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VIA EMAIL, ENCLOSURES TO FOLLOW BY REGULAR MAIL

Laurie Beachell
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Dear Laurie:

**Re: Immigration Research Project**

Thank you very much for the opportunity to work with the Council of Canadians with Disabilities on this important project. CCD has had a long standing concern about the barriers people with disabilities and their families face in immigrating to Canada. We are proud to have a role in shaping CCD's policy and advocacy positions on the issue of the accessibility of Canada's immigration policies.

The progress that Canadians with disabilities have made in making Canada more accessible and inclusive is in stark contrast to the continuing obstacles faced by potential immigrants with disabilities. The primary barrier has been the "excessive demand" clause of the *Immigration and Refugee Protection Act* (*IRPA*) and its interpretation.[1]

The intention of this provision appears, on its face, to be to exclude people with disabilities, seniors and others who would pose an excessive demand, either through cost or waiting lists. The provision has been criticized by John Rae of CCD as perpetuating "long held stereotypical views of persons with disabilities as being less deserving and a burden on society... The current law devalues Canadians with disabilities."[i]

The Supreme Court of Canada, in *Hilewitz*, examined the provision in 2005.[2] Issues of equality, diversity, and the valuable contributions by people with disabilities were raised by two interveners in *Hilewitz*: the Canadian Association of Community Living and the Ethno-Racial People with Disabilities Coalition of Ontario. Many onlookers hoped the Court's decision, which required an individual assessment of potential "excessive demands" would make Canada's immigration rules more accessible.

## I. Overview of the Project

The purpose of this project was, in part, to review the implementation of the *Hilewitz* decision on excessive demands and advise whether its implementation has lived up to our hopes. The project will also inform CCD's advocacy and policy development on this issue.

[1] S.C. 2001, c. 27.
[2] *Hilewitz v. Canada (Minister of Citizenship and Immigration)*; *De Jong v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 706 ("*Hilewitz*").

This project has not included a review of other provisions of *IRPA* that may act to exclude people with disabilities. One example of a section not discussed is s. 38(1)(a-b), which excludes people with health conditions that are likely to pose a threat to the health or safety of the public. CIC's Handbook for Designated Medical Practitioners describes the types of conditions that might lead to a finding of inadmissibility. The only conditions explicitly referenced as a potential threat to public health are tuberculosis, untreated syphilis, or HIV where the individual does not understand the steps to prevent its spread. The Handbook also describes conditions that might pose a threat to public safety, including "certain paranoid states, some organic brain syndromes associated with violence or risk of harm to others, or applicants with substance abuse leading to antisocial behaviour such as violence, impaired driving, or other types of hostile, disruptive behaviour."[3]

Through this project, we have undertaken the following tasks, as outlined in your memo of March 2, 2009:

- A concise review of *Hilewitz* and the key Court decisions following it;
- An analysis of the actions of the Immigration and Refugee Board of Canada following the implementation of the *Hilewitz* decision of the Supreme Court of Canada;
- A Freedom of Information request for any training materials for medical officers/ embassy/ border staff (in addition to the medical officer handbook);
- Requesting information under the *Access to Information Act* on applications that are not being appealed where the ground of denial was the excessive burden section for the purpose of obtaining data on a number of variables, including the number of cases, the medical condition people had, whether it was the principal applicant or a family member, and what category of immigrant they were;
- An examination of access to justice issues for persons dealing with the excessive demand policy. This will involve an examination of the cost of private legal representation and availability of legal aid in two or three provinces;
- An analysis of current Federal/Provincial discussions on excessive demand;
- Produce a one page summary on key immigration and disability cases, identifying the facts, the issues raised, and the key components of the court decision; and
- Concise analysis of the law in the United Kingdom, United States and Australia regarding immigration of persons with disabilities.

This report begins with a review of the statutory context for the project and the *Hilewitz* decision. We review the *Hilewitz* decision and the most significant court jurisprudence since the decision. We then report on the results of our *Access to Information Act* requests. We reviewed decisions of the Immigration and Refugee Board implementing *Hilewitz* and draw a number of themes from those decisions. The final reporting section reviews the law in other select jurisdictions in the commonwealth. We conclude with recommendations for next steps.

## II. Statutory Context

At the time of *Hilewitz* and *De Jong*, the applicable statute was the *Immigration Act*, R.S.C., 1985, c. I-2.. The relevant provision reads:

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[3] Citizenship and Immigration Canada, "Designated Medical Practitioner Handbook, 2009" at ii-17 at para. 6-2 – 6-4.

> 19. (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 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;

The Court held that this provision and its successor, s. 38 of *IRPA*, were essentially the same and that the Court's decision in *Hilewitz* under the *Immigration Act* would apply equally to *IRPA*. *IRPA* reads:

> 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.

**Exceptions**

At the time the *Hilewitz* family applied to immigrate, the health inadmissibility provision applied to all potential immigrants, regardless of the class of immigration. When *IRPA* was enacted, the provision excluded refugees, the spouse, common law partner, or children of a sponsor in the family class, and the spouse or children of refugees. The exception reads:

> 38. (2) Paragraph (1)(c) does not apply in the case of a foreign national who
>
> (a) has been determined to be a member of the family class and to be the spouse, common-law partner or child of a sponsor within the meaning of the regulations;
>
> (b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;
>
> (c) is a protected person; or
>
> (d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).

The *Regulations* also excludes a sponsor's conjugal partner and their dependent children, including children intended to be adopted.

> 24. For the purposes of subsection 38(2) of the Act, a foreign national who has been determined to be a member of the family class is exempted from the application of paragraph 38(1)(c) of the Act if they are
>
> (a) in respect of the sponsor, their conjugal partner, their dependent child or a person referred to in paragraph 117(1)(g); or

(b) in respect of the spouse, common-law partner or conjugal partner of the sponsor, their dependent child.

117. (g) a person under 18 years of age whom the sponsor intends to adopt in Canada if

(i) the adoption is not primarily for the purpose of acquiring any privilege or status under the Act,

(ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and

(iii) where the adoption is an international adoption and either the country in which the person resides or the person's province of intended destination is not a party to the Hague Convention on Adoption

(A) the person has been placed for adoption in the country in which they reside or is otherwise legally available in that country for adoption and there is no evidence that the intended adoption is for the purpose of child trafficking or undue gain within the meaning of the Hague Convention on Adoption, and

(B) the competent authority of the person's province of intended destination has stated in writing that it does not object to the adoption;

**Definitions**

Of note is that these exceptions only apply to people excluded under the excessive demands clause (s. 38(1)(c)), but not people excluded as a threat to public health or safety (s. 38(1)(a-b)).

The Regulations under *IRPA* (*IRPR*) include definitions of the terms in s. 38 of *IRPA*, which were not contained under the *Immigration Act* Regulations. It reads:

"excessive demand" means

(a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these Regulations, unless there is evidence that significant costs are likely to be incurred beyond that period, in which case the period is no more than 10 consecutive years; or

(b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of an inability to provide timely services to Canadian citizens or permanent residents.

"health services" means any health services for which the majority of the funds are contributed by governments, including the services of family physicians, medical specialists, nurses, chiropractors and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care.

> "social services" means any social services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,
>
> (a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; and
>
> (b) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies.[4]

**Procedures**

In implementing this provision, s. 34 of the *IRPR* requires a visa officer to consider any reports made by a health practitioner or medical laboratory with respect to the foreign national, and any condition identified by the medical examination before concluding that a foreign national's health condition might reasonably be expected to cause excessive demand.

Further, prior to a final medical inadmissibility decision being made, all applicants must be sent what is known as a "fairness" letter, which advises the applicant of the decision and provides an opportunity to respond in writing. On September 24, 2008, CIC published Operational Bulletin 063 – "Assessing Excessive Demand on Social Services". The Bulletin indicates that the applicant must be sent a "procedural fairness" letter, excerpts of the relevant statutory definitions (namely "excessive demand", "health services" and "social services"), and most significantly, a "Declaration of Ability and Intent". This Declaration requires the applicant to provide an individualized plan outlining why the person will not impose an excessive demand on social services.

Lawyers that we spoke with noted anecdotally that before *Hilewitz*, submissions in response to fairness letters rarely, if ever, resulted in a decision being reversed, but that since *Hilewitz,* this has changed. Now, it appears that responses to fairness letters in both health and social services cases are being considered and sometimes result in reversal of decisions. Immigration lawyers advise that this is an opportunity to note that an individualized assessment is needed for all applicants, and to provide further information about the individual's unique circumstances. This can include updated medical information. The opportunity to respond to a fairness letter seems particularly important for overseas applicants who, as will be discussed below, do not have a right of appeal from an inadmissibility decision.

From an access to justice point of view, one lawyer suggested that an unrepresented individual may not be aware of the legal significance of the fairness letter, and may fail to include relevant information. CIC does not appear to indicate that it is important to obtain legal advice in responding to a fairness letter, nor provide applicants with examples of the kind of information that could be provided.

Section 63 (1) of the *IRPA* provides for a right of appeal to the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board ("IRB") for a Canadian citizen or permanent resident seeking to sponsor a family member. No such right of appeal exists for other

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[4] *Immigration and Refugee Protection Regulations,* S.O.R./2002-227 (*Regulations*).

applicants. The IAD may allow an appeal if it is satisfied, at the time the appeal is disposed of, that the decision is wrong in law, that there was a denial of natural justice, or that there are sufficient humanitarian and compassionate circumstances to warrant special relief, in light of all the circumstances.[5] The IAD must take into account the best interests of any child affected by the decision.

For applicants who are not members of the family class, there is no right of appeal to the IAD. Rather, their only recourse is an application for leave for judicial review to the Federal Court. Alternately or additionally, an applicant may file a humanitarian and compassionate application. This can be a practical option for inland applicants such as individuals who entered Canada through the live-in caregiver program.

If unsuccessful on a humanitarian and compassionate application, there is also no right of appeal.

Family class immigrants can also pursue a judicial review to the Federal Court of the IAD decision, with leave.

## III. Court Decisions

Since *Hilewitz*, there have also been three main Court decisions that have elaborated or expanded upon the decision: *Colaco*, *Covarrubias* and *Lee*. *Hilewitz* and each of these subsequent cases are briefly summarized below. Attached are 4 one-page summaries of each of these key immigration decisions.

### *Hilewitz and De Jong*

Two men applied for permanent residence in Canada, one as an investor and the other as a self-employed individual. Both had a child with an intellectual disability that was deemed, after a medical examination, to be inadmissible under s. 19(1)(a)(ii) of the, then, *Immigration Act* as they would pose an excessive demand on social services through accessible education ("special education"). Both families attempted to demonstrate that they had not used publicly funded schooling previously and did not intend to do so in the future. This information was not considered by Citizenship and Immigration Canada (CIC).

The majority of the Supreme Court of Canada found that the term "excessive demands" is inherently evaluative and comparative. CIC must assess whether there is a reasonable probability, not a remote possibility, of excessive demands on social services, not merely eligibility for those services. In doing so, CIC must consider both medical and non-medical factors. The Court explained:

> The issue is not whether Canada can design its immigration policy in a way that reduces its exposure to undue burdens caused by potential immigrants. Clearly it can. But here the legislation is being interpreted in a way that impedes entry for *all* persons who are intellectually disabled, regardless of family support or assistance, and regardless of whether they pose any reasonable likelihood of excessively burdening Canada's social services. Such an interpretation,

[5] *IRPA*, s. 67(1).

> disregarding a family's actual circumstances, replaces the provision's purpose with a cookie-cutter methodology. Interpreting the legislation in this way may be more efficient, but an efficiency argument is not a valid rebuttal to justify avoiding the requirements of the legislation. *IRPA* calls for individual assessments. This means that the individual, not administrative convenience, is the interpretive focus.[6]

The Court concluded that the same analysis is applicable to the new *Immigration and Refugee Protection Act*. After the Court's decision, CIC interpreted and implemented its reasoning very narrowly.

### ***Covarrubias***[7]

The Covarrubias' had applied for refugee status based on the unwillingness of their government to provide needed medical treatment. Mr. Covarrubias was diagnosed with end-stage renal failure and was immediately put on life-sustaining hemo-dialysis treatment. In question was the interpretation of s. 97(1)(b)(iv) of IRPA, which excludes refugee protection from a risk to life caused by the "inability [of a claimant's country of nationality] to provide adequate health or medical care." The excessive demands provision was not a factor in the decision because refugees are excluded from its application.

The appellants argued that there was a difference between a country's unwillingness to provide medical care and a country's genuine inability to provide medical care. They argued that the exclusion only applied where a country lacked the financial ability to provide free medical care, not where it had the ability but chose not to. The Federal Court of Appeal accepted this argument, but found that it required the applicant to show a personalized risk to life on account of the country's unjustified unwillingness to provide him with adequate medical care, where the financial ability is present.

One example would be where a country makes a deliberate attempt to persecute or discriminate against a person by deliberately allocating insufficient resources for the treatment and care of that person's illness or disability. As has happened in some countries with patients diagnosed with HIV/AIDS, that person may qualify under the section, for this would be refusal to provide the care and not inability to do so. However, the applicant would bear the onus of proving this fact.

### ***Lee***[8]

The Lees qualified as immigrants under the entrepreneur category, but were found inadmissible based on medical conditions, including polycystic kidney disease, hypertension, moderate mitral regurgitation and chronic renal failure, that would reasonably be expected to cause "excessive demands" on Canada's health services. The applicant attempted to rely on *Hilewitz* and argued that even though it arose in the context of social services, the reasoning was equally applicable to excessive demands on health services.

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[6] *Hilewitz*, para. 45.
[7] *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, [2007] 3 F.C.R. 169.
[8] *Lee v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1841.

The Federal Court found that financial ability does not change entitlement or access to available health care, and this, compounded with the reality that there is no private health care available, results in the conclusion that financial ability to pay for health care is not a salient consideration in granting permanent resident status.

***Colaco***[9]

The Colacos applied to immigrate as skilled workers. Their daughter had a mild cognitive disability. She required little in terms of personal care assistance and it was agreed by the parties that her future needs would be limited to social services support and she would not have any extraordinary health care needs. The family had been providing all necessary support from their own resources and intended to continue to do so in Canada.

CIC argued that this case was different than *Hilewitz b*ecause the Colacos applied under the skilled-worker class and unlike business class applicants, they were not required to come to Canada with significant assets.

The Federal Court of Appeal held that the rationale in *Hilewitz* applies to skilled worker applicants as well. In response, CIC issued an operational bulletin clarifying that the *Hilewitz* decision applied to all categories of immigrants."

## IV. Freedom of Information Request

We requested information under the *Access to Information Act*. We initially requested the following information:

1) All documents, policies, training materials, or other materials regarding section 38 of *IRPA* including, but not limited to, materials which describe the purpose, interpretation and application of section 38 by designated medical practitioners, visa officers, and other personnel.
2) All documents, policies, training materials or other materials used by designated medical practitioners, visa officers and other personnel, relating to physical and mental disability.
3) Training materials for employees of Citizenship and Immigration Canada , Foreign Affairs Canada, or others who respond to immigration inquiries on behalf of the Government of Canada
4) How many visa applicants have been rejected based on section 38(1) of *IRPA* for the each of the years 2001-2008?
    a. Breakdown by year of the rejected applicants under section 38(1) by subsection i.e. 38(1)(a), 38(1)(b) and 38(1)(c).
    b. Nature of the medical conditions of the rejected applicants.
    c. Breakdown by year of the countries of origin of the rejected applications.
    d. Breakdown by year of the category of rejected visa applications (i.e. visitor, student, employment, permanent resident, etc.)

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[9] *Canada (Citizenship and Immigration) v. Colaco*, 2007 FCA 282 (CanLii).

e. Breakdown by year of the number of rejections based on applicability of section 38(1) to the principal applicant versus applicability of section 38(1) to family members.

After repeated delays and requests from CIC to narrow this request to "the implementation and operationalization of the excessive demand case pre and post 2005", we have received much of the information requested. In this section we only make note of the most interesting of documents. However, all documents are being forwarded to CCD by regular mail.

**Statistical Information**

Following our request for information, we were provided with a yearly breakdown of the category of rejected visa applications and whether it was the principal applicant or a family member that resulted in the rejection. These statistics relate to applications rejected prior to appeal.

Table 1: Total Excessive Demand in Response to *Access to Information Act* Request

| **Medical Failures – Totals** | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | **1998** | **1999** | **2000** | **2001** | **2002** | **2003** | **2004** | **2005** | **2006** |
| Medical Failed | 402 | 483 | 579 | 531 | 451 | 322 | 152 | 53 | 10 |
| Principal Failed | 266 | 339 | 397 | 356 | 314 | 191 | 95 | 27 | 7 |
| Dependant Failed | 136 | 144 | 182 | 175 | 137 | 131 | 57 | 26 | 3 |

Table 2: Excessive Demand, Principal Failed in Response to *Access to Information Act* Request

| **Medical Failed - Principal for Applications Received** | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Category** | **1998** | **1999** | **2000** | **2001** | **2002** | **2003** | **2004** | **2005** | **2006** |
| Business | 14 | 12 | 22 | 7 | 5 | 2 | 2 | 2 | 0 |
| Live-in Caregiver Programme | 2 | 0 | 0 | 2 | 0 | 3 | 2 | 2 | 0 |
| Provincial/Territorial Nominees | 0 | 2 | 1 | 1 | 1 | 3 | 4 | 3 | 2 |
| Skilled Workers | 75 | 88 | 92 | 106 | 37 | 24 | 23 | 5 | 0 |
| Family Class | 157 | 209 | 228 | 222 | 264 | 158 | 61 | 12 | 5 |
| Humanitarian & Compassionate/ Public Policy | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 2 | 0 |
| Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Protected Persons | 18 | 28 | 54 | 18 | 6 | 0 | 3 | 1 | 0 |
| **Totals** | **266** | **339** | **397** | **356** | **314** | **191** | **95** | **27** | **7** |

Table 3: Excessive Demand, Dependent Failed in Response to *Access to Information Act* Request

| Medical Failed - Dependent for Applications Received | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | **1998** | **1999** | **2000** | **2001** | **2002** | **2003** | **2004** | **2005** | **2006** |
| Business | 13 | 11 | 9 | 7 | 3 | 1 | 2 | 0 | 0 |
| Live-in Caregiver Programme | 0 | 1 | 0 | 0 | 1 | 1 | 0 | 0 | 0 |
| Provincial/Territorial Nominees | 0 | 2 | 3 | 3 | 4 | 6 | 5 | 9 | 1 |
| Skilled Workers | 69 | 82 | 91 | 91 | 39 | 55 | 30 | 7 | 1 |
| Family Class | 45 | 46 | 75 | 73 | 89 | 68 | 20 | 8 | 1 |
| Humanitarian & Compassionate/ Public Policy | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 |
| Other | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| Protected Persons | 9 | 2 | 4 | 1 | 1 | 0 | 0 | 1 | 0 |
| **Totals** | **136** | **144** | **182** | **175** | **137** | **131** | **57** | **26** | **3** |

The numbers were unexpectedly low. When questioned about these numbers, the CIC representative, Bruce McDonald, confirmed that they are accurate.

However, in reviewing the documentary information provided by CIC, we noted that one report contained a table of excessive demands cases that was dramatically different than that provided by CIC in response to our request for such statistics.

Table 4: Excessive Demand Statistics in Report by T.K. Gussman Associates

| **Year** | **Total Medical Assessments** | **Total Excessive Demand** | **Total Excessive Demand as % of Total Assessments** |
|---|---|---|---|
| 1993 | 324,921 | 1,008 | .31 |
| 1994 | 283,279 | 1,438 | .51 |
| 1995 | 312,013 | 2,991 | .96 |
| 1996 | 346,417 | 2,973 | .86 |
| 1997 | 296,725 | 2,623 | .88 |
| 1998 | 262,297 | 1,684 | .64 |
| 1999 | 321,605 | 1,322 | .41 |
| 2000 | 385,887 | 1,482 | .38 |
| 2001 | 409,151 | 1,488 | .36 |

When the statistics in Tables 1-3 and compared with Table 4 for the overlapping years, 1998-2001, there is a significant difference. The excessive demand cases contained in Table 4 are 2.5 to 4 times higher than those contained in Tables 1-3.

Because the numbers in Tables 1-3 were so much lower than our expectations and quite different from those in Table 4, we looked for a method of confirming the accuracy of the statistics. We have contacted CIC to clarify the discrepancy between the statistics and to understand whether this is a reflection of the inaccuracy of one set of statistics or whether they are in fact measuring different things. We have yet to receive a response to this request. In addition, we reviewed decisions of the Federal Court following applications in 2006 to determine if the number of its decisions also reflected the fact that there were only 10 denials. However, we were unable to confirm the accuracy or inaccuracy of these statistics.

While the total number of excessive demand cases is dramatically different, both sets of statistics show a decline in findings of inadmissibility from 1998 onwards. Tables 1-3 have the most significant declines from 2000 to 2006. There are a number of potential explanations or hypotheses to explain this reduction:

1) *IRPA*, enacted in June 2002, contained an exception to the excessive demands provision that the *Immigration Act* did not contain. Under *IRPA*, members of the family class who are spouses, partners or children of the sponsor (or their partner) are not subject to the excessive demands provision. Upon the enactment of *IRPA*, this exception immediately applied to all undecided applications. As a result, there was a significant drop in 2002, where the exception applied for half the year, and another in 2003, the first full calendar year of this exception.
2) The Federal Court denied the *Chesters* appeal in 2002,[10] where a woman who uses a wheelchair agued that the *Immigration Act*'s provisions on excessive demands breached the equality guarantees of the *Canadian Charter of Rights and Freedoms*.[11] However, the Federal Court decided *Hilewitz* and *DeJong* favourably in 2002. This was overturned by the Federal Court of Appeal in 2003 and the trial decision was upheld by the Supreme Court of Canada in 2005. The statistics may show that CIC had begun to implement these changes even after the Federal Court of Appeal had found in its favour. Some lawyers we spoke with noted that they noticed a decline in denials during this period.
3) When *Hilewitz* was first released, CIC interpreted it as applying solely to business class applicants where excessive demands were expected in social services. The statistics clearly demonstrate the impact that *Hilewitz* had as there were no findings of excessive demands in the year following the Court's decision in the business category.
4) It is possible that while CIC was only officially interpreting the provision as applying to business class applicants, it was considering similar factors for applicants in other categories.
5) The statistics may be demonstrative of a chill effect. While there was no significant adverse change that would result in a chill effect, CIC may be more proactively discouraging applications than it was before. In addition, the statistics do not reflect applications that have been withdrawn if an applicant received a preliminary indication that they might be found to be inadmissible.

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[10] *Chesters v. Canada (Minister of Citizenship and Immigration)*, [2003] 1 F.C. 361.
[11] *Canadian Charter of Rights and Freedoms*, being Part I of *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Unfortunately, confirming the accuracy of these hypotheses is outside the scope of this project. Assuming that there has not been a significant change in CIC's method of data collection, which may not be a fair assumption given the disparity between the tables, these results may indicate that the Canadian immigration system has become significantly more inclusive in recent years. This increased accessibility has resulted from statutory amendments and the guidance of the Court, both of which are a result of the aggressive advocacy that has been conducted by organizations like CCD. This is a success that CCD ought to be proud of.

If the numbers in Tables 1-3 are accurate, this may provide CCD a justification to advocate for the removal of the provision entirely. Please see the conclusion and next steps section for further discussion.

**Documents Received**

We have received a large number of documents from CIC in response to our information request. We enclose this information for your reference. A comprehensive review of this information is beyond the scope of this project. However, there is one item in particular that we wish to draw to your attention to.

Enclosed is the Excessive Demand Cost Threshold which notes the average cost of health and social services her capita in Canada. Anything in excess of that amount, over a 5-year average, is considered excessive.

During the course of this research we learned of a study being conducted by Peter Coyte, a professor of Health Economics at the University of Toronto that is funded by the Ontario HIV/AIDS Treatment Network. The study concludes, in part, that the current threshold to define excessive demands, established by regulation, is unreasonably low. Dr. Coyte explained that the current threshold is based on the "average" health and social services costs (approximately $5000 per year per person), but does not consider the variance of costs. This mathematical average is artificially lowered by the large number of people who make minimal use of health and social services. According to Dr. Coyte, a statistically more appropriate threshold is almost three times higher than the threshold set by the current regulation. The study shows that a significant portion of people with HIV/AIDS would be admitted based on the "statistically more appropriate" threshold. When we learned of the study, it was nearly complete and due to be released soon.

## IV. Implementation of *Hilewitz* at the Immigration and Refugee Board

To determine how the *Hilewitz* decision is being implemented by CIC and the Immigration and Refugee Board (IRB), we also reviewed decisions of the IRB and spoke with several immigration lawyers. The relevant IRB decisions consist of appeals to the IAD from family class sponsorship inadmissibility decisions regarding family members other than spouses and children. They also include consideration of humanitarian and compassionate factors (which was often the ground upon which an applicant sought entry to Canada before the amendment noted above).

Given the overlap between factors that can be raised with respect to the validity of the decision and humanitarian and compassionate grounds, in some cases there is a strategic question of

whether to appeal on both validity and humanitarian and compassionate grounds, or on only one of these grounds. Lawyers we spoke to recommended emphasizing humanitarian and compassionate grounds in most cases, because if a decision is reversed only on legal grounds, it will simply be sent back for a redetermination which can cause years of delay and could lead to a refusal in any event. There are many cases where the IRB does not consider humanitarian and compassionate considerations at all because the decision was found to be invalid. If a case is successfully argued on humanitarian and compassionate grounds, an applicant can avoid having to go through a redetermination.[12]

Similarly, while an appellant can rely on the Minister's failure to adduce up-to-date evidence about costs or wait lists, it is also open for an appellant to adduce this evidence. If an appellant relies on the Minister's failure, the visa post must reassess the medical condition, whereas if an appellant can adduce sufficient evidence to establish that there will be no excessive demand, then the medical admissibility issue will be overcome on appeal.[13]

In light of these procedural considerations, this section reviews the themes that we noted from this review of IRB decisions and our discussions with the immigration bar, which are as follows:

1. Demands on health services and social services are treated differently as there is a right to publicly-funded health services and often prohibitions on private pay services.
2. The applicant's intention to use social services can be relevant for social services where there is a specific plan of support for the applicant.
3. Eligibility for publicly-funded services in Canada is highly relevant and evidence demonstrating that the applicant would be ineligible can be determinative. Applicants should also inquire as to the availability of the services in their country of origin as receiving or eligibility to receive services prior to entry to Canada may remove the excessive demands impediment to immigration. This is particularly important in relation to health services, such as surgery.
4. Anticipated improvement or decline in an applicant's health condition is relevant if it is more than a mere possibility.
5. Evidence minimizing a disability must be used with caution. If it is without medical support the IRB may conclude that the family has unrealistic expectations or aren't aware of the extent of the applicant's disability.
6. So long as the applicant is not exempt from the excessive demand provision, the class of immigrant is not particularly relevant to its application. However, if an applicant is relying on insurance available through their employment, whether they are obliged to continue to work with that employer (pursuant to a work permit) may be relevant.
7. Evidence is required on all of these issues, but the IRB can come to conclusions, without evidence, where it is clear on its face. Applicants should be hesitant to rely on a lack of evidence by CIC and should instead put forward evidence in support of their application and to demonstrate how there will be no excessive demands. This may be a role that CCD or other disability organizations can play to support immigration applicants as many potential immigrants will not be aware of what services exist or what the eligibility criteria are.
8. Where an applicant has been found to be a member of the family class, but seeks an exception to the excessive demands provision, the IRB will consider humanitarian and compassionate factors, including:

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[12] See. e.g., *Afzal v. Canada (Citizenship and Immigration)*, 2009 CanLII 29151 (I.R.B.).
[13] See *Mohammed v. Canada (Citizenship and Immigration)*, 2009 CanLII 18197 (I.R.B.).

a. how close the family is and what hardship may be caused by excluding the applicant. In some cases this factor has weighed against the applicant as the IRB has concluded that the family is sufficiently close that the relationship can withstand distance or the hardship of distance demonstrates that the sponsor cannot support the applicant.
b. the best interests of a child, including how their relationship with grandparents will be affected by distance.

**Health Services versus Social Services**

The fact that *Hilewitz* involved social services rather than health services has been a source of some confusion in the case law.

Operational Bulletin 063, entitled "Assessing Excessive Demand on Social Services", recently updated by Operational Bulletin 063B,[14] implies that *Hilewitz* applies only to social services. This is consistent with case law indicating that because health services are publicly funded, an ability and intent to mitigate costs is not considered relevant.[15] However, individual circumstances remain relevant in all medical inadmissibility cases. This was recently expressed in *Haider*:

> While the appellant's ability to pay for his mother's health services is not something that should be considered, it is apparent from the Federal Court jurisprudence that there is a requirement that the medical officer provide an individualized assessment of the likely costs and/or the likely impact on waiting lists that the applicant's specific condition might reasonably be expected to cause.[16]

Further, factors that could arguably be raised include a family's ability and intent to pay for medication privately. The issue of medication costs arises in particular for applicants with HIV/AIDS. According to a February 2007 publication by the Canadian HIV/AIDS Legal Network, inadmissibility depends on the person's health and whether or not the person is on antiretroviral drugs, which are publically funded to varying degrees in different provinces.[17]

One lawyer we spoke with stated that he had a client applying for a work permit who succeeded in arguing that he would rely on a company health plan to meet his medication needs. He questioned whether this argument could have succeeded had the client been a permanent resident applicant who had no obligation to continue to work for the same employer.

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[14] Citizenship and Immigration Canada, Operational Bulletin 063, "Assessing Excessive Demand on Social Services" (September 24, 2008) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2008/Ob063.asp>; Citizenship and Immigration Canada, Operational Bulletin 063B, "Assessing Excessive Demand on Social Services" (July 29, 2009) <http://www.cic.gc.ca/english/resources/manuals/bulletins/2009/ob063b.asp>.

[15] See *Lee v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1461.

[16] *Haider*: *v. Canada (Citizenship and Immigration)*, 2009 CanLII 36246 (I.R.B.) at para. 18 ("*Haider*").

[17] Citizenship and Immigration Canada, "Manual ENF4: Port of Entry Examinations", Section 17.3; Citizenship and Immigration Canada, "Operational Processing Instruction 2002-2004: Medical Assessment of HIV Positive Applicants"; Canadian HIV/AIDS Legal Network, "Canada's immigration policy as it affects people living with HIV/AIDS" (February 2007) <http://mqhrg.mcgill.ca/i/bisaillon/Immigration_policy_and_PHA_2007.pdf>.

**Relevance of Intention to Use Services**

An intention not to use Canadian health services may not be relevant. The general principal is that one cannot opt out of the medical system. However, an election to have or not have surgery is relevant in determining whether a medical opinion is reasonable.[18] This argument may be limited if the IRB concludes the applicant may not continue to refuse treatment if the condition worsened.[19]

In the context of social services, specific plans for a family member should be outlined in response to a fairness letter, for example to explain why the applicant will not rely on publically funded services. They can also be raised as humanitarian and compassionate factors. Plans may include, for example, an indication that the sponsor's home in Canada has been designed with accessibility features.[20] Other examples include specific childcare arrangements and specific arrangements for how the applicant will spend his or her time in Canada.[21]

In some "social services" cases, the IRB rejected evidence that a family did not intend to use social services. There is generally a presumption that a person will take advantage of available social services or participate in community activities that would permit fuller participation in Canadian society. The policy rationale has been set out in the following terms:

> Canadian social philosophy has a commitment to equality, full participation and maximum community integration of all individuals in a state of dependence associated with mental retardation. This philosophy promotes community living with an extensive community-based social support system with the intent to maximize the individual's potential for independent living.[22]

However, *Zhang* is a good model with respect to a claim that the family does not intend to rely upon publically funded social services.[23] Here, counsel established that the listed services would not be required by interviewing Ontario agencies that administered the programs; that the applicant never relied on similar services in China; and that available supported independent living programs would not be suitable because the applicant always had and always would live with her sister. Further, counsel provided a detailed plan for the applicant's daily activities, which included programs and services available for free or for a nominal fee in the Chinese community. There was no discussion in the decision about whether any of these programs were government-subsidized.

In *Marhoum* the appellant was similarly successful on appeal.[24] Counsel established that the family had contacted organizations that could provide recreational activities for the applicant's son, who had an intellectual disability. It was established that the applicant's 38-year old son would not use special education to enter the labour market, as the family was able to taken care of his financial needs and the applicant had never worked.

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[18] *Deol v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 949 (FCA).
[19] See e.g., *Haider v. Canada (Citizenship and Immigration)*, 2009 CanLII 36246 (I.R.B.).
[20] See e.g., *Bhasin v. Canada (Citizenship and Immigration)*, 2009 CanLII 33695 (I.R.B.) at para. 15; *Somani v. Canada (Citizenship and Immigration)*, 2007 CanLII 68579 (I.R.B.).
[21] See, e.g., *Grewal v. Canada*, 2007 CanLII 68110 (I.R.B.).
[22] *Truong v. Canada (Citizenship and Immigration)*, 2005 CanLII 56891 (I.R.B.).
[23] *Zhang v. Canada*, 2006 CanLII 52290 (I.R.B.) ("*Zhang*").
[24] *Marhoum v. Canada*, 2008 CanLII 72169 (I.R.B).

By contrast, see *Gill*, where an applicant with a mental disability who had a job offer in Canada was nonetheless denied.[25] Here, the family failed to prove that it could financially support the applicant. The IRB considered a letter offering the applicant employment, and noted it was undated, did not indicate how long the offer was open, and that the responsibilities given to him "do not allow [him] to improve his mental health problem." This is arguably inconsistent with *Marhoum*, but also illustrates the importance of providing detailed plans for an applicant's recreational activities and/or other supports that are not government funded. It also illustrates the importance of providing evidence that the person will be supported by the family.

Willingness and moreover a commitment to pay for services is also an important factor.[26] While wealthy appellants are clearly most likely to succeed in establishing an ability to support the applicant, other evidence such as the family's ability and willingness to commit time to provide support can be helpful.[27]

**Relevance of Eligibility for the Service**

While *Hilewitz* indicates that a decision-maker must look beyond mere eligibility for a service, eligibility remains relevant if it can be established that the applicant is not eligible for the service. It therefore may be appropriate to research whether an applicant is a candidate for a particular surgery or whether for any other reason may be ineligible for a health or social service.[28]

If the applicant's family can receive the service, such as a surgery, in their country of origin (either at public or private expense), they ought to inquire into receiving it. The IRB may conclude that the legal impediment can be removed and the applicant permitted to immigrate if they were able to access the service outside of Canada before immigrating.[29] Where obtaining the surgery prior to entering Canada is not an option, it may be necessary to adduce evidence to support this, for instance indicating that the surgery or other service is not yet clinically indicated, or that the applicant is otherwise not eligible for the service in his or her country of origin.

**Relevance of Expected Improvement or Decline**

The applicant's expected improvement or decline can also be raised in a humanitarian and compassionate analysis. It is also possible to put further medical evidence before the medical officer to determine whether this factor would change the finding. For an applicant to be inadmissible, it is not enough that decline is "possible". In the absence of deterioration of a condition, which a medical officer concludes is merely possible, there will be no excessive demands.[30] In one case, the appellant succeeded in arguing that environmental conditions were superior in Canada and this would improve or keep stable a respiratory condition such that demands on health services would be less substantial.[31]

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[25] *Gill v. Canada,* 2008 CanLII 51688 (I.R.B.).
[26] *Bhawal v. Canada (Citizenship and Immigration)*, 2004 CanLII 56678 (I.R.B.).
[27] See eg. *Zhang.*
[28] See e.g. *Zhang.*
[29] See e.g. *Cheema v. Canada (Citizenship and Immigration)*, 2007 CanLII 67635 (I.R.B.).
[30] *Alibey v. Canada (Citizenship and Immigration)*, 2004 FC 305 at para. 57.
[31] *Greway*

**Evidence Minimizing a Disability should be used with Caution**

It is generally important for the family to have knowledge of the applicant's disability. It will be a negative credibility factor and generally hurt the appellant's chances if the appellant claims to have been unaware of the applicant's health conditions prior to the medical exam or does not know details such as what medications the applicant requires, what the true costs of treatment will be.[32]

In one case, the family provided some evidence to indicate the minimal impact of the applicant's disability. The IRB concluded that the family had unrealistic expectations of the applicant and did not want to acknowledge the applicant's limitations.[33] While the family's experience may be that the applicant's disability does not affect his or her daily life, and that the applicant has not historically relied on social services, unless there is credible medical evidence to support this view, testimony of this nature may be viewed negatively.

**Relevance of Class of Immigration**

In applications for temporary residence visas or visa extensions, the analysis of the impact over the next five years is considered, apparently regardless of the duration of the permit or the intended stay in Canada.

More problematic are situations where a person was able to enter Canada temporarily, but either because of a pre-existing medical condition that was not a bar to entry or due to a medical condition that developed while in Canada, is not eligible to reside in Canada permanently. Lawyers identified circumstances where clients invested significant time and money into work or school in Canada with the hope of becoming permanent residents, only to subsequently be refused on medical inadmissibility grounds. Despite being economic class immigrants, these individuals do not necessarily have the income or stability to overcome a medical inadmissibility finding. For this group of applicants the only recourse other than judicial review is a humanitarian and compassionate application.

While applicants with substantial financial resources can potentially rely on *Hilewitz* to overcome medical inadmissibility, finances are not necessarily enough. For instance, in social services cases, regardless of a family's finances, if the family's intention is for their disabled child to attend public school, the family will be inadmissible.[34]

**Evidence Required**

An analysis of the individual's unique circumstances does not require a detailed costing in every case. The IRB may conclude that it is "clear on its face" that a service, such as a kidney transplant, would constitute "excessive demands".[35]

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[32] See eg. Asif.
[33] *Gill*.
[34] *Newton-Juliard v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 177.
[35] See e.g. *Menon v. Canada (Citizenship and Immigration)*, 2004 CanLII 56719 (I.R.B.).

A decision may be challenged if it appears that all of the evidence was not considered. For example, in *Kim* the Federal Court found that a visa officer erred in not considering a relevant psychological report that formed part of the medical officer's opinion.[36] The report addressed future care issues, which were an important part of determining the probability of excessive demands on social services.

As noted elsewhere, the absence of evidence by CIC may be relied upon but is not necessarily productive. If the IRB finds that CIC has failed to provide adequate evidence on an issue, and the applicant failed to provide evidence to the contrary, the likely remedy will be a direction that CIC reconsider its decision.

**Humanitarian and Compassionate Factors**

There are two main venues in which Humanitarian and Compassionate ("H&C") considerations may be taken into account for the purposes of the excessive demand provisions of *IRPA*. The first venue for consideration of humanitarian and compassionate factors is through an actual H&C Application under s. 25(1) of *IRPA*, which allows the Minister to grant an exemption from criteria of *IRPA*. In contrast to the humanitarian and compassionate factors within the family class provisions of *IRPA*, s. 25(1) humanitarian and compassionate applications are often made by foreign nationals already in Canada who do not meet the requirements of *IRPA*. Most often these are foreign nationals who had their refugee claims denied and thereby have no status in Canada. S. 25(1) has become the prime route of obtaining status despite an adverse finding on the refugee application. Unfortunately, due to the language of the *Regulation* and its interpretation, these applicants will have their permanent residency application rejected because of their medical inadmissibility despite sufficient humanitarian and compassionate grounds. [37] Because these applicants have no right of appeal, their experience does not appear in the case law review below.

The second route is through humanitarian and compassionate factors embedded within *IRPA* for family class applicants with qualifying sponsors who are appealing to the IAD from a decision denying the application. These are individuals who have been found to meet the criteria of the family class and to be inadmissible because of excessive demands. They are appealing the denial of their family class application and in these appeals, humanitarian and compassionate factors are frequently considered in addition to or instead of additional evidence on the issue of excessive demands. Because there is significant overlap between humanitarian and compassionate factors and excessive demands, we also reviewed decisions based on humanitarian and compassionate grounds.

The key humanitarian and compassionate factors in excessive demand cases were recently summarized in *Polacco*:[38]

- The relationship of the appellant to the applicant; the strength of that relationship; whether the applicant, in whole or in part, are financially dependent upon the appellant; and/or whether the appellant has cultural duties or obligations towards the applicant.
- The number of family members the appellant has in Canada.

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[36] *Kim v. Canada (Citizenship and Immigration)*, 2008 FC 116.

[37] Citizenship and Immigration Canada, "Inland Processing Manual 5: Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds" <http://www.cic.gc.ca/english/resources/manuals/lp/ip05-eng.pdf>.

[38] *Polacco v. Canada (Citizenship and Immigration)*, 2009 CanLII 35662 (I.R.B.).

- The ease of travelling to see the applicant.
- The support the applicant can provide to the appellant (such as emotional support, child care, etc.).
- The circumstances of the applicant abroad and whether he or she suffers financial hardship.
- Whether there are negative factors which militate against the granting of special relief.
- The best interest of a child affected by the decision.

These factors most frequently arise in family class applications, where the potential immigrant is not the spouse or child of the sponsor (as they would be excluded from the excessive demands provision).

An additional factor sometimes discussed is the extent of anticipated demand. The IRB has held that "protecting Canada's health system from excessive demand" is an important objective and therefore there is a high standard to meet in assessing whether special relief is warranted. However, if the medical cost would not be "inordinate" the standard is not as high.[39] Stated otherwise, if the inadmissibility is on the cusp, the H&C factors need not be as compelling.[40]

### *Family relationship and hardship*

Family reunification is one of the objectives of *IRPA* but is not determinative. The significance the IRB gives to family ties and a desire to reunite varies and are somewhat inconsistent. In some cases, the IRB has concluded that the existence of a good family relationship, regular contact between the applicant and the family in Canada, and dependency are positive factors for H&C purposes.[41] In other cases, the IRB has concluded that the existence of a good family relationship and regular contact indicates that the relationship is sustainable at a distance and that therefore there is no hardship.[42]

A related factor sometimes considered is the reasons for the sponsorship. A reason frequently cited is that the applicant, often an elderly parent of the appellant, needs the support of the family member in Canada. Another common reason is that the appellant needs the support of his or her parent(s) to assist with child care.[43] The latter reason may be somewhat risky to argue. If the family in Canada is financially stable without the additional child care support from an applicant grandparent, the IRB may conclude there are insufficient H&C grounds.[44] However, if the family is not financially stable and may struggle to support the grandparents, the IRB may conclude both that the refusal was valid and that there are insufficient H&C grounds.

### *Best interests of the child*

In considering the best interests of any affected children, the IRB often considers the significance of children's relationships to the applicant. As noted above, in some cases the IRB has concluded that grandchildren can remain in contact with grandparents through letters,

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[39] See *Haider* at para. 25.
[40] *Nadarasa v. Canada (Citizenship and Immigration)*, 2007 CanLII 69347 (I.R.B.).
[41] See *Grewel*.
[42] *Cheema*.
[43] See e.g. *Grewal* and *Takhor v. Canada (Citizenship and Immigration)*, 2007 CanLII 63970 (I.R.B.).
[44] *Patel v. Canada (Citizenship and Immigration)*, 2008 CanLII 51678 (I.R.B.).

phone calls and occasional visits, and that even if it is in the best interests of a child for the grandparents to be reunited, unless there is something compelling about the relationship, this factor does not necessary assist.[45]

### Immigration and Refugee Board Decisions: Conclusion

Our research suggests that many medical inadmissibility cases could have a reasonable prospect of success even at preliminary stages (the procedural fairness letter), if the response addresses in detail why the individual's medical condition will not impose excessive demands on the Canadian health care system. In sponsorship appeals to the Immigration Appeal Division of the IRB, there is an additional opportunity to argue that the applicant should be admitted on humanitarian and compassionate grounds. This is the stage at which many applications succeed (which is an indication of the significant benefit to potential immigrants to Canada of the proposed amendment *IRPA*[46] permitting all foreign nationals a right of appeal from medical inadmissibility decisions).

The general sentiment of lawyers we spoke to was that the IRB is generally following *Hilewitz* appropriately, though there remains room for legal argument applying the principles in *Hilewitz* to different situations and particularly to situations where the anticipated demand is on health services rather than social services as in *Hilewitz*.

The more significant issue highlighted was how CIC and the Canada Border Services Agency (CBSA) handle medical inadmissibility cases. One lawyer described the impact of *Hilewitz* as exposing the immigration medical bureaucracy to scrutiny. More than one lawyer also commented on the challenge for visa and medical officers, since *Hilewitz*, when considering promises from the family to provide support. The experience of these officers is that people do not necessarily keep promises. The fact that they must nonetheless consider promises can place visa and medical offices in a personal conflict in their role as gatekeepers and protectors of Canada's public health care system.

## Access to Justice

As part of this project we briefly reviewed the accessibility of justice for people with disabilities seeking to immigrate to Canada. To do so, we reviewed the availability of publicly-funded legal representation in British Columbia, Ontario, Quebec and Saskatchewan and spoke with lawyers about their experiences.

### Publicly-Funded Legal Assistance

Unfortunately, publicly-funded legal assistance is generally not available for these types of matters. To qualify, one would have to be currently resident within the province, which would exclude out-of-country applicants with a finding of inadmissibility.

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[45] See, e.g., *Farahmand-Mobarekeh v. Canada (Minister of Citizenship and Immigration)*, 2008 CanLII 75574 (I.R.B.).

[46] Canada, Bill C-433, An Act to amend the Immigration and Refugee Protection Act (appeals), 2nd Sess., 40th Parl., 2009.

For those who are resident in the province, these cases would rarely receive publicly funded legal services. Because the excessive demands provision has an exception for refugees and certain close relatives in the family class, the individuals most affected by it would not be eligible for publicly funded services, which tend to only be provided for refugee applications, sponsorship appeals, and deportation hearings.

In Ontario, legal services are generally funded for refugees and sponsorship appeals. Sponsorship is one of the areas that are the subject of findings of inadmissibility, but as these are not findings in relation to spouses or children, they are funded much less frequently by Legal Aid Ontario.

In British Columbia, free legal assistance is only provided for refugee claims and where a person faces deportation. In Saskatchewan, no issues under the *Immigration and Refugee Protection Act* receive free legal assistance.

In Quebec, legal assistance might be available if there is a threat to the applicant or his or her family to physical or psychological safety, means of subsistence or a serious threat to freedom. As these will not typically arise from an immigration application outside of the refugee context, funded legal services would not be available.

Criteria for civil suits and other suits are: the potential threat, for the applicant or his family, to physical or psychological safety, to means of subsistence or to basic needs and a serious threat to either's freedom.

**Discussions with Immigration Bar**

We had a number of informal discussions with members of the immigration bar. One of the topics discussed was the accessibility of justice for these individuals. Most lawyers agreed that the access to justice issues were comparable to those in other areas of law. One lawyer commented that challenging medical inadmissibility decisions is very expensive regardless of the category of immigration, and that generally an applicant who can afford a lawyer has a better chance of challenging an inadmissibility decision based on "excessive demands". In his view, the most significant access to justice issues related to family class applicants. However, another lawyer noted that economic class immigrants, for instance skilled workers, can face equally significant barriers because of the costs and challenges associated with judicial review. In his experience, lawyers tend to charge more money for judicial reviews as compared to appeals.

From a procedural perspective, the greater weight given to the responses to fairness letters is significant. It means that applicants have an opportunity to influence CIC's initial decision and need not consider pursuing expensive and time-consuming appeals or judicial reviews.

However, one lawyer noted that many people submit applications and respond to fairness letters without legal representation or advice, and are often unaware of the legal significance of the fairness letter. As a result, they may fail to include relevant information. CIC does not

appear to indicate that it is important to obtain legal advice in responding to a fairness letter, nor provide applicants with examples of the kind of information that could be provided. In addition, an immigration lawyer who does not often address excessive demands findings may not have adequate information or contacts to adequately respond to a fairness letter and prepare evidence about the availability or unavailability of health and social services. There is an important role for specialized counsel and organizations who have specific knowledge of the disability services sector.

## Federal/ Provincial Discussions on Excessive Demand

One question that arose from our discussions was the extent of the provincial influence on the implementation of the excessive demands clause, particularly in the context of provincially or territorially nominated applicants. These are individuals that have been nominated by the jurisdiction of their intended destination who have the skills, education and experience necessary to make an immediate contribution.

In the chart above, you will note that the number of provincial nominees found to pose excessive demands has been quite consistent even though the total number of people found inadmissible as declined dramatically. The numbers are still very low, but are now a significant percentage of the total people deemed inadmissible.

Unfortunately, we were unable to learn much information about discussions between the federal and provincial/territorial governments about the interpretation of excessive demands. I spoke with two individuals within provincial/territorial governments about their experiences of these discussions. We were not able to obtain a lot of current information through these discussions, but did learn interesting historical information. However it is our understanding that these discussions continue between the federal and provincial/territorial governments.

We learned that the provincial/territorial government successfully advocated with the federal government to adjust the mechanism of measuring "excessive demands". The federal government had proposed a calculation that would set a very low threshold, but the provincial/territorial government proposed an alternative calculation that resulted in a higher threshold. The higher threshold is what has been implemented by the government (though, as noted above, it is still criticized as being too low). We learned that the Canadian government wished to exclude all potential immigrants with HIV or mental health diagnoses, regardless of evidence of cost to the provinces.

We also learned that the lead provincial/territorial negotiator in these discussions is often the ministry responsible for immigrant settlement, with input from ministries responsible for health and social services.

These discussions, while not based on current discussions, demonstrates that one potential avenue of future advocacy by disability organizations is through the provincial/territorial governments. The provinces and territories do not control the interpretation of the excessive demands clause, though the money spent on health and social services comes from provincial coffers and the provinces are the ones that are targeting these individuals to fill a gap in their workforce. As a result, they have an interest in the interpretation and application of the clause

and may be willing to influence the outcome. CCD may wish to identify the provincial/territorial points of contact in each jurisdiction for the purpose of gathering information and advocacy.

## Analysis of the Law in the United Kingdom, the Unites States and Australia

### United Kingdom

#### *The Rules*

The UK Immigration Rules outline possible medical grounds of exclusion for visa applicants.[47] The objective is to prevent the entry of, or bring to notice, persons who if admitted to the UK might:

a. endanger the health of other persons in the UK; or
b. be unable for medical reasons to support themselves and/or dependants in the UK; or
c. require major medical treatment (for which an entry clearance application has not been made).

Where an applicant has been diagnosed with a condition that would prevent them from supporting themselves or their dependants, the Rules recommend the applicant be refused on medical grounds. Usually, only persons intending to remain in the UK for 6 months or more are required to have medical clearance. Each post can make its own policy based on regional factors. Where the Medical Inspector finds that an applicant is undesirable based on medical grounds, the applicant will be refused unless there are "strong compassionate reasons" to justify admission. This determination is made by the Home Office.

Whether a medical refusal attracts a full right of appeal or a limited right of appeal depends on the reason for entry to the UK. Visitor visa applicants do not have a right of appeal however applicants for visas which would allow them to stay longer than six months do.

#### *Preliminary Comparison **to Canada***

UK medical examination requirements are much less stringent than Canadian requirements. Unlike in Canada, medical examinations are not required of all visa applicants. Screening for HIV and tuberculosis is also not standard. Waivers are available where an applicant agrees not to rely on the National Health Service, the publicly funded provider of free health care, for medical treatment. Although the UK does not bar applicants based on prospective excessive demand on social or health services, applicants can be refused where they may require "major medical treatment" and there are insufficient compassionate grounds to issue a waiver.

Overall, the issue of disability and immigration does not appear to be a particularly controversial one in the UK. There has been periodic debate on whether the immigration system is too open resulting in immigrants burdening the health system. An ongoing debate has taken place in the UK regarding whether mandatory medical testing should be implemented for all immigrants. In 2004, the UK Home Ministry shelved plans for mandatory HIV testing of all immigrants, fearing the rule may encourage illegal immigration and push the disease underground.

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[47] Paras.26-39.

**United States**

***The Rules***

Immigration to the United States of America is governed by the *Immigration and Nationality Act* (*INA*).[48] All individuals applying for an immigrant visa must submit to a mental and physical medical examination before the visa is issued. Information about the health of an applicant for a visa is acquired through a medical examination performed according to the specific guidelines published by the Center for Disease Control and Prevention. An applicant's own admission is not sufficient to uphold a finding of inadmissibility on medical grounds.

Applicants are excludable if they have been determined to have:

1. a physical or mental disorder and a history of behavior associated with the disorder that may pose or has posed a threat to the property, safety or welfare of themselves or others; or
2. previously had a physical or mental disorder and a history or behavior associated with the disorder that may pose or has posed a threat to the property, safety or welfare of the themselves or others and which behavior is likely to recur or lead to other harmful behavior.[49]

Harmful behavior is defined as behavior that "may pose, or has posed, a threat to the property, safety, or welfare of the alien or others." Interestingly, "[m]ental retardation no longer renders an applicant inadmissible on medical grounds, unless the civil surgeon or panel physician determines that the applicant is also exhibiting or has exhibited in the past, associated harmful behavior...."[50]

An individual who is likely to become a public charge at any time is excludable. The INS looks at the totality of circumstances in making its determination including their age, capacity to earn a living, health, family circumstances, employment history and whether or not they have ever received public assistance. Most immigrants must submit an affidavit of support as evidence that they will not become a public charge. The affidavit is required of all family based immigrants. The affidavit of support creates an enforceable legal obligation and the US government can sue to recover any public benefits provided in the first five years of residence.

An applicant who has been issued an adverse medical certificate may appeal only to an additional medical board and not to a judicial tribunal.

A waiver of medical grounds of inadmissibility is available subject to any terms, conditions and controls, if any, imposed by the Attorney General. There are waivers available for most of the health grounds of inadmissibility except for those with drug addiction issues.

An applicant with a communicable disease may receive a wavier if the applicant has the requisite relationship to a U.S. citizen or permanent resident spouse, unmarried child, unmarried

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[48] *Immigration and Nationality Act*, 8 U.S.C..
[49] *Immigration and Nationality Act*, 8 U.S.C. 1182, s. 212.
[50] U.S. Citizenship and Immigration Service, "Guidance on Revisions to CDC's *Technical Instructions for Civil Surgeons* Form I-693 (March 19, 2009) <http://www.uscis.gov/files/nativedocuments/revision_cdc_tech-instr_civil_surgeons_i693.pdf>.

minor lawfully adopted child or parent and is eligible for permanent residence status except for the health related grounds of inadmissibility.

A person with a physical or mental disorder who is found inadmissible must meet special conditions required by the Bureau of Citizenship & Immigration Services. The applicant must submit a detailed medical history and, in the case of mental illness, the applicant must also show that he or she has recovered. The applicant must have a statement from a hospital or physician practice affirming that it will examine the immigrant upon admission.

*Preliminary Comparison* ***to Canada***

Applicants with mental or physical disabilities are only excluded if they are at risk of harmful behavior, pose a threat to either themselves or others or are likely to become a public charge. Because social and medical services are much more privatized, the American system is not as concerned about immigrants creating excessive demand nor is it a valid comparator to Canada. However, the two systems have a number of similarities in that they both aim to exclude people who may require public resources (through excessive demands or by becoming a "public charge") or may pose a threat to the health or safety of the applicant, the community, or property.

**Australia**

***The Rules***

Immigration to Australia is governed by the *Migration Act*, which is explicitly exempted from the *Disability Discrimination Act.* [51]

Most visa applicants must satisfy what is known as the standard health requirement.[52] Depending on the type of visa application, a visa applicant must satisfy the health requirement as it is set out in the relevant portion of the regulations. The standard health rules require that the applicant be "free from tuberculosis" and not have a condition that would pose a threat to public health or the community.

In addition, the applicant must not have a condition that is likely to require health care or community services or is likely to meet the medical criteria for the provision of a community service; during the period of the applicant's proposed stay in Australia. However, because financial assets may disqualify someone for community services, such services will be ignored for many applicants.

If the applicant would be eligible for a community service, the condition must not be one where the provision of the health care or community services would be likely to result in a significant cost in the areas of health care and community services. Alternatively, the provision of service must not prejudice the access to heath care or community services for others, regardless of whether the health care or community services will actually be used in connection with the applicant.

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[51] *Disability Discrimination Act 1992* (Aus.), s. 52.
[52] *Migration Regulations*, Schedule 4, Item 4005, 4006A and 4007.

Because the Australian government provides social welfare benefits, costs are taken into consideration. A procedural manual dictates that if an applicant is likely to consume public health resources at a rate 50 per cent above average over a five-year period, then a Medical Officer will likely recommend against the applicant. Cost estimates are not always accurate and can be a ground of appeal.

In some cases, the Minister may grant a waiver of the health requirements. Such waivers are available, among other situations, where the Minister is satisfied that the granting of the visa would be unlikely to result in undue cost to the Australian community or undue prejudice to the access to health care or community services.

The courts have generally been quite reluctant to overturn a decision of a MOC. Though both the Migration Review Tribunal and Federal Court have jurisdiction to review migration decisions, courts have been extremely unwilling to challenge Medical Officer's opinion, unless there is clear evidence that the opinion was incorrect.

On the question of significant cost, in the case of *MIMA v Seligman*, [1999] FCA 117, the Australian Full Federal Court decided that the cost public pension benefits also ought to be included as "it would be artificial to construe the term 'community services' so narrowly as to exclude pension benefits which may become payable to the proposed entrant."

*Preliminary Comparison* ***to Canada***

Australia's *Migration Act* has been expressly exempted from the *Disability Discrimination Act* and so discrimination of the basis of disability, in the context of immigration, is not contrary to the law in either country.

The Australian system's approach to disability is quite similar to the Canadian system. Both exclude applicants who may cause excessive demand on social or health services. The similarities between the systems are largely due to both Australia and Canada offering universal health care and significant social programs for residents. Immigration restrictions are in place with the stated of purpose of ensuring that these services are not overburdened. The Australian system goes farther than the Canadian by not automatically exempting children and spouses.

While anything above a five-year average in Canada would render an applicant inadmissible, in Australia the expected cost must be 50% above average before the applicant will be considered inadmissible.

Of note, the Australian system expressly includes consideration of eligibility for community and health services. However, an individual's ability or intention to pay for services and community/ family support are not considered unless relevant to the applicant's eligibility for such services.

Significant opposition to Australia's immigration laws has taken place. There have been a number of cases highlighted by the media where the disability exclusion has operated unfairly to separate families or reject otherwise productive immigrant families. In November 2008 the Minister for Immigration and Citizenship, Senator Chris Evans, announced that the Joint Standing Committee on Migration would look at the health requirement in the Migration Act and how it impacts on people with a disability.

## Findings

### More Accessible Since *IRPA* and *Hilewitz*

This research has shown that Canada's immigration system has become dramatically more accessible for people with disabilities in recent years. The statistics showed only 10 people found to be inadmissible in 2006, in contrast with 579 in 2000.

The statistics are also reflected by the case law, which has required CIC to undertake more individualized assessments of costs and not make assumptions based on diagnoses. The statute has created a number of exceptions to the excessive demands clause thereby allowing spouses and children sponsored in the family class and refugees to immigrate regardless of any potential excessive demand. The immigration bar also suggested that preliminary findings of inadmissibility can be overcome with appropriate evidence.

### Language of *Act* Still Based on Ableist Assumptions

Nonetheless, the language of *IRPA* continues to pose challenges to immigration for people with disabilities. *IRPA* excludes people with health conditions that are expected to result in excessive demands. If it were purely for the purpose of reducing cost, all people likely to pose excessive demands would be excluded from admission. Canada would exclude children because the cost of education is in excess of the cost threshold. It would exclude women in their child-bearing years, particularly those who desire to have more children than the Canadian average. Highschool graduates intending to pursue post-secondary education rather than immediately entering the workforce would be excluded. However, as inadmissibility is based on health condition rather than age, gender, religion, cultural, or life plans, none of these individuals would be found to be inadmissible though, arguably, they are also likely to create costs in excess of the cost threshold.

I would suggest that the reason that only health conditions are considered is based on an implicitly ableist benefit side to the cost-benefit analysis. From this perspective, child-bearing and education are viewed as activities of implicit benefit to society, whereas the provision of health or social services to a person with a "health condition" is not.

An example may assist to demonstrate this point. If a family seeks to immigrate with their 17 year old child that intends to continue to university, CIC would not consider any excess demand or cost posed by that child even though statistics show that government funding, per university student, was $9,900 in 2006-2007.[53] In contrast, if a family seeks to immigrate with the 17 year old child with a developmental disability that will require some employment supports before entering the workforce, that child may be found to pose excessive demands.

This is not based on a cost comparison from one child to the other, but based on the fact that the cost created by one child is considered and the other is not. I suggest that this is based on an implicit benefit weighing that has resulted in only costs from health conditions being considered. The objective of the legislation then cannot reasonably be said to be to avoid excessive demands or costs to the government, but to only allow immigrants for whom the cost

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[53] Association of Universities and Colleges of Canada, "Trends in Higher Education, Volume 3: Finance" (2008) <http://www.aucc.ca/_pdf/english/publications/trends_2008_vol3_e.pdf> at 5.

posed is one the government views benefit in, which, by definition, excludes the benefit to Canadian society brought by people with disabilities.

### Advances in Accessibility are Harmful to Excessive Demands Applications

Our research shows that the availability of specialized disability services, such as supportive housing, accessible education, and employment supports, may make Canada's immigration system less accessible. Applicants must show that services don't exist, that they are ineligible for them or will choose not to avail themselves of such services. It is quite ironic that the items that make Canada more accessible for current residents make it less accessible for prospective immigrants.

Similarly, Canadians with disabilities advocate for an understanding of disability that does not perpetuate historical notions of dependence and paternalism. However, arguments about an individual's independence or suggestions that a condition is not disabling may cause an adjudicator to determine that the individual or their family does not have realistic expectations. This may result in their evidence being viewed as unreliable when determining whether they will pose excessive demands.

### Costing Mechanism

Similarly, the costing mechanism outlined in the *Regulation*, may not be the most statistically appropriate. Professor Coyte's research has suggested that a statistically more appropriate means of calculation would result in a higher cost threshold, thereby resulting in more people being found to be admissible to Canada.

## Next Steps

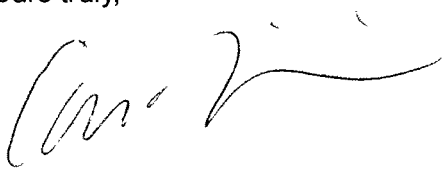
Based on these conclusions we would suggest the following next steps:

1. Conducting a similar research project on the implementation of section 38(1)(a-b) of *IRPA*, which excludes people whose health condition is likely to be a danger to public health or public safety. These inadmissibility criteria are applicable to all members of the family class and refugees, some of whom are excluded from the excessive demands provision.
2. Advocating, through the provincial governments to have the excessive demands provision removed. The fact that so few people are being found to be inadmissible means that the clause is no longer necessary. The cost to the Canadian government of implementing the section is certainly far in excess of the savings gained by excluding 10 people per year that might have posed excessive demands. Its existence now only serves to perpetuate an ableist model, without providing any cost savings to the government.
3. In advocacy, pointing to the fact that only excessive demands based on health condition, rather than age, religion, or intentions is considered. While the statute only refers to costs, the fact that it references health condition means that it is implementing a pure cost-benefit analysis, based on ableist assumptions of benefit. This is unacceptable in Canadian society.

4. Evidence is required on all of these issues, but the IRB can come to conclusions, without evidence, where it is clear on its face. Applicants should be hesitant to rely on a lack of evidence by CIC and should instead put forward evidence in support of their application and to demonstrate how there will be no excessive demands. This may be a role that CCD or other disability organizations can play to support immigration applicants as many potential immigrants will not be aware of what services exist or the eligibility criteria.
5. CCD ought to make contact with lawyers and disability organizations to ensure that adequate expertise is available to respond to preliminary findings of excessive demands. The research shows that applicants are largely successful in responding to fairness letters, but the information required goes beyond the expertise of immigration lawyers and requires the expertise of individuals within the disability services sector.

I'd like to reiterate that it has been a great pleasure to work on this project for CCD. We would be happy to answer any questions that you might have and look forward to working with CCD on this issue and others in the future.

Yours truly,



Cara Wilkie

Encls. Case summary, *Hilewitz* and *De Jong*
Case summary, *Lee*
Case summary, *Colaco*
Case summary, *Covarrubias*
National summary, United Kingdom
National summary, United States of America
National summary, Australia
Compact discs with all electronic documents

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[i] Council of Canadians with Disabilities, *A Voice of Our Own* 27:1 (January 2009), "Immigration Act Perpetuates Stereotypical Views", < http://ccdonline.ca/en/publications/voice/2009/01>.