CANADA'S IMMIGRATION HEALTH INADMISSIBILITY AND THE CASE FOR DISABILITY DISCRIMINATION

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I. INTRODUCTION

It is not unusual for countries to restrict immigrants based on their "costly" health conditions. In Canada, immigration law restricts a foreign national from getting admitted as a permanent resident if the foreigner has dangerous or excessive health conditions. This law is codified in the Immigration and Refugee Protection Act, section 38:

> (1) A foreign national is inadmissible on health grounds 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.[1]

[1] Immigration and Refugee Protection Act, S.C. 27§38 (2001).

Many people have criticized this health requirement as being unethical, particularly the "excessive demand" criteria of 27§38(1)(c). One of the most important criticisms has to do with how the provision constitutes disability discrimination. Individuals who want to take legal action against section 38 or its equivalent would assert that either the state did not give equal protection of access to health services, which is needed for a non-citizen to survive, or the claimant would say that section 38 is discriminatory towards disabled individuals, whether that discrimination is direct or indirect. This paper will mainly focus on claims that section 38 is discriminatory, rather than on access to services even though both issues can be linked.

Individuals can challenge section 38 on the basis of disability discrimination by bringing a Charter challenge, or a constitutional challenge against the Canadian government's actions. Section 15 of the Canadian Charter of Rights and Freedom (Charter) is relevant for Section 38 discussions. Section 15 states:

> (1) 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 [*sic*], religion, sex, age or mental or physical disability.[2]

In short, Section 15 emphasizes equal rights between all individuals, including having the right to be free from disability discrimination. Section II of this Article discusses Section 38 and how the provision has changed in modern times. Section III examines Charter challenge cases as it relates to section 38's potential to discriminate against individuals with physical and mental disabilities. This Article will also explore whether those challenges have ever been successful. Given the 2018 Ministerial change to the health admissibility criteria, this Article discusses whether the new policy still has the potential to be discriminatory. After discussing the 2018 policy change, Section III will

[2] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act (1982), *being* Schedule B to the Canada Act 11§15 (1982).

review limitations to winning a section 15 discrimination case. Section IV examines the international mechanism in circumventing the Charter challenge limitations. Lastly, this Article will discuss in Section V how, despite the lack of success for disabled claimants, section 38 is still discriminatory when viewed from someone who is outside of the legal field. Because outsiders to the law are the ones who are actually impacted by laws, using those insights would be beneficial for improving immigration policy for the future.

II. SECTION 38 OF THE IMMIGRATION AND REFUGEE PROTECTION ACT

When an immigrant tries to apply for permanent residency, those immigrants have to undergo a medical evaluation.[3] Once evaluated, the immigration officer can reject an immigrant's application based on Section 38. Section 38 lays out three conditions under which someone could be

[3] Constance MacIntosh, *Medical Inadmissibility, and Physically and Mentally Disabled Would-Be Immigrants: Canada's Story Continues*, 42 DALHOUSIE L. J. 125, 135 (2019) (hereinafter *MacIntosh*).

inadmissible for health-related issues: when the applicant is likely to be a danger to public health, when the applicant is likely to be a danger to public safety, and lastly, if there is a reasonable expectation that the applicant would cause excessive demand on health or social services.[4] "Excessive demand" can mean either of the following:

- A demand for which the anticipated costs would likely exceed the average Canadian per capita health and social services costs over a period of five years unless the evidence points to significant costs beyond that period, in which case the period is 10 years.

- A demand that would add to existing waiting lists and would increase the rate of mortality and morbidity for permanent residents and citizens as a result of denials or delays in the provision of services.[5]

According to Section 38(2), the health requirement is exempted for a family class member who is either a spouse, common-law partner, or a

[4] Immigration and Refugee Protection Act, S.C., 27§38 (2001).
[5] SHARRYN AIKEN, ET AL., IMMIGRATION AND REFUGEE LAW: CASES AND COMMENTARY (2015) (hereinafter AIKEN) at 379.

child of the sponsor; someone who applied for permanent resident as a Convention refugee; or an applicant who is a protected person.[6] If someone is found to be inadmissible, sometimes the minister may issue a temporary resident permit pursuant to section 24(1) of the Immigration and Refugee Protection Act.[7]

Additionally, when immigrants to Canada demonstrate the ability and intent to financially support themselves regarding social services, medical officers must take that fact into account when determining whether there is a reasonable probability of an excessive demand. In other words, a showing that the applicant has the financial ability and intent to pay for their own social services may help that applicant's case to be admitted. The most notable authority is the *Hilewitz v. Canada* case, involving an investor class's dependent special needs

[6] Immigration and Refugee Protection Act, S.C., 27§38 (2001).
[7] Immigration and Refugee Protection Act, S.C., 27§38 (2001). A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time. *Id.*

child.[8] In this case, the supreme court elaborated that the legislative intent of section 38 supports individual assessments, instead of a categorical exclusion, of both medical and non-medical factors that could influence how much burden that individual might place on social services. The court concluded that a family's ability to financially support a dependent with a disability should be factored into the question of whether a person would be an excessive burden.[9] As a result of this case's decision, applicants who are potentially medically inadmissible could show that they have the ability to support themselves when it comes to social services. If the individuals can show that they or a family member would not be a public burden to social services, then the individual or family member would not be inadmissible.[10]

Later court decisions deemed health services as different from social services, and as such the ability to pay for one's own health services is not always

[8] Hilewitz v. Canada, S.C.C. 57 (2005).
[9] AIKEN, *supra* note 5, at 383-388.
[10] MacIntosh, *supra* note 3, at 138-139.

sufficient to establish admissibility. For example, in the *Lee v. MCI* case, the court differentiated between social services and health services, because no matter how much an applicant would claim to pay for his or her own health services, "it is not possible to enforce a personal undertaking to pay for health services that may be required after a person has been admitted to Canada as a permanent resident."[11] This is because health services in Canada are mostly publicly funded.[12] Moreover, the court is concerned that the applicant's medical needs would pose a burden on an already long waitlist for healthcare services. Because of those reasons, the *Lee* court and other subsequent decisions, like *Deol v. Canada*,[13] concluded that claims of being able to financially support one's own health services would not be sufficient for admission. However, there have been some exceptions such as considering applicants who

[11] Lee v. Canada (Minister of Citizenship and Immigration), F.C. 1461, 10 (2006).
[12] *Id.* at 10-12.
[13] Deol v. Canada (Minister of Citizenship and Immigration), 1 F.C. 301 (2003).

can pay for out-patient medications that are dependent on a private health insurance.[14]

Despite this pushback, there have been ministerial changes in 2018, which relaxed the prior harsh criteria for people who needed health services. According to the new policy, there would be an exemption for temporary and permanent resident applicants if the cost of health and social services does not exceed "$19,812 per year" "over [five] years."[15] The new policy would also narrow the social services that would have been included in the cost calculation.[16]

Due to this laxing of the existing health condition requirement, there is a question of whether the new policy changes would still constitute disability discrimination. According to scholar Constance MacIntosh, the new policy, while an improvement from the previous immigration policy, still

[14] Companioni v. Canada (Minister of Citizenship and Immigration), F.C. 1315 (2009).
[15] "Excessive Demand: Calculation of the Cost Threshold, 2018," Government of Canada (2018), https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/excessive-demand.html.
[16] MacIntosh, *supra* note 3, at 127-128.

discriminates against a smaller group of certain disabled individuals.[17] In an article by the HIV and AIDS Legal Clinic, the author stated that the new policy, while giving some HIV positive immigrants the opportunity to be admissible, will still deem some other individuals with disabilities to be inadmissible. As such, to eliminate discrimination, the author believes that the federal government should get rid of the excessive demand criteria.[18] The next section will delve into case law that discusses whether section 38 constitutes disability discrimination. Because most, if not all of these cases, occurred before the 2018 policy change, those case decisions can be helpful when evaluating how likely the 2018 policy will be considered to be discriminatory towards disabled individuals.

[17] *Id.* at 147.
[18] *Many people living with HIV are no longer medically inadmissible to Canada*, HIV and AIDS Legal Clinic Ontario (HALCO) (July 4, 2018), https://www.halco.org/2018/news/excessive-demand-update.

III. LEGAL ANALYSIS OF DISABILITY DISCRIMINATION

The most famous definition of discrimination, when applied within Charter challenges, came from the *Andrews v. Law Society of British Columbia* case (*Andrews*).[19] The *Andrews* court defined "discrimination" as "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."[20]

Overtime, many subsequent discrimination cases have restricted this definition. One of those cases is *Law v. Canada*, which sets out three criteria used to determine whether section 15 discrimination has occurred. The first step is to ask whether the offending law will draw a "formal distinction

[19] Andrews v. Law Society of British Columbia, 1 SCR 143 (1989).
[20] AIKEN, *supra* note 5, at 250.

between the claimant and others on the basis of one or more personal characteristics or fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics."[21] The second step is to ask whether the claimant was subject to "differential treatment on the basis of one or more of the enumerated and analogous grounds."[22] Enumerated grounds are the grounds that are listed in section 15(1) of the Charter, such as "race, national or ethnic origin, colour [*sic*], religion, sex, age or mental or physical disability."[23] Lastly, courts need to ask whether differential treatment will "discriminate in a substantive sense, bringing into play the *purpose* of s. 15(1) of the *Charter* in remedying such ills as

[21] Law v. Canada (Minister of Employment and Immigration), 1 S.C.R. 497, 39 (1999).
[22] *Id*.
[23] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, *being* Schedule B to the Canada Act 11§15(1) (1982).

prejudice, stereotyping, and historical disadvantage."[24]

The *Withler v. Canada* case further refined the *Law* criteria to evaluating the discriminatory act on the basis of a two-part test: one, "whether the law creates a distinction that is based on the enumerated or analogous ground" and two, "whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping."[25] The *Withler* case refined the *Law* test because the nature of the *Law* test is problematic due to the test's requirement of comparing one group's treatment with another similarly situated group. According to the court in the *Withler* case, comparing one group with another does not take into account the complexity of "overlapping grounds of discrimination," nor is the test helpful if there is no comparative group with similar experiences to that of the applicant's group.[26]

These interpretations of discrimination have been applied to claims of disability discrimination within

[24] *See Law*, at 1 S.C.R. at 39.
[25] AIKEN, *supra* note 5, at 250.
[26] AIKEN, *supra* note 5, at 254.

the context of section 38. The *Chesters v. Canada* case is the most influential case dealing with section 15 Charter challenge and the health inadmissibility provision. In the *Chesters* case, the claimant alleged that section 38 of the Immigration and Refugee Protection Act is discriminatory towards disabled individuals. Chesters, the claimant who has multiple sclerosis and was thus found medically inadmissible, submitted that section 19, which was the equivalent of section 38 at that time, is discriminatory because the provision "identified a class of people who are to be singled out and subjected to closer scrutiny on the basis of a disease, disorder or disability."[27] Unlike the modern section 38, section 19 during the early 2000s worded health inadmissibility as:

> (1) 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

[27] Chesters v. Canada (Minister of Citizenship and Immigration), 1 F.C. 361, 61 (2003).

> concurred in by at least one other medical officer,
> (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services.[28]

Chesters pointed out that the older version of section 38 identifies a specific group of people, and thus the provision has an adverse discriminatory effect since it impacts a group of people "who are already vulnerable to discrimination."[29] Moreover, the claimant further submitted that the medical examination process "improperly relied on stereotyped reasoning concerning persons with disabilities" without taking into account the "particular circumstances of an individual, including an individual's employment history, education, career plans and life status."[30] This assertion touched upon an important assumption that has been prevalent within the history of disability discrimination, particularly the stereotyped

[28] *Id.* at 98.
[29] *Id.* at 62.
[30] *Id.* at 57.

assumption that disabled individuals "will presumptively be a draw on the public purse."[31]

In response to the claimant's arguments, the court stated that the "section in question focuses on excessive demands, not on disease, disorder or disability"[32] and as such, the argument that the provision discriminated against one of section 15's enumerated grounds should fail. Furthermore, the court stated that not every differential treatment is equated to discrimination, which is a rationale that was drawn from *Law*.[33] In the end, the court did not find that the health inadmissibility provision had an adverse discriminatory impact on Chesters nor the people within the disability class.[34]

This decision is not too different from many other cases dealing with health inadmissibility and disability discrimination. For example, in *Deol v. Canada*, the court asserted that the provision, section 19 at that time, "does not have the purpose or effect

[31] MacIntosh, *supra* note 3, at 135.
[32] *See Chesters*, 1 F.C. at 125.
[33] *Id.* at 100.
[34] *Id.* at 119.

that is discriminatory within the meaning of the equality guarantee."[35] In *Deol*, the claimant, who was a permanent resident at that time, tried to sponsor her parents. Deol's father had a health condition that could allow for an elective surgery at the time of the case.[36] In other words, the surgery was not necessary, and the claimant could live without the surgery. However, the Appeal Division of the Immigration and Refugee Board still made calculations of the surgery and anticipated the incurred cost in the "foreseeable future" and as such, denied the father's visa application.[37] According to the *Deol* court, the health inadmissibility provision does not intend to, nor purposely, discriminate because the meaning of discrimination in a "constitutional sense" would involve promoting "the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and

[35] Deol v. Canada (Minister of Citizenship and Immigration), 1 F.C. 301, 53 (2003).
[36] *Id.* at 6-9.
[37] *Id.* at 6.

consideration."[38] Additionally, the court did not believe that the link between denying a visa and disability discrimination was strongly established by the claimant. Due to this weak linkage, the court asserted that the visa refusal did not result in a devaluation of "human worth" or "human dignity" for the claimant and her parent.[39] Moreover, the court pointed out that the health inadmissibility provision evaluated the claimant's parent on an individual assessment basis, instead of picking on all individuals with disabilities, the latter which would have constituted discrimination.[40] The court concluded that since the health admissibility of the claimant's father did not violate the claimant's and the father's human dignity and freedom, there was no discrimination.[41]

The *Deol* and *Chesters* cases revealed the difficulties in proving discrimination as it pertains to health inadmissibility. Since both the *Deol* and

[38] *Id.* at 53.
[39] *Id.* at 56.
[40] *Id.* at 60-61.
[41] *Id.* at 64.

Chesters, other cases have been brought and so far, the cases for discrimination have failed. With such a high bar for claiming a ground for discrimination, it is obvious that there are limitations to section 15, disability discrimination claims, especially as it pertains to section 38 of the Immigration and Refugee Protection Act. What does that mean for the recent 2018 policy change that increases the threshold for excessive burden? Hypothetically speaking, if a disability discrimination claim has been alleged now, it would be very unlikely for a discrimination claim to succeed under the new lenient policy, given the fact that any disabled individuals who originally would have been inadmissible are now admissible.

IV. A WAY AROUND THE CHARTER CHALLENGE LIMITATIONS?

Given the *Deol* and the *Chesters* opinions, it seems that the case law focused primarily on the provision's purpose of governing excessive demand rather than on the question of whether section 38

targeted a group. In addition, court decisions have centered on the provision's individual assessment approach instead of a group assessment, thereby discrediting claims of disability discrimination. These two main rationales from *Deol* and *Chesters* added challenges for any future disability discrimination claims that alleged that section 38 is discriminatory.

Besides the challenges of showing that the provision targets a specific group of people instead of controlling for excessive demand, applicants face other hurdles towards winning inadmissibility discrimination claims. The first hurdle has to do with Charter section six limitations on non-citizens and the second hurdle has to do with section one of the Charter, which gives the Canadian government justification to limit rights when necessary. In terms of the status of non-citizenship cases, such as *Charkaoui v. Canada*, have restricted the rights of non-citizens. The *Charkaoui* case is particularly influential because the court expansively and broadly interpreted section six of the Charter as giving states

the right to deport and therefore, according to the court, section six allows for "differential treatment of citizens and non-citizens in deportation matter."[42] Because of that, the reasoning goes that a "deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violates section 15 of the Charter."[43] Although *Charkaoui* deals with deportation issues, some scholars accurately predicted that this case "signifies that…[section six] and 15 will, at least sometimes, be read together in immigration matters" and the result could be detrimental for non-citizen equality rights.[44] Indeed, even one author noticed that the recent trend of constitutional immigration cases tend to make distinctions between citizen and non-citizen rights stronger, and this could result in making non-citizens in Canada more vulnerable "to rights abuses than at any point in the previous thirty years."[45]

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[42] Charkaoui v. Canada (Citizenship and Immigration), S.C.C. 9 (2007).
[43] AIKEN, *supra* note 5, at 243.
[44] *Id.* at 244.
[45] Catherine Dauvergne, *How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada*

As for section one Charter limitations, section one stated the following: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[46] In other words, section one of the Charter "establishes that rights and freedoms guaranteed by the Charter are not unconditional but subject to reasonable limits."[47] When paired with a section 15 case, not necessarily having anything to do with health inadmissibility, existing courts such as ones in *Charkaoui* and *Lavoie v. Canada*,[48] have tended to reject the Charter challenge, usually along the lines of how necessary such provisions are. Even though the court in *Chesters* had mentioned but did not discuss section

Jurisprudence, 58 MCGILL L. J. 663, 727-728 (2013) [hereinafter *Dauvergne*].

[46] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act (1982), *being* Schedule B to the Canada Act, 11§1 (1982).

[47] VALENTINA CAPURRI, NOT GOOD ENOUGH FOR CANADA: CANADIAN PUBLIC DISCOURSE AROUND ISSUES OF INADMISSIBILITY FOR POTENTIAL IMMIGRANTS WITH DISEASES AND/OR DISABILITIES, 1902-2002 (2019) at 158.

[48] *Charkaoui v Canada (Citizenship and Immigration)*, 1 SCR 350 (2007) at 129-137; *Lavoie v Canada*, 1 SCR 769 (2002) at 53-58.

one, if future cases do discuss "excessive demand" as constituting a justified limitation on equality, then this implication would be detrimental to disabled non-citizen's fight against section 38.

Because non-citizens have limitations when it comes to Charter claims, there have been discussions on how to best strengthen their rights in Canada, such as the right to not experience disability discrimination. One of those ways of circumventing Charter limitations includes getting international forums involved, since Canada has been a party to many international conventions, such as the Convention on the Rights of People with Disabilities (CRPD). This approach seems promising given Canada's obligation to abide by international standards and use international human rights obligations to inform domestic laws.[49] Many experts, international forums, and instruments have interpreted international obligations as protecting the rights of non-citizen, disabled individuals as well as citizens with disabilities. For example, scholar

[49] Dauvergne, *supra* note 45, at 725.

Constance MacIntosh gives a detailed account of how a Committee on Citizenship and Immigration concluded that Canada's international obligation to disabled individuals extends to non-citizens as well.[50] Another scholar, Catherine Dauvergne, pointed out how some international forums found that Canada "breached international human rights commitments to non-citizens."[51] Still, Ravi Malhotra mentioned that article 18 of the CRPD "stipulates that people with disabilities are entitled to freedom of movement and nationality."[52]

Despite this positive outlook, it is unclear how international protection can be effectively applied on a domestic level. The case *Leobrera v. Canada* [*Leobrera*] demonstrated that international law interpretations made by domestic courts can result in devastating implications for disabled non-citizen. In *Leobrera*, the court uses the CRPD and the

[50] MacIntosh, *supra* note 3, at 144.
[51] Dauvergne, *supra* note 45, at 727.
[52] Ravi Malhotra, *The Impact of the Convention on the Rights of Persons with Disabilities on Canadian Jurisprudence: The Case of Leobrera v. Canada*, 54 ALTA. L. REV. 637, 648 (2017) [hereinafter *Malhotra*].

Convention on the Rights of the Child to "prevent adult children with disabilities from obtaining access to the more flexible 'best interests of the child' test."[53] Even though the plaintiff's disabled child had her Humanitarian and Compassionate application granted,[54] the author can see how the court's interpretation can be problematic.[55]

Although the *Leobrera* case has mixed results, based on one scholar's observations, the scope of international law application may have potential in improving non-citizen's Charter cases. To scholars like Dauvergne, disabled non-citizens would be better protected if the Charter and international human rights norms worked together.[56] The CRPD's General Comment acknowledges the existence of attitudinal barriers, including the notion that disabled individuals are a burden to society,[57] which would hurt arguments upholding the "excessive demand"

[53] *Id*.
[54] Saporsantos Leobrera v. Canada, 2010 FC 587 (2010).
[55] Malhotra, *supra* note 52, at 648.
[56] Dauvergne, *supra* note 45, at 727-728.
[57] CRPD, *General comment No. 6 (2018) on equality and non-discrimination*, 19th Sess, adopted 26 April 2018, UN Doc CRPD/C/GC/6.

inadmissibility. Thus, it does seem that many scholars are accurate in predicting CRPD's potential in filling in the gaps of disability rights. How to enforce such international standards; however, is still unclear, since the CRPD does not have much of an enforcement mechanism besides compelling State Parties to report to a Committee every four years.[58]

V. DOES SECTION 38 STILL DISCRIMINATE?

Even though the existing Canadian case law rejected claims of disability discrimination, the lived experience of disabled individuals has shown that the health inadmissibility provision can still be argued to be discriminatory outside of a legal context. While the language of "excessive demand" does not seem to be targeting any group on the surface, the fact that the new 2018 policy still negatively impacts a small number of disabled individuals, some of whom have a chronic disability, still reveals that the provision does add more social barriers to a group that has been

[58] Convention on the Rights of Persons with Disabilities art. 35, May 3, 2008, 2515 U.N.T.S. 3.

historically disadvantaged. On top of all the criteria that non-citizens have to meet, the disabled applicant has to participate in additional screening and monitoring.[59] Meanwhile, immigrants without disabilities do not have that added concern or scrutiny. The legal scholar Constance MacIntosh analogously argued that if minimalizing social and health service costs is at the core of society's value, then such standard would apply equally to immigrants who make poor lifestyle choices, applicants who have children, individuals who want to live past 65 years of age, and women who plan to have children.[60] Since this is not the case, then the heightened evaluation for certain individuals with health conditions does constitute discrimination.

Even though some disabled individuals who met the 2018 threshold would be admissible, this fact does not make the health inadmissibility provision

[59] Excessive Demand on Health Services and on Social Services, GOV'T OF CAN. (2022), https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/standard-requirements/medical-requirements/refusals-inadmissibility/excessive-demand-on-health-social-services.html#application.
[60] MacIntosh, *supra* note 3, at 148.

any less discriminatory. The excess demand criterion enforces the common stereotype that paints disabled individuals as a burden to society, unless they individually prove otherwise. Scholar MacIntosh has critiqued how section 38 started with the presumption that "a disabled person is a problem,"[61] while scholar Malhotra mentioned how disabled immigrants are seen as a "financial burden to the state."[62] Sunny Taylor, a disability activist, also justifiably argued that society should not value disabled individuals based on their contributions or ability to work.[63] While the courts in *Chesters* and *Deol* have either ignored or minimized this prejudicial view, the health inadmissibility provision is tied to the assumption that a disabled individual might be a financial burden. This prejudicial assumption about disabled individuals should have met the prejudicial view standard as expressed in the *Withler* case. Unfortunately, a thorough discussion

[61] MacIntosh, *supra* note 3, at 148.
[62] Malhotra, *supra* note 52, at 637.
[63] Ravi Malhotra, *Disability Rights and Immigration*, NEW SOCIALIST (2006), at 7.

of the historical, prejudicial assumption of a burdensome, disabled immigrant was left out of those cases.

Sadly, even with all of these scholarly discussions about disability discrimination within the Canadian immigration policy, the high legal threshold to prove disability discrimination might continue to prevent disabled immigrants from winning their cases or even pursuing a case to-begin-with. This discrepancy between case law and actual lived experiences of disabled immigrants reveals that the law has cognitive dissonance when it comes to protecting historically marginalized groups from discrimination and as such, the work of disability activists and the legal system still has a long way to go.