Visitor Visas: The Stamp of Inequality" (1998) 25 Man. L.J. 483. Donald Galloway has also written about immigration in the context of liberal theory {"Three Models of (In)Equality" (1993) 38 McGill L.J. 64; "Liberalism, Globalism and Immigration" (1993) 18 Queen's L.J. 266; and "Strangers and Members: Equality in an Immigration Setting" (1994) 7 Can. J. L. & Jur. 149)} as has William Kymlicka, "Liberalism and the Politicization of Ethnicity" (1991) 4 Can. J. L. & Jur. 239, and Catherine Dauvergne, "Beyond Justice: The Consequences of Liberalism for Immigration Law" (1997) 10 Can. J. L. & Juris. 323.

42. Somerville and Wilson, *supra* note 40, observe that the effect of excluding non-nations because they have HIV or AIDS "might seem to be a paradox in certain countries—namely the co-existence in law of anti-discrimination measures for the protection of *nationals* from discrimination on the basis of illness (or likewise, on the basis of nationality), and exclusionary entry restrictions for *non-nationals* based on these same grounds" [emphasis added], at page 798. The authors therefore wonder whether immigration law is therefore "ethical," acknowledging that this question "might seem unusual to some lawyers."

43. Another view is that judges may refuse to consider these norms to be discriminatory *because* they are applied to aliens.

challenged in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed."[44] It would appear therefore fallacious to exclude institutions such as Citizenship and Immigration Canada from this examination simply because they relate to non-citizens, unless there is a legitimate basis for exempting non-citizens from human-rights protections. I will therefore turn to citizenship and immigration theory to determine whether such a basis exists.

1. *Citizenship and immigration theory*

It has been said that "[t]he alien has traditionally been *hors la loi*."[45] The principle of state sovereignty provides nations control over their borders and the right to admit or exclude non-nationals. In Canada, controls upon the admission of newcomers were first introduced after Confederation, when immigration policy began to address problems resulting from an essentially unrestricted program, such as "unhealthy travelling conditions and unscrupulous profiteers, and the exclusion of individuals who were physically or mentally unfit or who exhibited other socially undesirable qualities."[46]

The trend toward greater selectivity and away from unrestricted encouragement of English-speaking settlers became a feature of immigration legislation passed in the early twentieth century, in which "prohibited classes" began to be described, and a broad and general power of deportation was created. The classes of people who would be refused entry or removed included persons with disabilities, persons without sufficient means to support themselves, criminals, political subversives, and other "undesirable" persons. Regulations were passed to require immigrants to possess a certain amount of money, depending upon their race, occupation or destination, and "to prohibit the landing in Canada, of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character."[47]

Throughout Canada's history, foreigners have often been made scapegoats in the attempts by legislators to assuage populist fears. Provinces such as British Columbia and Saskatchewan attempted to indirectly limit immigration from Asia through the denial of entry of certain races into certain occupations[48] or the placement of controls upon settlement. Federal efforts to impede the entry to Canada by Asians included the

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44. *BGSEU, supra* note 9 at para. 41.

45. This means "beyond the scope of the law." See H. Patrick Glenn, *Strangers at the Gate: Refugees, Illegal Entrants and Procedural Justice* (Cowansville, QC: Yvon Blais) at 5.

46. See Christopher J. Wydrzynski, *Canadian Immigration Law and Practice* (Aurora: Canada Law Book, 1983) at 39-66, for a full treatment of the history of Canadian immigration law.

47. *Ibid.* at 46.

48. See, for example, *Kwong Wing* v. *R.* (1914), 18 D.L.R. 121, 49 S.C.R. 440, which dealt with provincial legislation prohibiting "Orientals" from employing white women; and *Union Colliery* v. *Bryden*, [1899] A.C. 580 (P.C.), considering legislation preventing Chinese immigrants from working in the mining industry.

notorious "continuous journey" regulations[49] and the *Chinese Immigration Act*.[50] Growing unease resulting from the Russian Revolution, and domestic uprisings such as the Winnipeg General Strike of 1919 were reflected in legislation that resulted in the deportation of thousands of trade unionists, suspected subversives, and other "undesirables."

The Depression of the 1930s and the outbreak of the Second World War led to active discouragement of immigration; after the war, the acute labour shortage led to a demand for immigrant workers and an expansion of the categories of admissible immigrants. However, the focus was placed upon immigrants from Britain, the white commonwealth, the United States, and France, while immigration from Asia and Africa would continue to be severely restricted. Prime Minister Mackenzie King invoked the principle of state sovereignty in defending his government's restrictive immigration policy in a speech that continues to resound in today's legislation:

> [w]ith regard to the selection of immigrants, much has been said about discrimination. I wish to make it 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.[51]

This paradigm principle of Canadian immigration law has been described as "so powerful that it is often seen to 'trump' not only any human rights claims by non-citizens but also the human rights-related obligations which are included in s. 3 of the [Immigration] Act."[52] It has also allowed policy makers to react more favourably to public demand for restrictions upon the rights of aliens[53] than to any demand for the extension of rights or protections to this group.[54] As Donald Galloway suggests,

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49. Immigrants seeking admission to Canada in the early twentieth century were required to have travelled in one "continuous journey," without interrupting their travel. (This was intended to prevent immigration from South Asia, since travel from that part of the world could not be completed "continuously" at that time.) The "climate" regulations were based on the notion that certain races were unable to adapt to Canada's cold climate, and were therefore spared the discomfort of residing here.

50. S.C. 1909.

51. *House of Commons Debates* (1 May 1947) at 2646.

52. Anna Pratt, "Dunking the Doughnut: Discretionary Power, Law and the Administration of the Canadian *Immigration Act*" (1999) 8 Social & Legal Studies 199, at page 207. Section 3(f) of the Act includes the objective "to ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*," R.S.C. 1985, c. I-2, as am., s. 3(f).

53. Barsallo writes, "Amidst the powerful press campaign designed to present rich immigrant drug dealers as the prototype of recent immigrants, not even the deportation of people who have lived in Canada since their childhood has attracted popular condemnation," *supra* note 41 at note 97, 504.

54. "The evidence is overwhelming—from Canada's historical discriminatory exclusion of "undesirable" racial and ethnic groups, to the detention and deportation of "subversives" and the indigent, to the more recent deportation of those deemed to represent a danger to the public—that the Canadian people and its governments have easily and comfortably accepted that the rights of non-citizens can

immigration law and policy are more likely to define the directions most favourable to the Canadian economy than to raise issues about any political obligations to "strangers."[55]

Undoubtedly, this principle is also the primary reason that discriminatory immigration rules or decisions have rarely been subjected to the scrutiny of a rights-based analysis in Canada, notwithstanding the expansion of international law[56] and the introduction of constitutional equality rights and anti-discrimination legislation in the *Bill of Rights*, the *Charter of Rights and Freedoms*, and the *Canadian Human Rights Act (CHRA)*,[57] which purported to widen the scope of entitlements for foreign non-residents.[58]

These constitutional and quasi-constitutional guarantees are not easily enforced, given the reluctance of courts and tribunals to intrude into the territory occupied by immigration officials: it has been said that "[i]mmigration law, like the law surrounding parole and prison discipline, has held a reputation among people interested in administrative law as a sort of wasteland in which judges have been loathe to apply the legal principles we normally associate with a sense of justice in Canadian public administration."[59]

Constitutional guarantees of due process were extended to foreign non-resident asylum seekers in 1985 in the *Singh*[60] case, resulting in the reform of Canada's refugee determination system. However, notwithstanding Wilson J.'s prescient warning in that case,[61] the traditional distinction between "rights" for Canadian citizens and "privileges" for non-citizens continues to inform the jurisprudence. As noted by Galloway, the caselaw that purports to follow *Singh* is particularly problematic, because that case does not "specify whether it is amenability to Canadian law or physical presence in Canada which is determinative."[62]

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be abridged with vastly more ease than those of citizens": Pratt, *supra* note 52 at 206.

55. Galloway, *supra* note 41, "Strangers and Members" at 154.

56. Glenn, *supra* note 45 at 6.The extent to which the procedural and substantive rights of aliens have been advanced by international law is slight, although the European Convention on Human Rights may hold more promise than international instruments such as the 1949 Universal Declaration on Human Rights, or the 1951 Convention Relating to the Status of Refugees, which provide definitions, but not remedies or procedures by which to evaluate violation of rights.

57. R.S.C. 1985, c. H-6.

58. Prior to the domestic enactment of equality rights, challenges to the old provincial statutes that discriminated against "aliens" were limited to cumbersome constitutional arguments that such legislation was *ultra vires* the powers given to the provinces by the *British North America Act*. See, for example, the cases cited *supra* at note 48.

59. Phillip L. Bryden, *supra* note 41 at 484.

60. *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422.

61. She wrote, "The creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the *Canadian Bill of Rights* . . . I do not think this kind of analysis is acceptable in relation to the *Charter*. It seems to me rather that the recent adoption of the *Charter* by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re-examined," at 461-62.

62. D. Galloway, "The Extraterritorial Application of the Charter to Visa Applicants" (1991) 23 Ottawa

Others suggest that a variety of factors, in addition to curial deference, is responsible for this "wasteland." Bagambiire writes,

> The reluctance of the courts to impose stringent constitutional standards in the area, the preparedness of the courts to quickly defer to the executive arm of government, the lack of sophistication in Charter issues on the part of most members of the immigration bar and academy, and the vulnerability and lack of resources on the part of those who would benefit directly from Charter challenges in the field, have all conspired to make the Charter a hollow promise in the immigration and refugee area.[63]

Aliens with disabilities are therefore vulnerable to social constructions: those that underlie the extension of principles of accommodation to persons with disability generally, and those that underlie the extension of rights to non-citizens. In each case, the complex web of bio-medical and socio-economic considerations that operate as obstacles to substantive equality are evident.

2. *Contextualizing discrimination in immigration law and decision-making*

Discrimination, in the plain sense of the word, has been said to be integral to the formulation and operation of immigration policy, which requires *distinctions* to be made between persons who apply for entry or admission, for reasons of state security, as well as administrative considerations.[64] The legislation's definitions and categories create a range of criteria related to a person's status, which are designed to assist immigration officials in selecting immigrants. The selection process is, generally speaking, based upon an assessment of status in light of rules of admissibility that are geared to test for "suitability." However, if the criteria themselves are harmful, in that they result in exclusion based upon discriminatory norms, or if discretion is exercised unfairly in the application of the rules, and the result is exclusion, then "discrimination" in its pejorative sense should be seen to arise, and in turn trigger legal challenges.[65]

L. Rev. 335, discusses how Wilson, J.'s reference to refugee claimants as being "physically present in Canada" has been invoked in caselaw, which has limited the application of fundamental justice to persons applying for immigrant visas: see *Ruparel* v. *Canada (Minister of Employment and Immigration)* (1990), 17 Imm.L.R. (2d) 190 (F.C.T.D.); the mobility rights section of the *Charter* has also been cited as authority for the limitation of rights to non-citizens: see *Chiarelli* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711.

63. *Canadian Immigration and Refugee Law* (Aurora, Ontario: Canada Law Book, 1996) at 391.

64. Julius H. Grey stated, in his 1984 text, *Immigration Law in Canada,* "In a sense all of immigration law is discriminatory . . . It is therefore, not surprising that neither the statutory *Canadian Bill of Rights* of 1960 [footnote omitted] nor the *Charter of Rights and Freedoms* in 1982 [footnote omitted] have had any effect on immigration law." (Toronto: Butterworths) at 152.

65. A 1993 documentary produced by the National Film Board of Canada, entitled *Who Gets In?* provides graphic examples of the extent to which "discretion" operates in the assessment of "suitability" in its examination of overseas processing in Canadian visa offices in the Philippines, Hong Kong, and Nigeria. In a powerful scene, Mike Molloy, then consul in Nigeria, candidly discussed his denial of a landing request made by a former Army officer from Zaire as a refugee, on the grounds of "personal suitability," which he assessed by imagining how a person "like him" would "fit in" to a Canadian neighbourhood, for example, next door to his mother. His commentary is heard over the visual image of this muscular African man dressed in army boots, clearly hopeful and anxious about his application as he waits in the lobby of the embassy for what the viewer already knows will be a

The potential for a positive outcome of such challenges in favour of aliens has typically been tempered, however, by a judicial approach that treats immigration decisions as virtually unassailable,[66] and resists the application of paramount legislation such as the *Canadian Human Rights Act* and the *Charter*.[67]

Indeed, in *Anvari* v. *Canada*, Mahoney, J., in dismissing allegations of disability-based discrimination brought against the Minister of Immigration under the *Canadian Human Rights Act*, observed, "The *Immigration Act* is replete with provisions which not only permit but require that adverse differentiation be made in relation to individuals on grounds of national origin; its provisions also require adverse differentiation on grounds of age, marital and family status as well as disability . . . The Act is about little else than discriminatory practices . . . "[68]

This inherently exclusionary legislation has not yet sufficiently offended egalitarian values to the extent that political pressure has been brought to bear to reform it. On the contrary, it has been noted that the "general characterization of migrants as abusers of social welfare systems or as criminals would indicate that migrants are perceived as morally different."[69] Historically, Canadian residents' negative perception of immigrants has found its way into stunning examples of legislated racism and xenophobia.[70] The creation of "prohibited classes" of persons considered unacceptable has enabled successive governments of the day to exclude unwanted aliens,[71] which have always included persons with disabilities. Economic and political pressures have also contributed to the public demonization of immigrants, as seen in the turn-of-the-century anti-Asian

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negative decision, in an effective depiction of how subjective factors (which some may consider racist) influence discretion.

66. A notable recent example of an exception to this rule may be seen in the contextual approach taken in the case of *Baker* v. *Minister of Citizenship and Immigration*, [1999] S.C.J. No. 39, in which the standard of review for discretionary decisions related to landing applications based on humanitarian and compassionate grounds was re-evaluated by the Supreme Court of Canada. It is also interesting to note that courts of provincial superior jurisdiction have, on occasion, been much more willing than judges operating in the federal-level courts to scrutinize immigration legislation for equality and fairness, when, for example, they have been called upon to exercise their *parens patriae* jurisdiction (see *Francis* v. *Minister of Citizenship and Immigration*, [1998] O.J. No. 1791 (QL)).

67. In fact, Arthur Weinrib and Rocco Galati complain that the rights of aliens "at common law were better than they are now under the *Charter*" in *The Criminal Lawyers' Guide to Immigration and Citizenship Law* (Aurora, Ontario: Canada Law Book, 1996) at 3. The authors further state that the guiding principles of *Singh* appear to have been undermined by cases such as *Dehghani* v. *Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, 18 Imm.L.R.(2d) 245, and *Chiarelli*, *supra* note 63.

68. (1993) 19 Imm.L.R. (2d) 192, at 196. As will be discussed, *infra*, Mahoney, J.'s sanguine assessment of the discriminatory nature of the *Immigration Act* in this case is a classic example of the "rights" vs. "privileges" dichotomy.

69. Somerville and Wilson, *supra* note 40 at 798.

70. This means, literally, "fear of the stranger."

71. Pratt, *supra* note 52, notes, "As previously legitimate racist and moralistic grounds for exclusion were legally and socially delegitimized, concerns about security, criminality and danger, often articulated through the language of risk, emerged almost simultaneously as one of the last remaining legitimate grounds for exclusion," at 219.

policies and laws referred to above,[72] and in the current characterization of immigrants in public discourse[73] as criminals (dangers to the public), bogus refugees (queue jumpers, illegal migrants), and social-assistance recipients (welfare defrauders).[74]

Canada's humanitarian sympathies, and the waxing and waning of the country's need for workers, have battled with "shifting social anxieties" that are "inflected by dominant, historically specific discourses"[75] to dictate the numbers and the types of "desirable" immigrants.[76] In addition, the process of selection of these immigrants is characterized by the exercise of wide discretionary powers within a framework that is exclusionary in its nature and philosophy. The medical inadmissibility criteria, which tend to exclude persons with disabilities, form just one part of this exclusionary framework.

i. Medical inadmissibility: Persons with disabilities as a "prohibited class"

It appears that the earliest Canadian legislative attempts to create medically inadmissible classes focussed upon threats posed by "unhealthy" immigrants. Section 11 of the 1859 *Act Respecting Emigrants and Quarantine*, in addition to requiring the quarantining of emigrants suffering from typhoid and smallpox, *referred* to the rejection of "lunatic, idiotic, deaf and dumb, blind or infirm person[s]."[77] While subsequent legislation continued to exclude immigrants suffering from "loathsome" diseases, such as tuberculosis,[78] as well as (up until 1978) "idiots, imbeciles or morons,"[79] the 1976 *Act* modernized medically based restrictions on admission by ceasing to list specific types of conditions and applying criteria that consider the "danger to public health and safety" and "excessive demand on health and social services" that might result from "any disease, disorder or other health impairment."

Currently, all persons seeking entry or admission to Canada as immigrants or visitors must satisfy the "medical admissibility" and "ability to self-support" criteria of the

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72. *Infra* pages 18-19.

73. *Racist Discourse in Canada's English Print Media* by Frances Henry and Carol Tator, published by The Canadian Race Relations Foundation, March 2000, conducts a discourse analysis of the "Just Desserts Café" killing, which provided a field day for media on issues of immigration and criminality. The authors state that this coverage "contributed significantly to changes in the law by tightening the rules for the deportation of alleged criminals," at 128.

74. See Employment and Immigration Canada, *Managing Immigration: A Framework for the 1990s* (Ottawa: Employment and Immigration Canada, 1992), in which migrants are referred to repeatedly in association with criminal activity and abuse of the welfare system.

75. Pratt, *supra* note 52 at 218.

76. "The stalwart peasant in a sheepskin coat with a stout wife and a half dozen children" represents an early vision of a desirable hard-working (white, able-bodied and principally male) settler, as seen by Sir Clifford Sifton, Minister of the Interior, in 1896. Dauvergne, *supra* note 40, discusses a recent Canadian government Immigration Plan in the context of "the hegemonic sway of liberal discourse," noting that "economic discourse, citizenship discourse and cultural discourse" account for Canadian immigration policy "since the establishment of the nation," at 325.

77. 22 Vict., c. 40.

78. Section 3(b), *Immigration Act*, R.S.C. 1927, c. 93.

79. Section 5, *Immigration Act*, R.S.C. 2952, c. 325.

legislation. Visa officers considering applications are required to have regard to section 19(1) of the *Immigration Act*, which states,

> No person shall be granted admission who is a member of any of the following classes:
>
> (a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,
>
> (i) they are or are likely to be a danger to public health or to public safety; or
>
> (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services;

This legislation, which has been used to deny entry and admission to visitors and immigrants with disabilities, has been described as "the bane of disability advocates for many years,"[80] and "an example of discriminatory attitudes reflected in legislation."[81] I will return to these charges in a critique of the "public danger" and "excessive demand" criteria from a disability-rights perspective after briefly examining how findings of medical inadmissibility are made.

In practical terms, in order to find an applicant admissible, the visa officer must be satisfied about the "reasonableness" of medical examinations that are required of all immigrants and certain visitors under section 11 of the *Act*. "Medical officers of health" apply section 22 of the Regulation to the *Immigration Act,* and follow a policy manual prepared by the Ministry of Citizenship and Immigration, which mandates consideration of eight factors when forming an opinion on admissibility under this section.[82] Once the medical officer has rendered an opinion, concurred with by one other medical officer, this opinion is provided to the visa officer. The decision to approve or deny the application for a visa is provided to the visa applicant, and, in cases of family-class immigrants, to the sponsor, in writing.

Practical problems of accessibility, significant time delays and cost face immigrants seeking to challenge a finding of medical inadmissibility through the mechanisms available for appeals and judicial review of decisions of visa officers.[83] Appeals, which

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80. Sandra A. Goundry, *Final Brief on the Proposed Amendments in Bill C-86 to Sections 19(1)(a) and (b) of the Immigration Act* (Winnipeg: The Canadian Disability Rights Council, 1992) [hereinafter *Brief*].

81. *Supra* note 14 at 7.

82. There are five general grounds on which the applicant is assessed: risk to public health, expected demand on services, response to medical treatment, surveillance, and potential employability or productivity. Status is based on a total of the scores, ranging from M1, which identifies no health impairment, M2 and M3, where the condition is insufficient in itself to render the applicant inadmissible, but may, when considered in combination with other factors, M4 and M5, where present inadmissibility is subject to future review, and M6 and M7, where the condition is identified as precluding admission at present and in the foreseeable future.

83. The location of both the IRB (AD) and the Federal Court registries and courts is also problematic for many residents of Canada who do not live in major centres. Currently, in Ontario, the IRB (AD) sits

are taken before an administrative tribunal as opposed to a Federal Court judge, are a more accessible and "user-friendly" form of review, but are available only in limited circumstances.[84] If the person considered to be medically inadmissible sought entry as a visitor or as an immigrant[85] at a visa office abroad, there is no right of appeal to a panel of the Immigration Appeal Division. Rather, judicial review of the visa officer's decision must be sought in the Federal Court (Trial Division) pursuant to the provisions of the *Federal Court Act*.[86]

This is a more costly proposition, as legal representation is most likely required, because the rules are complex and the objection must be founded in an error of law in order for it to succeed. For example, neither a court nor a panel of the Appeal Division reviewing a finding of medical inadmissibility has jurisdiction to question the correctness of the finding, since the forming of a medical opinion is the prerogative of the medical officer.[87]

Section 22 of the regulation, which contains criteria to be considered in forming a determination of inadmissibility, has been criticized for failing to offer definitions for critically important terms such as *danger to public health or safety, excessive demand, social services*, or "any of the other phrases used in s. 19(1)(a)."[88] In the *Ismaili* case, the Regulation was also held to be partially *ultra vires* the regulation-making power conferred upon the Governor in Council by Parliament, to the extent that it prescribes factors related to the determination by medical officers of "whether the admission of any person would cause or might reasonably be expected to cause demands on health or social services."[89]

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only in Toronto, and the Federal Court is accessible only in Toronto and Ottawa. There is, of course, the additional hurdle of the holding in *Ruparel supra* note 62, that *Charter* protections are not available to persons "not physically present in Canada."

84. When the person considered medically inadmissible is being sponsored by a Canadian citizen or permanent resident, the sponsor has the right to challenge that finding by filing an appeal with the Immigration Appeal Division. This appeal may be based upon an error of law, or upon "equitable grounds" (where there are compelling humanitarian or compassionate considerations for overturning the finding).

85. The term *immigrant* is a term of art, describing a person who "seeks landing." *Landing*, in turn, is defined as "lawful permission to establish permanent residence in Canada": *Immigration Act*, R.S.C. 1985, c. I-2, s. 2.

86. R.S.C. 1985, c. F-7.

87. However, this opinion may be reviewed collaterally. In the words of Cullen, J., in the *Ismaili* case, a reviewer "is not competent to make findings of fact related to medical diagnosis, but is competent to review evidence to determine whether the medical officers' decision is reasonable. Grounds for unreasonableness of a decision include incoherence or inconsistency, absence of supporting evidence, or failure to consider cogent evidence," *Ismaili* v. *Minister of Citizenship and Immigration* (1995), 29 Imm.L.R. (2d)1, 100 F.T.R.139 (T.D.) [hereinafter *Ismaili*] at para. 27.

88. Davies B.N. Bagambiire, *Canadian Immigration and Refugee Law* (Aurora, ON: Canada Law Book, 1996) at 89. For example, the case of *Ng* v. *Canada* (1986), 1 Imm.L.R. (2d) 307 sought to judicially define the term *excessive* as being "something out of the ordinary; a superabundant demand or demand of any extreme degree," at 313.

89. The section of the legislation, which contains the regulation-making power, was amended, and language relating to demand for services was omitted from the amendment. The Court held that this

In addition to these difficulties created by the legislation, there is another problem in the claim that "the nature of the cases support the claims . . . that persons with disabilities are being denied admission into Canada on the basis of discriminatory assumptions and practices."[90]

ii. Critiquing the criteria from the perspective of disability rights

It has been argued by disability-rights advocates that medical officers do not pay adequate attention to the factors set forth in the regulations and instead concentrate on the diagnosis itself. Even if they do apply the other factors, it is said that they are not appropriately trained or situated to determine the potential of a person with a disability to participate in society, and often "ascribe to many of the myths about persons with disabilities which are prevalent in society and which are rooted in a medical orientation."[91] Furthermore, medical officers based overseas may reflect cultural attitudes towards persons with disabilities that are even more antiquated than those prevalent in modern-day Canada.[92]

Protection of the public purse has also led to restrictions placed upon entry of those considered likely to be a burden on society through "excessive demand of health and social services." The ability to secure permanent employment sufficient to sustain oneself and one's dependants also guides discretionary decisions on "settlement capability" of sponsored immigrants and others seeking permanent residence on "humanitarian and compassionate grounds." However, one need only reflect on the description of Canadian citizens with disabilities as "largely supplicant, substantially under-represented in the workforce, frequently marginalized and isolated and significantly poorer than other Canadians"[93] in order to appreciate that a person with disabilities seeking immigration status will be facing employment-related barriers that are even higher than those faced by other immigrants, which are already considerable.

It has been noted that "even a cursory examination of the section 19(1)(a) jurisprudence reveals that the medical inadmissibility sections of the *Act* are problematic from the perspective of persons with disabilities."[94] While many decisions made under this regulation have been judicially reviewed, and findings of medical inadmissibility have been attacked on grounds of procedural fairness, or improper exercise of discretion,[95]

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portion of the regulation therefore had no legal foundation and could not stand.

90. *Brief, supra* note 81 at 10: "This is particularly true of cases in which the refusal is based on a medical diagnosis of Down Syndrome or 'mental retardation' and the virtually automatic finding of 'excessive demands'—which make up an alarming proportion of medical inadmissibility cases."

91. *Ibid.* at 21.

92. *Ibid.* at 28: "In other cultures and countries, attitudes toward persons with disabilities may not be consistent with the equality perspective which Canada promotes."

93. McKenna, *supra* note 23 at 158. See also G. Annable, *Perspectives on the Journey: The Qualifications and Experience of Canadian Job Seekers with Disabilities* (Winnipeg: The Canadian Council on Rehabilitation and Work, 1993), and the Statistics Canada *Health and Limitation Survey*, 1986 and 1987.

94. *Brief, supra* note 80 at 10.

95. The chain of cases reported tends to suggest that visa officers have no discretion to review the

the legislation itself has not been successfully challenged on questions of fundamental justice or equality rights.

Several attempts have been made to challenge the legislation itself on *Charter* grounds at the level of the Immigration Appeal Division, attacking the constitutional vagueness of the "excessive demand" criterion of the medical inadmissibility rules. In the *Grewal* case,[96] Canadian-citizen sponsors of immigrants who appealed the denial of permanent resident status to a non-resident relative who was found to be likely to place excessive demands upon Canadian health and social services alleged that their section 7 *Charter* rights were infringed upon because the concept under consideration was too vague, making it impossible for them to know the case they had to meet. Previous cases, such as *Ismaili* and *Jim*,[97] were considered to have created tests on what constitutes excessive demands, including "more than what is normal" demands on health and social services. It was found in *Grewal* that what constitutes "normal" is not a matter for legal debate, but rather a policy matter, which ought to be defined through government policy.[98]

Even though the constitutional rights alleged to be infringed upon were located in citizens, not aliens, in that case, the tribunal refused to extend *Charter* protection, reasoning that, while "the concept of 'excessive demand' is general and lacks precision . . . it falls short of being vague," and "benefits an appellant who can then argue the specific circumstances to be considered in his or her particular case, more than would a fixed definition of what would in all cases be considered excessive."[99]

No cases have thus far successfully challenged the creation of prohibited classes on the grounds that they infringe upon section 15 rights,[100] or, in which the medical-inad-

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medical officers' conclusion, but may decide whether an applicant will be a burden on health and social services, although this cannot be said to be a principle that has been consistently applied. See, for example, *Ismaili, supra* note 89, *Poste* v. *Minister of Citizenship and Immigration* [1997] F.C.J. No. 1805, Imm.-4601-96, 22 December 1997, and *Wong* v. *Minister of Citizenship and Immigration,* (1998) 34 Imm. L.R. (2d) 18 (F.C.T.D), which tend to hold that the visa officer must not merely rely on the opinion of the medical officers, but must also decide whether a person will be a burden on health services and social services, where the medical officers' conclusion is unreasonable. Bagambiire notes, however, that succeeding in this manner may in fact be an "empty victory" if the subsequent medical opinion ordered also results in a finding of inadmissibility on new medical grounds.

96. *Grewal* v. *Canada (Minister of Citizenship and Immigration)* [1997] I.A.D.D. No. 1181, No. V95-01266.

97. *Jim* v. *Canada (Solicitor General)*, (1993), 22 Imm.L.R. (2d) 261 (F.C.T.D.).

98. *Ibid.* at para. 31. The hypothetical question posed was, "If an individual is an elderly male, is the normal group he is to be compared to in order to determine whether his admission would cause excessive demands on health and social services, all Canadians, Canadian males, all Canadian males within his age group, or all Canadian males within his age group suffering from the same condition?"

99. *Grewal, supra* note 96 at para. 42.

100. Examples of cases in which section 15 is raised are *Orantes* v. *Canada (Minister of Employment and Immigration)*, (1990), 34 F.T.R. 184 (T.D.), in which the applicants unsuccessfully argued that women as a group were disadvantaged by the operation of the "inability to support" criteria, and *Nueda* v. *Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 577 DRS 94-03195, Action 92-T-1401, in which it was unsuccessfully argued that foreign domestic workers form a

missibility criteria specifically are alleged to violate the equality rights provisions of the *Charter*.[101] Moreover, it has been noted that a meritorious challenge usually results in the award of a "minister's permit"[102] (as opposed to permanent resident status).[103] This has been described as part of a "government strategy to 'challenge-proof' an unconstitutional law."[104]

When cases *have* been fully litigated and subsequently reported, it is clear that courts considering claims of discrimination in relation to these criteria have failed to apply a rights-based analysis to medical inadmissibility. This may be illustrated by the approach seen to be taken by the Federal Court of Appeal in the case of *Canada (A.G.)* v. *Anvari*.[105] In that case, the Court held that a tribunal appointed under the *Canadian*

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group that is discriminated against. Section 7 and section 12 have also been argued unsuccessfully in cases where criminality has excluded aliens and even permanent residents.

101. In Bui v. *Canada (Minister of Citizenship and Immigration)* [1998] I.A.D.D. No. 24, No. V96-00598, other grounds (reasonableness) were used to overturn the decision to deny admission of a person with disabilities, and therefore it was considered unnecessary by the tribunal to consider the *Charter* challenge. Similarly, in *Sidhu* v. *Canada (Minister of Citizenship and Immigration)* [1997] I.A.D.D. No. 1064, No. W95-00018, counsel was said to have failed to satisfy the panel that "the *Charter* is applicable to the instant case, as at issue is the medical status and potential admissibility of a non-Canadian living outside Canada." In *Deol* v. *Canada (Minister of Citizenship and Immigration)* [2000] I.A.D.D. No. 214, there was also said to be "insufficient evidence to place the Principal Applicant within the definition of 'disability' contemplated by the *Charter*." The Federal Court of Appeal, in *Thangarajan* v. *Canada (Minister of Citizenship and Immigration)* [1999] 4 F.C. 167, refused to construe section 19(1)(a) narrowly in considering whether "social services" included "special education," because it was "not prepared to assume that paragraph 19(1)(1) would offend section 15 of the *Charte* . . . [i]n the absence of a proper debate with respect to section 15 and a section 1 analysis," para.19. Leave to appeal to the Supreme Court of Canada was subsequently denied {[2000] S.C.C.A. No. 38}.

102. Minister's permits are issued in exceptional cases at the discretion of a delegate of the Minister of Citizenship and Immigration, where a person is "otherwise inadmissible." This exceptional nature is also problematic. As stated by the Canadian Disability Rights Council, "[T]he current use of Minister's Permits, used in this way, reinforces the idea that persons with disabilities are exceptions – requiring 'special' not equal treatment." *Brief, supra* note 80 at 22. Minister's Permits provide few of the "privileges" of permanent resident status—they are issued for temporary periods, and therefore discourage feelings of "belonging." A few of the "perquisites" that go along with permanent resident status, but are forbidden to permit holders and therefore exacerbate these feelings are social insurance numbers that do not begin with the numeral *9* and therefore identify their bearers as "non-resident," entitlement to student loans and "regular" tuition, and the ability to obtain a travel document.

103. "The question which arises is, how many times a Minister's permit has been issued on the eve of the filing of a lawsuit against the government." *Ibid.* at 22.

104. *Ibid.* at 22.

105. *Canada (A.G.)* v. *Anvari* (1993), 19 Imm.L.R. (2d) 192 (Fed. A.A.) reversing (1991), 14 C.H.R.R. D/292 (Cdn. Human Rights Review Trib.). Mehran Anvari applied for landing under a special program created in the 1980s to facilitate admission of Iranian nationals applying for permanent residence from within Canada. He was approved in principle, but later denied landing, following the finding by medical officers that he would require medical treatment to assist him as a result of the lingering effects of childhood polio. He filed a complaint with the Canadian Human Rights Commission, alleging discrimination arising from his disability. The Human Rights Tribunal found that the evidence of the medical officers on the "excessiveness" of the costs of corrective surgery was speculative, and in conflict with evidence led by Anvari's medical experts which suggested that the

Human Rights Act did not have jurisdiction to entertain a complaint of discrimination under that legislation, based on the allegation that a medical opinion formed within the context of the *Immigration Act* was unreasonable. Even if the tribunal did have jurisdiction, the Court concluded that "subpara. 19(1)(a)(ii) mandates an otherwise discriminatory practice which is *bona fide* justified."[106] The Court analogized the language of the medical-inadmissibility criteria ("would cause or might reasonably be expected to cause excessive demands on health or social services") to the *Canadian Human Rights Act*'s requirement of *bona fide* justification.[107]

From the perspective of disability-rights theory, this reasoning is clearly flawed. It appears to accept as a given that the "excessive demand" criterion is a justification in and of itself for prohibiting admission, without questioning the precepts upon which it is based (what is "normal" as compared to "excessive"?).[108] It also ignores the possibility that the criterion itself represents a discriminatory norm that may be directly traced to the economic and biomedical models of disablement. It also inherently incorporates outdated, discriminatory concepts in failing to create a context in which all of the factors set out in section 22 of the regulations (including socio-economic factors) could be taken into account.[109]

Were this case to be litigated today, legal argumentation reflecting theoretical critiques of the traditional models of disablement, and the judicial reasoning found in recent decisions such as *BCGSEU,* could be made to urge a different result, which would integrate the concept of reasonable accommodation into the "justification" process, and challenge the exclusionary nature of these criteria on principles of substantive equality.[110]

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cost would not be "excessive," and ordered that he be landed and be compensated for medical expenses and injury to his feelings and self-respect. The respondent Minister of Employment and Immigration appealed to the Review Tribunal, which modified the compensation award, but concurred in the finding of discrimination. That ruling was appealed to the Federal Court of Appeal.

106. *Ibid.* at 198.

107. Section 15(g) of the *CHRA* exempts otherwise discriminatory practices if "there is a *bona fide* justification for that denial or differentiation."

108. In *Grewal*, for example, the Immigration Appeal Board panel member states, "There is no end to the debate in Canada concerning the extent to which resources available for health and social services are strained. For Parliament, and those wishing to see a continuation of the existence of a social safety net, seeking to ensure that these resources are not unreasonably strained to a greater extent is a valid social objective," *supra* note 97 at para. 43.

109. The Canadian Disability Rights Council also has raised serious questions about the appropriateness of the chief decision maker being medical practitioners, in view of the inherent problems with the skewed way in which disability is perceived in the "biomedical model" and the attendant difficulties with integrating the concept of accommodation. See *Brief, supra* note 80 at 36.

110. It is troublesome to note the Federal Court of Appeal's refusal to consider constitutional argumentation in *Thangarajan* (*supra* note 101) on the grounds that it was too "general." However, this suggests the need for extensive and thorough groundwork to be laid through expert evidence, which supports a finding of discrimination and enables a section 1 analysis to be withstood.

Criticisms of the legislation's failure to avoid unfair reliance on discriminatory norms based upon disability-rights theory have formed part of lobbying strategies, particularly by the Canadian Disability Rights Council, which are designed to be incorporated into amendments to the immigration legislation. In a brief submitted in 1992, a serious attack was made upon the inequality fostered by the medical-inadmissibility criteria. To illustrate the subtle invidiousness of these criteria, the Council identified certain myths that they reflect.

These myths are described as perpetuating "five of the most insidious and prevalent discriminatory attitudes and beliefs about persons with disabilities which continue to inform public policy on immigration."[111] Rooted within the economic and biomedical models of disability, the myths underlie the discriminatory norms reflected in inflexible, discriminatory rules, which result in the denial of entry and admission to Canada to persons with disabilities, stereotyping persons with disabilities into one or more of the following categories: "chronically ill individuals," "a drain on the health care system," "an excessive burden on society," "unemployable and can never contribute to society," and/or in the case of immigrants and visitors with HIV/AIDS, "a danger to public health and safety and their admission would cause excessive demands on medical services."[112]

The brief setting out these myths, as well as an item-by-item critique of the criteria, which strongly criticized their lack of flexibility, and therefore human-rights and equality-rights protections, was submitted to the legislative committee reviewing Bill C-86, an *Act to Amend the Immigration Act*, in 1992. This was not the first (or last) time the federal government was exhorted to amend this legislation in order to respect the constitutional standard of equality enshrined in section 15 of the *Canadian Charter of Rights and Freedoms*. In 1985, the Parliamentary Committee on Equality Rights released a report entitled *Equality for All*, following an audit of all federal laws for compliance with section 15. In that report, it was recommended that "medical standards for admission to Canada be made public and reviewed and modified in order that they be more flexible in their application."[113]

In its response, the government accepted the recommendation that section 3(f) of the *Immigration Act* be amended to state, as an objective of Canadian immigration policy, that such policy should ensure that the *Act*, the Immigration Regulations and Immigration guidelines contain standards of admission that do not discriminate in a manner prohibited by the *Charter*. However, it refused to amend the "medical standards for admission," and took the position that its regime was flexible enough to adapt to changing conditions.[114]

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111. *Ibid.* at 16.

112. *Ibid.* at 16-20.

113. (Ottawa: Supply and Services Canada, 1985).

114. *Toward Equality: The Response to the Parliamentary Committee on Equality Rights* (Ottawa: Supply and Services Canada, 1986).

In 1991, the *Immigration Act* was identified by disability-rights activists as a statute based on "outmoded and stereotypical assumptions and beliefs about persons with disabilities," which required amendment "to begin the process of legislative reform prerequisite to the realization of full social, economic, and political integration of persons with disabilities."[115]

Bill C-86 purported to amend the legislation by removing express references to "disability":

> (a) persons who, in the opinion of a medical officer concurred in by at least one other medical officer, are persons
>
> (i) who, for medical reasons, are or are likely to be a danger to public health or to public safety, or
>
> (ii) whose admission would cause or might reasonably be expected to cause excessive demands, within the meaning assigned to that expression by the regulations, on health or prescribed social services.

Disability-rights advocates responded to the proposed amendment by arguing that this simply removed evidence of direct discrimination, while maintaining tests that focus upon the disability, and not the "person as a whole."[116] It was also argued that, by continuing to give medical officers the power to determine admissibility, when the medical profession has failed to move beyond the model of thought that disability represents impairment or illness, the legislation continues to discriminate against persons with disabilities. Invoking criticisms of the "biomedical model of disablement," the Canadian Disability Rights Council has stated that "physicians are notoriously ill-equipped to assess the abilities and evaluate the potential contributions of an applicant with a disability—their nature and orientation of their education and training almost preclude such an expertise."[117] Furthermore, the test of "excessive demand" is used, without defining it or using data on the rate of use of health and social services by immigrants generally, as compared to the Canadian population.

In 1998, the government-appointed Legislative Review Advisory Group (LRAG) tabled a white paper entitled "Not Just Numbers."[118] This report, which was aimed at overhauling decision-making in immigration law, proposed the creation of a federal-provincial council, to "provide a forum for more structured consultation and policy development on issues of mutual interest."[119] It also made a series of recommendations in a framework for future immigration, including the following:

> The Immigration and Citizenship Act should maintain the distinction between persons who are inadmissible for reasons of danger to public health and safety and those who are inadmissible on account of excessive costs to the health-care system.

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115. *Ibid.* at 1.

116. *Brief, supra* note 80 at 24.

117. *Ibid.* at 25.

118. Legislative Review Advisory Group, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works and Government Services, 1997).

119. *Ibid.*, Recommendation 22.

> The term "excessive costs" should be defined by the Federal-Provincial Council on Immigration and Protection and described in the Regulations in such a way that it is transparent and objective.

It also recommended that the federal-provincial council establish criteria for the admission of "otherwise medically inadmissible persons," and that the legislation grant only provisional status to "persons subject to medical surveillance," and that renewal of their documents or approval of their citizenship applications be made contingent upon the demonstration of "an acceptable contact address in Canada,"[120] and "ongoing contact with provincial authorities."[121]

While the LRAG recommendations called for training of medical officers, this training was directed at the collection of "information on emerging and ongoing international health risks," not the appropriate assessment of work-related capacities or need for treatment or intervention, once again ignoring the recommendations of the Canadian Disability Rights Council.

Indeed, it appears that these recommendations continue to be ignored. In the fall of 2000, Bill C-31, "An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted, or in danger," was introduced by the government. This Bill "died on the order paper" when Parliament was dissolved upon the calling of a federal election, and was replaced by an identical Bill C-11. This Bill clearly focuses upon other aspects of inadmissibility, particularly criminality, and again ignores the problems inherent, from an equality perspective, in medical admissibility.[122] It creates "health grounds," which cause the inadmissibility of a "foreign national, other than a permanent resident . . . if their health condition (a) is likely to be a danger to public health; (b) is likely to be a danger to public safety; or (c) might reasonably be expected to cause excessive demand on health or social services."[123]

Again, there is no articulation of the standards that are set with respect to medical inadmissibility, or of the meaning of *excessive demand.* In other words, nothing has changed since the 1992 statement by the Canadian Disability Rights Council that the medical inadmissibility section of the legislation "has been identified by disability rights organizations as discriminatory both before and after the enactment of Bill C-86."[124]

The use of the difference of disability as a justification for exclusion continues, therefore, to be endorsed, if not required, by the criteria found in the *Immigration Act* and regulations. Elsewhere in Canadian law, a very different approach is beginning to

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120. *Ibid.*, Recommendation 132.

121. *Ibid.*, Recommendation 133.

122. This Bill passed second reading and was referred to committee February 27, 2001. At the time of writing this article, it was in the committee stage.

123. Bill C-11, "An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted, or in danger," 1st Sess., 37th Parl., 2000.

124. *Supra* note 14, p. 7, n. 16.

be applied in discrimination cases decided under human rights codes[126] and the *Charter*.[127] These cases, dealing with diverse issues affecting the lives of persons with disabilities, have engendered a growing respect for the differences of disability, and a rejection of the use of difference as a justification for exclusion.

It is contended that, just as norms underlying rules that exclude persons with disabilities from other areas of society have been held to be discriminatory, so should discriminatory immigration rules, which may exclude persons with disabilities from Canadian society itself, be rejected in favour of a more accommodating standard.

II. CONCLUSION: TOWARDS A RIGHTS-BASED ANALYSIS

The shift in analysis to the harmful effects of social structures and institutions on persons with disabilities and away from disabilities in the "socio-political" model of disability theory was fostered by the introduction of modern human-rights legislation and the enshrinement of equality rights in the Canadian Constitution. Caselaw interpreting these fundamental principles has eschewed outdated formal equality models in favour of a contextual approach that takes into account the effects of discrimination.

Decisions that deny admission and entry to Canada to persons with disabilities should therefore be examined within the legal framework of the *Charter* and the *Canadian Human Rights Act. The first, and not insignificant, hurdle that must be overcome is* the presumption that only privileges, and not rights, should obtain to foreign non-residents.

This will require a significant "paradigm shift" in the way immigration law and policy are viewed by legislators and decision makers, similar to that inspired by the *Singh* case in 1987. Then, Canada's humanitarian policies, enshrined in its constitutional and international commitments, required the amendment of legislation to bestow aliens (refugee claimants) with certain rights related to the processing of their claims. It is submitted that similar concerns should militate in favour of extending considerations of due process and equality to persons with disabilities who seek entry and admission to Canada.

Additional support for such a shift in perspective may also be found in related caselaw. While cases dealing with persons found to be inadmissible due to criminality have refused to extend section 7 rights to the process surrounding deportation,[128] it is submitted that these cases must be re-examined in light of the recent Supreme Court

126. For example, the *Huck* case *(Saskatchewan (Human Rights Commission)* v. *Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93 (Sask. C.A.)).

127. For example, *R.* v. *Swain*, [1991] 1 S.C.R. 933, and *Eldridge, supra* note 9.

128. For example, *Chiarelli, supra* note 62. While quite different from disability in many respects, the notion of criminality is as deeply entrenched in immigration law as is medical inadmissibility. Both rest upon the rationale of "protection of the health, safety and good order of Canadian society." Others have attacked the widespread deprivation of rights resulting from the high degree of power granted to immigration decision makers to deal with aliens and permanent residents who are convicted of crimes. See, for example, Pratt, *supra* note 52.

of Canada decision in *New Brunswick (Minister of Health and Community Services)* v. *G. (J.)[J.G.]*,[129] which extended the scope of section 7 rights. That case considered a mother's eligibility for legal aid in child-protection proceedings in which custody of her children was at risk. The Court found, in the particular circumstances of that case, that the failure of the state to provide counsel put her at risk of being deprived of her security of the person in a manner that did not accord with the "principles of fundamental justice."

Canadian immigration law and policy appear to be fraught with dichotomous objectives (for example, the protection of health, safety, and good order of Canadian society, on the one hand, and ensuring that its standards of admission do not discriminate, on the other). However, it is possible to balance these seemingly incompatible goals, since the creation of flexible, respectful policies treating the admission of immigrants and visitors is consistent with protecting society. As noted by L'Heureux-Dube, J., in the recent decision in *Baker*,

> The context here is one where immigration officers must regularly make decisions that have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.[130]

This judgment, which reviewed the exercise of discretion in applying the "humanitarian and compassionate" inland processing policy, balances the import of decisions made "to the interests of Canada as a country" against their import to the individuals affected, and explicitly requires "an openness to difference." In this decision, the values expressed in the legislation and in international instruments were examined and held to be integral to the approach taken in decision-making.

This decision is important for many reasons; for the purposes of this paper, its contextual approach and its refusal to regard immigration law and policy as a forbidding "wasteland," remote from principles of fundamental justice, are welcome additions to the discourse relating to disability rights in immigration law and policy.

It is submitted that the use of medical-inadmissibility criteria, which are predicated upon discriminatory norms, offend the "principles of fundamental justice" by depriving persons with disabilities access to a respectful and fair determination of their applications for entry and admission.

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129. [1999] S.C.J. No. 47, September 10, 1999.

130. *Supra* note 67 at para. 47.

In this analysis, a newly defined notion of *excessive demands,* which would include reasonable criteria supported by scientific data and applied through the use of fair and flexible guidelines, would stem concerns that providing persons with disabilities with a fair process would open the "floodgates" (in this case, the borders), creating an explosion in the public cost of health services and social services.

Once it has been demonstrated that fundamental justice should obtain to applicants for admission to Canada with disabilities, then both the *CHRA*[131] and the *Charter* may be employed to identify and eliminate the use of outdated models of disablement, which lead to disability-based discrimination in the context of an application for entry or admission to Canada.

Critics of the economic and biomedical models of disablement have demonstrated the harmful effects of policies informed by unfounded assumptions about people with disabilities, which include systemic discrimination. A heightened awareness of the social construction of disability is now reflected in the demands of modern anti-discrimination and equality law, which seeks to respect the rights of all persons. Courts have been entrusted[132] with the power to enforce foundational human-rights instruments, which in turn have the power to transform society in ways that afford protection and rights of participation to all of its members.

Disability-rights theory now provides the legal foundation to correct years of systemic discrimination against foreign non-residents seeking entry to Canada. Unfounded and discriminatory assumptions that people with disabilities will never be productive citizens, are chronic drains on the health-care system, and inevitably place an excessive burden on society cannot continue to operate to keep out valuable contributors to Canadian society and their family members. The medical-inadmissibility criteria are rigid, blunt instruments that unfairly exclude persons with disabilities by discouraging the consideration of immigrants as whole persons, and leaving them in the "wasteland" of unexamined injustices.

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131. Caselaw has settled the issue of whether an applicant from outside of Canada may seek to have a complaint investigated under the *CHRA*. See *Canada (Secretary of State for External Affairs)* v. *Menghani*, [1994] 2 F.C. 102 (T.D.); *Singh (Re)* [1989] 1 F.C. 430; (1988), 55 D.L.R. (4th) 673; 10 C.H.R.R.D/5501; 86 N.R. 69. Previous cases dealing with medical inadmissibility, such as *Anvari*, should be distinguishable in light of subsequent caselaw, such as *BCGSEU,* which has outlawed exclusionary rules, which fail to take account of the effect of such rules upon disadvantaged groups.

132. See early *Charter* cases in which the Supreme Court of Canada articulated principles of interpretation, such as *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 ("each Charter right must be given a large and liberal interpretation which best promotes its purposes," 156-57), *Andrews* (at 175, 182-93), and *R.* v. *Turpin* [1989], 1 S.C.R. 1296 (at 1221-31) in which section 15 was recognized as the culmination of Canada's expanding human-rights responsibilities.