

Excessive Demand on the Canadian Conscience: Disability, Family, and Immigration

JUDITH MOSOFF*

I. INTRODUCTION

ON 8 JANUARY 1999, the Honourable Lucienne Robillard, Minister of Citizenship and Immigration, announced a major review of the immigration system. Particularly important to families with disabled relatives overseas was the Minister's commitment to explore the removal of the excessive demands provision for spouses and dependent children. The excessive demands provision of the current immigration system makes individuals with disabilities inadmissible to Canada if they are expected to be medically or socially expensive and thereby prevents family unification where the overseas relative has a disability. While the current explanation for preventing family unification in these circumstances is economic, the history and underlying inconsistencies of immigration policy suggest that financial arguments mask a more fundamental stereotype that immigrants with disabilities will not be worthwhile members of Canadian society. Much overdue, removal of the excessive cost provisions for close family members would remedy a long-standing pattern of disadvantage, and signal a moral commitment to the humanitarian interests expressed in immigration policy.

This paper examines the historical and ideological context that has established parameters for the exclusion of families with a disabled relative.

* Assistant Professor, Faculty of Law, University of British Columbia. I would like to thank my friends and colleagues Philip Bryden, Catherine Dauvergne, Guy Riecken and Jim Russell all of whom read earlier drafts of this paper and made helpful suggestions. I am grateful for the support of the Women and Change Program of the Social Sciences and Humanities Research Council and the valuable research assistance of Cerasella Aldea, Kim Brooks, Shelley Ion, Debra Parkes and Benita Wassenaar. Special thanks to Isabel Grant. Many of the ideas in this article arise from my experiences with families who are clients of the UBC Clinical Program at the Immigration and Refugee Clinic of the Legal Services Society of British Columbia. In part, my thinking is based on their tenaciousness to unify their family in Canada in the face of unjust rules. This article is dedicated to those families.

Underlying this policy is a set of ideas about disability that rationalises the exclusion of people with disabilities in a variety of contexts. Immigration is a particularly useful case study in which to examine ideas about disability because the same ideological mechanisms which keep Canadians with disabilities and their families "outsiders" to the benefits of the Canadian state operate in a more direct way to keep people with disabilities outside of Canada. In particular, I examine the obstacles to family re-unification where the sponsor attempts to bring to Canada a close family member who has a disability.

Exclusion from the mainstream of Canadian social and political life has been the historical norm for persons with disabilities. As La Forest J. stated for a unanimous court in *Eldridge v. British Columbia (A.G.)*:

It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions...¹

Although more people with disabilities in Canada now live outside of institutions in their communities, their entitlement to social citizenship remains tenuous. That is, people with disabilities are still unable to "share in the full social heritage and to live the life of a civilized being according to the standards prevailing in the society."² In addition to the individual with a disability, the family with a disabled member is often overlooked in social and public policy.³ As with differences such as race, poverty, and sexual orientation, the ideology of the family erases or distorts disability in the picture of family.⁴

¹ (1997) 151 D.L.R. (4th) 577 (S.C.C.) at 613 [hereinafter *Eldridge*].

² T. H. Marshall, "Citizenship and Social Class" in S. M. Lipset, ed., *Class, Citizenship and Social Development: Essays by T.H. Marshall* (Chicago: University of Chicago Press, 1964) at 78.

³ For example, government-subsidized housing requires only one wheelchair accessible bedroom in a family unit, contemplating that there may be a disabled child in the family but not a disabled parent who needs access both to her bedroom and her child's. See K. A. Blackford, "Erasing Mothers with Disabilities through Canadian Family-related Policy" (1993) 8 *Disability, Handicap and Society* 281.

⁴ K. Arnup, "Mothers Just Like Others': Lesbians, Divorce and Child Custody in Canada" (1989) 3 *C.J.W.L.* 18; M. Bateman, "Lesbians, Gays and Child Custody: An Australian Legal History" (1992) 1 *A.G.&L.L.J.* 47; M. Fineman, "Images of Mothers in Poverty Discourses" (1991) 2 *Duke L.J.* 274; M. Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 *Queen's L.J.* 306; M. Kline, "Child Welfare Law, 'Best Interest of the Child' Ideology, and First Nations" (1992) 30 *Osgoode Hall L.J.* 375; D. Roberts, "Racism and Patriarchy in the Meaning of Motherhood" (1993) 1 *Am. Univ. J. Gen. Law* 38.

While law has removed some barriers for Canadians with disabilities,⁵ it has proved not to be a panacea for eliminating obstacles in their lives.⁶ Although Canada has signed on to a number of relevant international instruments,⁷ has adopted s. 15 of the *Canadian Charter of Rights and Freedoms* guaranteeing equality to people with mental and physical disabilities,⁸ and each province has comprehensive human rights legislation prohibiting discrimination on the basis

⁵ See e.g. *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388, where non-consensual, non-therapeutic sterilisation for people with intellectual disabilities was disallowed; *Canada (Canadian Disability Rights Council) v. Canada* (1988), 21 F.T.R. 268, where the right to vote was not dependent on institutionalisation and/or capacity to manage property. See also *R v. Swain*, [1991] 1 S.C.R. 933. In *Eldridge*, *supra* note 1, sign language interpreters required for the deaf were held to be an insured medical service.

⁶ M. D. Lepofsky, "A Report Card on the *Charter's* Guarantee of Equality to Persons with Disabilities after 10 Years: What Progress? What Prospects?" (1997) 7 N.J.C.L. 263.

⁷ For example, the United Nations *Declaration of the Rights of Disabled Persons*, Dec. 9 1975, U.N.G.A. Res. 3447A(XXX) U.N. Doc. A/10284/Add.1 and acceded to the *Universal Declaration on Human Rights*, Dec. 10 1948, U.N.G.A. Res. 217A(III) U.N. Doc. A/810; *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316; *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316; and the *Declaration of the Rights of Mentally Retarded Persons*, Dec. 20, 1971, U.N.G.A. Res. 2856(XXVI), U.N. GAOR, Supp. No. 29, U.N. Doc. A/8429.

⁸ Section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*], states that:

(1) Every Individual is equal before and under the law and has the rights to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

of disability,⁹ people with disabilities are still excluded. Statistics on income and educational levels indicate that people with disabilities remain disadvantaged.¹⁰

Two fundamental models dominate public policy concerning disability: the medical model where disability is considered a medical problem or defect, and the economic model where the cost of including people with disabilities is the prime consideration.¹¹ In combination with a liberal vision of the state where entitlements to benefits depend on a distinction between “insiders” and “outsiders,” the medical and economic models form the basis of disability exclusions in the immigration system. In this paper I will suggest that a human rights model¹² or a social model¹³ of disability would result in a different vision of immigration policy. Under these models, the focus is neither on the individual as a deviant human being nor on the expense of a disability, but on the larger social, economic and political forces that create or sustain disadvantage. There is a collective responsibility to remove barriers that are disabling. Law itself may be implicated or may be remedial.¹⁴

⁹ Every jurisdiction in Canada contains human rights legislation that prohibits discrimination on the basis of mental or physical disability. See *Human Rights Act*, S.Y. 1987, c. 3; *Northwest Territories Fair Practices Act*, R.S.N.W.T. 1988, c. F-2; *Human Rights Code*, R.S.B.C. 1996, c. 210; *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c.H-11.7; *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1; *Human Rights Code*, S.M. 1987-88, c. 45, C.C.S.M. c. H175; *Human Rights Code*, R.S.O. 1990, c. H.19; *Charte des droits et libertes de la Personne*, L.R.Q. c. C-12; *Human Rights Code*, R.S.N.B. 1973, c. H-11; *Human Rights Act*, R.S.N.S. 1989, c. 214; *Human Rights Code*, R.S.N. 1990, c. H-14; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12.

¹⁰ See Canada: Minister of Industry, Science and Technology, *A Portrait of Persons with Disabilities* (Ottawa: Statistics Canada, Housing, Family and Social Statistics Division, 1995). For example, men with disabilities aged 35-54 have incomes that are less than 60 percent of men of the same age who do not have disabilities. As well, among persons in the 35-54 age bracket, those with disabilities were approximately half as likely to have university degrees as those without disabilities. See also *On Target?: Canada's Employment-Related Programs for Persons with Disabilities* (North York: The Roeher Institute, 1992).

¹¹ J.E. Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993) c. 3, 4; I.B. McKenna, “Legal Rights For Persons With Disabilities In Canada: Can The Impasse Be Resolved?” (1997-98) 29 *Ottawa L. Rev.* 153.

¹² See M. Rioux, “Toward a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality” (1994) 7 *Can. J. Law & Juris.* 127; Bickenbach, *supra* note 11 at c. 5.

¹³ While some important differences exist between the human rights and social models, I will use the terms interchangeably within this paper. The social model of disability is explored in such work as M. Oliver & C. Barnes, *Social Policy and Disabled People: From Exclusion to Inclusion* (London: Addison Wesley Longman, 1998); L.A. Marks & M. Jones, *Disability, Divers-ability and Legal Change*, (Dordrecht: Martinus Nijhoff/Kluwer, 1999).

¹⁴ Specific laws exist to exclude persons with disabilities. Examples include mental health legislation authorizing civil commitment or non-consensual treatment. Other laws contain

Under s. 19(1)(a)(ii) of the *Immigration Act*,¹⁵ people with disabilities are inadmissible to Canada because they are expected to be a drain on state resources.¹⁶ The current legislation prohibits any person with a disability from becoming a permanent resident of Canada if the person "might reasonably be expected to cause excessive demands on the health and social service systems."¹⁷ The bar to admission applies to all categories of immigrants including members of the family class.¹⁸

To provide a context to this exclusion, it is necessary to look at the broader framework of immigration policy. Section 3 of the *Act* states that the goal of Canadian immigration policy is "to promote the domestic and international interests of Canada."¹⁹ In elaborating the more specific objectives, the *Act* describes a diverse set of aims without any stated priorities. For example, the *Act* recognises Canada's social responsibilities in such goals as facilitating family reunification, upholding Canada's humanitarian tradition with respect to the displaced, and ensuring that admission standards do not discriminate in a manner inconsistent with the *Charter*. However, other objectives refer to economic interests such as fostering the development of the economy and facilitating entry of visitors for commercial purposes. Inevitably, dominant ideas in Canadian society will inform the application of the general objectives of immigration policy. More specifically, prevailing ideas about disability will influence the interpretation of general goals. Although the excessive demands provision is unfair to families with disabled relatives, it may appear right and justified in the context of dominant ideas about disability. Popular views about the nature of the Canadian welfare state and the reasons for (and solutions to) its current problems provide a further rationale for the policy.

To examine the ideas that justify exclusion, I first describe ways that the immigration scheme has always treated people with disabilities poorly and the manner in which the current legislation prevents people with disabilities from immigrating to Canada. Secondly, although current immigration policy favours economic immigrants in general, I will explore certain ways that family class

specific exemptions from employment protections in the cases of sheltered workshops where people with disabilities work, often on the basis that work includes a component of rehabilitation. See *Fenton v. British Columbia (Forensic Psychiatric Services Commission)* (1991), 82 D.L.R. (4th) 27 (B.C.C.A.).

¹⁵ S.C. 1976, c. 52 [hereinafter the *Act*].

¹⁶ This paper concerns family members who are refused on the basis of s. 19(1)(a)(ii) and does not address public health concerns which is a separate ground for refusal in s. 19(1)(a)(i).

¹⁷ *Immigration Act*, *supra* note 15 at s. 19(1)(a)(ii).

¹⁸ *Immigration Act*, *supra* note 15 at ss. 9(4), 19(2)(c); *Immigration Regulations*, SOR/83-675, s. 6(1)(a).

¹⁹ *Ibid.* at s. 3.

immigrants appear to be privileged. Historically, however, only particular families have enjoyed the privilege. Just as the immigration system has failed to extend such a privileged position to families because of their race or definition of family, immigration policy continues to deny the benefit of family unification to families with a disabled relative. Thirdly, I identify the ways that exclusion is justified in the current system. These mechanisms include an excessive reliance on the medical model of disability and a dishonest economic explanation for preventing family unification because the relative has a disability. Fourthly, I examine two proposed changes to the system, the 1992 Amendments to the Act, and the Recommendations of the 1997 Report, *Not Just Numbers*.²⁰ Fifthly, I comment on the ways that the liberal view of the state buttresses disability-based exclusions. I argue that a social model of disability and *Charter* values ought to inform immigration policy.²¹ I conclude that preventing family sponsorship on the grounds of disability is unjust and inconsistent with Canadian values. While a proposal to eliminate the excessive cost provision for spouses and dependent children is a welcome step, I argue that all exclusions based on disability and its associated costs should be eliminated in family class immigration.

II. DISABILITY AND IMMIGRATION

A. Historical Provisions

Since confederation, certain categories of people have always been prohibited from entering Canada, reflecting a general consensus about the undesirability of certain persons such as criminals, and persons with contagious diseases.²² As well, persons with disabilities have consistently been impeded from coming to Canada.²³ Despite specific changes over time, the legislative history reveals three

²⁰ Canada: Minister of Employment and Immigration, *Not Just Numbers: A Canadian Framework for Future Immigration* (Ottawa: Minister of Public Works & Government Services, 1997) [hereinafter *Not Just Numbers*].

²¹ This paper will address the values underlying a *Charter* analysis. However it will not include a comprehensive doctrinal analysis of s. 15, s. 1, or the applicability of the *Charter* to extraterritorial applicants to Canada. These important legal issues are not the subject of this paper.

²² S. Goundry, "Final Brief on the Proposed Amendments in Bill C-86 to Sections 19(1)(a) and (b) of the *Immigration Act*" (Canadian Disability Rights Council, September 1992) [unpublished].

²³ Eugenic influences have tended to group together all allegedly "undesirable" traits. Karl Pearson, a leading eugenicist who headed the Department of Statistics at University College in London, defined the "unfit" as "the habitual criminal, the professional tramp, the tuberculous, the insane, the mental defective, the alcoholic, the diseased from birth or from excess." See D. Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity*

persistent ideas about persons with disabilities. First, people with disabilities may be collapsed into a category or categories that distinguish them from another category occupied by non-disabled persons.²⁴ This categorisation reflects and perpetuates existing stereotypes about people with disabilities and is consistent with a medical model of disability. Secondly, immigration policy has been especially negative toward people with labels of mental disability. Thirdly, legislation consistently anticipates that people with disabilities will be a financial burden on Canada. In this section, I will highlight each theme through the various versions of the Act.

Stereotypes were suggested in the very title of the first immigration statute, *An Act Respecting Emigrants and Quarantine*,²⁵ which implied a connection between immigrants and disease. In the early legislation people with disabilities were grouped according to the diagnosis or characteristic that made them “different” from the typical norm. These stereotypes were based on ideas of people with disabilities as contagious, dangerous, not quite human, or non-persons,²⁶ and were reflected in such stigmatising language as the “Lunatic, Idiotic, Deaf and Dumb, Blind or Infirm.”²⁷ In the 1869 Act, such persons were inadmissible to Canada if a Medical Superintendent determined that they would become a public charge. From 1906 until 1976, labels or diagnoses were absolutely determinative of admissibility. In this medically deterministic era, certain diagnoses such as epilepsy made a person inadmissible regardless of cost of the treatment or whether the condition could be controlled. The result was that no amount of family support, no compensating strength, attribute, or proof of independent living could overcome the label and permit admission to Canada. The most recent legislation, the *Immigration Act, 1976*²⁸ deleted references to specific diagnoses and focused on more politically acceptable criteria such as cost, giving exclusion an appearance of social rationality. As I will discuss in a later section of this paper, the 1992 amendments hearken back to the strict medical determinism of an earlier era.

The second theme, that mental disability is a particularly negative trait, began with a differentiation between mental and physical disability in the 1906

(New York: Knopf, 1985) at 33. See also L.J. Davis, ed., *The Disability Studies Reader* (New York: Routledge, 1997) c. 1.

²⁴ This type of categorisation is not unique to immigration. Inevitably a legal category selects out a certain attribute and overlooks important differences. See M. Minow, *Making all the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990).

²⁵ R.S.C. 1859, c. XL.

²⁶ E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs: Prentice-Hall, 1963) at 18.

²⁷ *Immigration Act*, S.C. 1869, c. 10, ss. 9, 11(2).

²⁸ *Supra* note 15.

Act²⁹ and resulted in a complete exclusion for people with mental disabilities. Arguably linked to the eugenics movement,³⁰ the 1906 Act continued to ban absolutely all people with a mental disability, such as any person “who is feeble-minded, an idiot or an epileptic, or who is insane or has had an attack of insanity within five years.”³¹ Having a mental disability continued to create a complete bar to admission. The definition was extended to include “persons who have been insane at any time previously,”³² “persons of constitutional psychopathic inferiority,”³³ and “persons over fifteen years of age physically capable of reading who cannot read the English or the French language or some other language or dialect.”³⁴

The third idea, that persons with disabilities are costly, was expressed in the early legislation. An obligation was placed on the Master of a Vessel to report passengers with disabilities, to indicate whether they had accompanying relatives, and to pay \$300 for each such person, in order to save Canada or a province the expense.³⁵ Ultimately, concerns about cost interacted with the distinction between mental and physical disability and assumptions about capacity to work. People with physical disabilities (but not mental disabilities) were seen as having the potential to support themselves.³⁶ It was either not

²⁹ *Immigration Act*, R.S.C. 1906, c. 93, s. 26.

³⁰ The science of eugenics which encourages “good” stock to reproduce and discourages or prevents “bad” stock from reproducing has affected marriage and sterilization laws in Canada. It is logical that eugenic thinking extends to immigration matters. See T. Caulfield & G. Robertson, “Eugenic Policies in Alberta: From the Systematic to the Systemic” (1996) 35 *Alta. L. Rev.* 59.

³¹ *Immigration Act*, *supra* note 29.

³² *Immigration Act*, R.S.C. 1927, c. 93, s. 3(a).

³³ *Ibid.* at s. 3(k).

³⁴ *Ibid.* at s. 3(f). Besides the obvious effect of this provision on people with intellectual disabilities, the real intent may have been to exclude people of certain races and national origins. See D. Bagambiire, “The Constitution and Immigration: the Impact of the Proposed Changes to the Immigration Powers Under the *Constitution Act, 1867*” (1992) 15 *Dalhousie L.J.* 428 for a discussion of the so-called “literacy test” established by the provincial government pursuant to the *British Columbia Immigration Act*, S.B.C. 1908, c. 23.

³⁵ The origins of these rules were not exclusionary. In an earlier era of more open immigration policy, the rules served to protect immigrants from horrendous conditions on voyages to Canada. By requiring proper record keeping and bonds, the legislative intent was to ensure more humane treatment. See C.J. Wrydzynski, *Canadian Immigration Law and Procedure* (Aurora: Canada Law Book, 1983) at 41.

³⁶ The history of American disability exclusions reveal a similar distinction between physical and mental disability. In general, the basis on which a person with physical disabilities has been excluded has been the probability of becoming a “public charge.” However, certain mental disabilities such as “insanity”, “epilepsy” and “psychopathic personality” were independent statutory bases of exclusion. See J. Stanton “The Immigration Laws from a

considered possible for people with mental disabilities to be self-supporting, or people with mental disabilities were viewed as so undesirable that the issue of self-sufficiency was not important. For example, the 1952 version of the *Act* continued the pattern of a blanket exclusion of people with mental disabilities, but exclusionary rules could be overcome with sufficient family support for people with physical disabilities, or after the public health risk subsided for persons with contagious diseases.³⁷

Although the language has been updated in recent times and the justifications for exclusion made more apparently rational, the same themes persist. The history shows that disability-based exclusions preceded the development of publicly funded health care and other important social programs in Canada.³⁸ Therefore, our current justification to exclude people with disabilities because they might draw too heavily on publicly funded health and social services is really a new twist on an old policy that is based on even older stereotypes.

B. Current Provisions

Section 19 of the *Act* sets out the classes of persons who are inadmissible to Canada and prohibits from admission:

(a) persons who are suffering from any disease, disorder, *disability* or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,

- (i) they are or are likely to be a danger to public health or to public safety, or;
- (ii) *their admission would cause or might reasonably be expected to cause excessive demands on health or social services;*

(b) persons who there are reasonable grounds to believe are or will be unable or unwilling to support themselves and those persons who are dependent on them for care and support, except persons who have satisfied an immigration officer that adequate arrangements, other than those that involve social assistance, have been made for their care and support. [emphasis added].

The important term that is used to exclude people, *excessive demands*, is not defined, but cannot be inferred merely from the existence of a medical

Disability Perspective: Where We Were, Where We Are, Where We Should Be" (1996) Geo. Immigr. L. J. 441 at 446.

³⁷ *Immigration Act*, R.S.C. 1952, c. 325, s. 5. The blanket exclusion continues in the 1970 consolidation.

³⁸ Canada's national health insurance scheme was achieved in two stages. The *Hospital Insurance and Diagnostic Services Act*, S.C. 1957, c. 28 provided for the cost of provincially operated health insurance plans to be shared by the federal government. The *Medical Care Act*, S.C. 1966, c. 64 extended federal cost-sharing to provincial plans insuring doctors' services. See: Canada: Library of Parliament, *Medicare in Canada* by P. Rosenbaum (Ottawa: Research Branch, Political and Social Affairs Division, 1988).

condition³⁹ and is “more than what is normal or necessary.”⁴⁰ In 1992, an amendment to s. 19 of the *Act* defined *excessive demands*, but this amendment has not yet been proclaimed.⁴¹ In 1997, the influential report *Not Just Numbers* recommended changes to medical inadmissibility and to family class immigration. Later in this paper I will argue that the 1992 proposed changes are no improvement. While the central recommendation of the 1997 Recommendations is extremely positive, the net result is equivocal.

A determination of admissibility under s. 19(1)(a)(ii) begins with a mandatory medical examination.⁴² A medical examination includes all medical investigations and tests reasonably required to assess whether the person is admissible to Canada.⁴³ Since a prospective immigrant must apply to come to Canada from outside the country, unless there are exceptional circumstances,⁴⁴ the medical examination usually takes place in the country of origin. On the basis of the medical examination a medical officer who has been authorised by the Minister of National Health and Welfare must issue a certificate regarding medical status.⁴⁵ If the medical officer issues a medical certificate that makes a person inadmissible, the records are sent to Ottawa for confirmation of the diagnosis. Applicants must have an opportunity to make representations to the officer about negative assessments.⁴⁶

Although s. 22 of the *Immigration Regulations* specifies the factors that must be considered by medical officers in assessing whether a condition poses a danger to public health or safety,⁴⁷ factors relevant to excessive demand have

³⁹ *Deol v. Canada (Minister of Employment and Immigration)* (1992), 18 Imm. L. R. (2d) i (F.C.A.) [hereinafter *Deol*].

⁴⁰ *Jim v. Canada (Solicitor General)* (1993), 22 Imm. L. R. (2d) 261 (F.C.T.D.); *Choi v. Canada (Minister of Employment and Immigration)* (1995), 29 Imm. L. R. (2d) 85 (F.C.T.D.) [hereinafter *Choi*].

⁴¹ *Immigration Act*, S.C. 1992, c. 45, s. 11 (not yet in force).

⁴² *Immigration Act*, *supra* note 15 at s. 11(1).

⁴³ *Alam v. Canada (Minister of Employment and Immigration)*, [1990] I.A.D.D. No. 90 online: QL (IMRE)

⁴⁴ For example, inland applications are often made for a spouse who may be at the time of the marriage a student, a visitor, or have no status in Canada. The preliminary question is whether there are compelling humanitarian and compassionate reasons to process the application within Canada. The second issue is whether the person is accepted for landing as a permanent resident.

⁴⁵ *Immigration Act*, *supra* note 15 at s. 2(1) under the definition of medical officer.

⁴⁶ *Gao v. Canada (Minister of Employment and Immigration)* (1993), 18 Imm. L. R. (2d) 306 (F.C.T.D.) [hereinafter *Gao*].

⁴⁷ *Immigration Regulations*, SOR/78-172, s. 22.

been found to be *ultra vires* the Act.⁴⁸ Apart from the *Medical Officer's Handbook*, a voluminous policy document that outlines a classification scheme for a s. 19(1)(a) medical status designation⁴⁹ and gives examples,⁵⁰ there is little direction about how to determine excessive demand.⁵¹

In certain circumstances, including a determination of medical inadmissibility, a person may be allowed to enter or stay in Canada on a Minister's permit,⁵² a discretionary permit that by itself affords the person no entitlement to work, attend school, or receive social services. When an individual has resided in Canada continuously for five consecutive years on a Minister's permit without violating any other provisions of the Act, the person (and dependants) may be landed⁵³ as long as the receiving province, if it has entered into an agreement with the federal government,⁵⁴ agrees to the person's admission.

⁴⁸ See *Ismaili v. Canada (Minister of Citizenship and Immigration)* (1995), 29 Imm. L.R. (2d) 1 (F.C.T.D.) [hereinafter *Ismaili*]. However, in *Tang v. Canada (Minister of Employment and Immigration)*, [1996] I.A.D.D. No. 9 online: QL (IMRE), the Appeal Division suggested that these same factors may be used as an exercise of doctors' professional expertise, knowledge, and experience. If the result is that doctors are not bound to rely on some specified criteria, but may use these and other unstated criteria as "professionals", doctors will have greatly increased discretion with fewer means to ensure their accountability.

⁴⁹ The Handbook prescribes five criteria each gauged on a 7 point scale which are combined for a final statement of medical status (M). These include: risk to public safety or health (H), expected demand on health or social services (D), response to medical treatment (T), surveillance (S) and potential employability or productivity (E). Only prospective immigrants classified as M1 or M2 are admissible unconditionally; those who are M3 are conditionally admissible; people who are M4 or M5 are inadmissible but subject to review after a period of time; those who are M6 or M7 are inadmissible.

⁵⁰ See e.g. the following case study at 3-9 of the Handbook

Case #1 is a healthy 35 year old engineer, currently fully employed in his country of origin, who is a traumatic above knee amputee following a motorcycle accident at age 25. He is presently productive and functioning independently and can be anticipated to continue to be so in Canada. He will require periodic medical follow-up, and a new prosthesis every 3-5 years. Anticipated health care costs are reasonable and his profile would be H1, D2, T3, S1, E3, M3.

⁵¹ Medical officers may consider the Handbook guidelines as one element in assessment. *Ajanev v. Canada (Minister of Employment and Immigration)* (1996), 33 Imm. L.R. (2d) 165 (F.C. T.D.) [hereinafter *Ajanev*].

⁵² *Immigration Act*, *supra* note 15 at s. 37.

⁵³ *Ibid.* at s. 38.

⁵⁴ Prospective immigrants must specify the province in which they intend to reside. See *Immigration Act*, *supra* note 15 s. 6(6), 'Selection by Province' and s. 38(2) 'Consent of province required' which states:

Where the Minister has entered into an agreement with a province pursuant to s. 108 whereby the province has sole responsibility for the selection of

III. FAMILY CLASS AND IMMIGRATION

A. Family Class Immigrants: the Privileges in the System

The goals of immigration policy set out in s. 3 of the Act present an ongoing choice between selection of immigrants for economic purposes and selection for humanitarian reasons. Statistics show a clear and increasing preference for economic immigrants over family class immigrants.⁵⁵ For the years 1996 through 1999, the number of family class immigrants estimated by the annual Immigration Plan declined steadily while the number of economic immigrants increased.⁵⁶

Despite the emphasis on economic reasons for selecting immigrants, the legal structures provide two advantages to family class applicants: first, more lax selection criteria and second, a more accessible appeal for refusals. To qualify, a sponsor must be of a certain age with a particular status in Canada, and the sponsoree (applicant) must be a close relative as defined by the makers of immigration policy.⁵⁷ Unlike the criteria for other immigrants, family class immigrants do not need to demonstrate that they have independent means. Financial criteria for family class applicants are much relaxed and the "point system" in place for independent applicants is not applied to family class applicants. A long-standing government policy has been to require the sponsor to support the applicant for ten years.⁵⁸ Sponsors must meet the Low-Income Cut-Off (LICO) guidelines published by Statistics Canada although the LICO guidelines do not apply to spouses or dependent children under 19 years of

certain classes of immigrants who intend to reside in that province, an immigrant of any of those classes of immigrants who intends to reside in that province may be granted landing under subsection (1) only if the province has given its consent.

- ⁵⁵ Historically rises and falls in immigration levels correlate highly with labour market conditions. See Wrydzynski, *supra* note 35, c. 4.
- ⁵⁶ Subsections 7(1) and (2) of the Act require a yearly Immigration Plan to be submitted to Parliament by 1 November each year indicating numbers of immigrants anticipated in each category. For the years 1996 through 1998, the actual numbers of family immigrants fell short or barely met the projections outlined in the Plan, projections already decreasing over this period. For the same years (except for 1998) the numbers of economic immigrants greatly exceeded the numbers in the Plan. See <<http://cic.net.ci.gi>>.
- ⁵⁷ Currently, any Canadian citizen or permanent resident who is over 19 years of age and living in Canada may sponsor a member of the family class for permanent residence.
- ⁵⁸ Despite the provisions of the *Immigration Act*, *supra* note 15 at s. 118(1) that an undertaking may be assigned by the Minister to Her Majesty in right of any province, sponsorships break down in some cases and the enforcement mechanisms are weak. The applicant must seek social assistance with an ensuing squabble between the federal and provincial governments about who is responsible for supporting the individual.

age.⁵⁹ Overall, the scheme is organised around the idea that families will take care of their own, and the new immigrant will not rely on public assistance. As I will discuss later, the same vision does not exist where the family member has a disability.

If a family class application is refused, there is a right of appeal to the Appeal Division of the Immigration and Refugee Board.⁶⁰ The appeal is characterised as a right of the sponsor, that is the Canadian citizen or permanent resident rather than the applicant. It follows that the exclusion is seen to affect not just the family member outside of Canada, but the family in Canada.⁶¹ Independent applicants including entrepreneurs and investors have no right of appeal to the Immigration and Refugee Board. Therefore, those applicants who promise Canada an economic return for admission are not able to have their cases reviewed by the Board, considered a more informal and accessible venue than the courts.⁶²

The appeal of a family class refusal is a hearing *de novo*,⁶³ and may be brought on the grounds of errors in law, fact, mixed law and fact, or that there exist “compassionate or humanitarian considerations that warrant the granting of special relief.”⁶⁴ The result is that as long as an applicant is found to be a member of the family class, the Appeal Division may exercise its equitable jurisdiction. Exercise of this equitable jurisdiction requires more than the existence of a family connection, since family unification is the basis of all family sponsorship applications. Because of the special relations of family support that tend to exist in these circumstances, the equitable jurisdiction is particularly important where a family member has a disability.⁶⁵

Although the procedural advantages I have outlined do not result in greater numbers of family class immigrants, they are important to legitimate the immigration system as a humanitarian process. Their function is to symbolise Canada’s social values of commitment to family, presumably on a universal basis. History shows, however, that any privileging of the family applies in a

⁵⁹ *Immigration Regulations*, SOR/97–145 s. 4; SOR/98–270, s. 2.

⁶⁰ See *Immigration Act*, *supra* note 15 at s. 77(3.01, 3.1) where certain exceptions are set out. .

⁶¹ This is consistent with *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 [hereinafter *Benner*].

⁶² Very limited rights to judicial review of other decisions under the *Immigration Act* are available with leave of the Federal Court of Canada.

⁶³ *Kahlon v. Canada (Minister of Employment and Immigration)* (1989), 7 Imm. L.R. (2d) 91 (F.C.A.).

⁶⁴ *Immigration Act*, *supra* note 15 at s. 77(3).

⁶⁵ See *Deol*, *supra* note 39 at 7, where the Federal Court of Appeal held that the Appeal Division “failed to take into account, in particular, the nature of [the applicant’s] condition, [an intellectual disability and] the psychological dependencies it engenders.”

restricted fashion.⁶⁶ It is therefore not surprising that the privilege is not available to families that have a disabled relative.

B. Which Families are Privileged?

Historically, whether a particular family has been privileged by the immigration system has depended on three factors: race, wealth, and the definition of the relationships that constitute family.

Racial preferences in Canadian immigration policy have been implicit in rules about country of origin,⁶⁷ or prohibitions against members of certain groups. Reasons for the prohibitions have included “[p]eculiar customs, habits, modes of life and methods of holding property, and probable inability to become readily assimilated.”⁶⁸ The particularly onerous rules for Asians are well-known.⁶⁹ Separate legislation governed Chinese immigration initially, but particularly oppressive rules for Asians continued to permeate the immigration system.⁷⁰ Racially based rules for individuals were reiterated in rules relating to families, and receded only gradually over time. In 1954, the harsh exclusion of Asians from landing in Canada was relaxed for families as long as the Canadians could support any dependants.⁷¹ A 1956 amendment permitted Canadian citizens or permanent residents to sponsor certain family members from a large number of countries but continued to exclude certain Asian countries.⁷²

⁶⁶ See D. McIntosh, “Defining ‘Family’: A Comment on the Family Unification Provisions in the Immigration Act” (1988) 3 J.L. & Soc. Policy 104; See also K. Post, “Excessive Demands on Health and Social Services: s. 19(1)(a)(ii) Immigration Act: What is the Standard to Sponsor Infirm and Elderly Parents?” (1992) 8 J.L. & Soc. Policy 142.

⁶⁷ Until the late 1950s, admissibility criteria included exclusions, restrictions or special requirements that related to country of origin. For example, the ‘Norms of Admissibility’ established in the *Immigration Regulations* of 1954 stipulated that any British subject, or Irish, American, or French citizen with the means to maintain himself until he secured employment was admissible. To immigrate from any other part of the world was much more difficult. See Wydrzynski, *supra* note 35 at 55.

⁶⁸ *Immigration Regulations*, SOR/50-232, s. 4.

⁶⁹ See *Chinese Immigration Act*, R.S.C. 1906, c. 95, s. 7 which sets out the well-known head tax for Chinese persons and required that a permit and a bill of health be obtained in order to land. Section 9 limited the numbers of Chinese immigrants that any vessel could carry.

⁷⁰ See the 1927 *Immigration Act*, *supra* note 32 at c. 93 where the preamble states: “due to the unemployment conditions now existing in Canada ... all Asians prohibited except wives or unmarried children under 18.” Before this, “immigrants of any Asiatic race” were prohibited. As country specific prohibitions against immigration were lifted, the relaxed rules did not apply to Asians.

⁷¹ *Immigration Regulations*, SOR/54, s. 20(2). “Only Asians allowed if the wife, husband or unmarried children of a Canadian citizen in a position to care for dependents”.

⁷² See *Immigration Regulations*, SOR/56-180, s. 20(c). The countries included Egypt, Israel, Lebanon, Turkey, any country of Europe, North, South and Central America. The country

Eventually a further amendment permitted family sponsorships by Canadian citizens of persons from India, Pakistan or Ceylon,⁷³ and subsequently sponsorships by permanent residents.⁷⁴ Ultimately, explicit references to country of origin were removed from the rules about family sponsorships.⁷⁵

Exactly who counts as a close family member is based on the North American ideal of the family: a nuclear unit with family members economically dependent on one another but independent of the state.⁷⁶ The first formal definition of "family" appeared in the *Immigration Act 1927*⁷⁷ as, "father and mother, and children under 18 years." This permitted a Canadian citizen or admissible person to bring, or send for, his father or grandfather over 55 years of age, his wife, his mother, his grandmother, or his unmarried or widowed daughter, all of whom needed to be illiterate. Subsequent definitions of family maintained the vision of the nuclear family but were more explicit about the family as an economic unit. For example, *The Immigration Act 1952* s. 2(g) defined family as "the father and mother and any children who, by reason of age or disability, are in the opinion of an immigration officer, mainly dependent upon the head of the family for support." Beginning in 1978, Canadian citizens or permanent residents over the age of 18 could sponsor children, parents, grandparents and other relatives if they were of a certain age or if they were economically or otherwise dependent on the sponsor.

Over time there have been many changes to the definition of family member. Despite these changes the immigration system has steadfastly maintained a conservative vision of the family. Neither common-law nor same-

list changed numerous times over the years, sometimes dropping and adding back the same country. Early on there was an implicit assumption that immigrants would be coming from Europe. The languages to be used in notice posting in the *Immigration Act*, R.S.C. 1906, c. 93, s. 44 were "English, French, Swedish, Danish, German, Russian and Yiddish, and such other languages as ordered from time to time."

⁷³ At first only 150, 100, and 50 persons per year from these countries were permitted landing, respectively.

⁷⁴ *Immigration Regulations*, SOR/64-327.

⁷⁵ The immigration system accomplishes the country of origin/racial preference goals through other means, much like the continued exclusions of people with disabilities, by substituting the question of cost for offensive labels. Since family class applications are processed outside of Canada the small number of visa offices in a large country like India effectively restricts the number of applications that may be processed. Restricting the number of visas that are given to any one office accomplishes the same thing.

⁷⁶ Much feminist literature has explored the ideology surrounding economic relationships between family and state. See F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 *Harvard L.R.* 1497; J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992).

⁷⁷ *Supra* note 32.

sex partners have been defined as spouses⁷⁸ and polygamous marriages, legal in many third world countries, have not been recognised. Adoptions are limited to persons who are under 19 years of age, and adopted children can sponsor their adoptive parents but not their biological parents. All other relationships exist at the margins of family. Family class members with disabilities are similarly marginalised.

IV. PROBLEMS WITH THE CURRENT ACT

UNDERLYING THE IMMIGRATION SCHEME is a set of ideas about disability that gives shape and justification to keeping people with disabilities out of Canada. The rationale for excluding relatives with a disability relies on the familiar medical and economic models of disability that dominate public policy in Canada.⁷⁹ These models share several important characteristics. First, the 'problem' of disability is located in the difference or deviance of the individual rather than in a social or political context. Secondly, experts are relied upon to remedy the problem of the individual. The assumption is that the expertise is objective, neutral and value-free. As a result, a decision to treat a person with a disability as a sick and costly stranger to Canada is seen as correct, unbiased, and in the public interest, resting upon "... an ideology of non-ideology."⁸⁰

In this section I analyse the ways in which medical and economic models of disability function to legitimate the exclusion of family members with a disability within the Canadian immigration scheme. While I point out various aspects of these models that are illogical or internally inconsistent, the critique is not intended to correct or fine-tune the ways that medical and economic expertise should be used to make decisions. I argue that these systems are inappropriate models upon which to decide questions of family unification. The more relevant perspective is a social model of disability that focuses on the societal context in which persons with disabilities live.⁸¹

A. Over-reliance on the Medical Model

Clearly, doctors have enormous power in deciding admissibility. Despite the duty of the visa officer to consider all relevant factors, the result of the medical examination is by far the most important information, often the only information upon which s. 19(1)(a) refusals are made. Many cases have said that the

⁷⁸ However, opposite sex common-law spouses residing in a conjugal relationship for one year or more may be admitted with an undertaking and if the LICO guidelines are met.

⁷⁹ Bickenbach, *supra* note 11.

⁸⁰ L. Philipps, "Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy" (1996) 11 Can. J. Law & Soc. 141 at 149.

⁸¹ Oliver & Barnes; Marks & Jones, *supra* note 13.

correctness of the medical diagnosis is the exclusive prerogative of the medical officer.⁸² In law, however, the ultimate decision of whether a person is admissible to Canada rests with a visa officer or an immigration officer⁸³ who has a duty to act fairly and to ensure that the medical officer's opinion is reasonable.⁸⁴ A visa officer may determine that the medical officer's opinion was unreasonable because it was incoherent,⁸⁵ framed in terms of possibility rather than probability,⁸⁶ or based on irrelevant considerations.⁸⁷ Although the phrases "medical refusal" or "medical inadmissibility" are not found in the Act, these widely used terms reflect the common understanding that all other opinions are quite insignificant.

A medical model of disability views a person with a disability as someone who is 'deficient' or 'damaged,' and where possible, needs fixing by professionals. Consistent with this model, the Canadian immigration system places doctors in a position to evaluate the extent of the damage, and to estimate the extent of services that will be necessary. This medical orientation is relevant not only to assess an individual, but also to provide a context for public policy.⁸⁸ For example, the power of medical discourse to control disease or to contain deviance may lead to quarantine or institutionalisation.⁸⁹ The same result, that is, banning the different or 'sick' person from our society, results in immigration exclusions.

As in other areas of disability policy, doctors are accepted as the appropriate professionals to decide whether, on the basis of a disabling condition, someone is

⁸² *Canada (Minister of Employment and Immigration) v. Jiwanpuri* (1990) Imm. L.R. (2d) 241 (F.C.A.). See also *Ajanev*, *supra* note 51. However, the medical officer is bound to exercise discretion. That is, to choose among alternatives rather than simply to follow policy found in the Handbook without considering the individual case. See P. H. Auerbach, "Discretion, Policy and S. 19(1)(a) of the *Immigration Act*" (1990) 6 J.L. & Soc. Policy 133.

⁸³ Depending on whether application is made outside or within Canada.

⁸⁴ *Gingiovenanu v. Canada (Minister of Employment and Immigration)* (1995), 31 Imm. L.R. (2d) 55 (F.C.T.D.); *Jafari v. Canada (Minister of Citizenship and Immigration)* (1995), 35 Imm. L.R. (2d) 140 (F.C.T.D.). See also *Ismaili*, *supra* note 48.

⁸⁵ *Gao*, *supra* note 46.

⁸⁶ *Hiramen v. Canada (Minister of Employment and Immigration)* (1986), 65 N.R. 67 (F.C.A.).

⁸⁷ *Ahir v. Canada (Minister of Employment and Immigration)* (1983), 2 D.L.R. (4th) 163 (F.C.A.).

⁸⁸ Doctors contribute to public policy in promoting "a clear agenda for social action, namely prevention, cure, containment, pain management, rehabilitation, amelioration, and palliation." Bickenbach, *supra* note 11 at 12.

⁸⁹ See M. Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, trans. R. Howard (New York: Vintage Books, 1965); See also Goffman, *supra* note 26.

eligible for a particular entitlement.⁹⁰ As gatekeepers to a wide range of public benefit schemes,⁹¹ doctors serve to protect or to redeem state interests, which in current times are defined narrowly along fiscal lines.⁹² In the case of immigration the dynamics are somewhat different—determining that a person is disabled disentitles the individual from the benefit of immigration rather than entitling the person to a benefit like a pension. The central role of the doctor, however, is unchanged.

Even as gatekeepers, the powerful position of doctors within the immigration system is illogical. First, the legislative criterion of whether a person will place excessive demands on health care and social services is ultimately economic. Since medical officers have no special training, experience, or expertise in the subject of economics, they are not the appropriate experts to answer questions in this field. In particular, economic questions about the relationship between disability and social services or disability and labour market integration are outside the ambit of medical expertise.⁹³ Secondly, doctors in immigrant-producing countries of the world practice medicine in very different health care, social service, and legal regimes than those in Canada. As a result, doctors in the country of origin of the applicant are ill-equipped to gauge the complex questions of whether a person may place excessive demands on the system.

More important than the issue of how to determine the question of excessive demand or who should have the authority, I argue that the financial assessment of a medical condition is simply not relevant to a family sponsorship. If immigration policy recognises the need to unify families, the "... social need should not have to be screened through the filter of medical values and

⁹⁰ See D. Stone, *The Disabled State* (Philadelphia: Temple University Press, 1984) for a comprehensive description of the role of physicians in the development of American disability benefit programs.

⁹¹ The role of doctors is not restricted to state benefits. Their expert decisions play the same role to determine whether an individual is eligible for private insurance benefits.

⁹² See R. Hayman, "Presumptions of Justice: Law, Politics and the Mentally Retarded Parent" (1990) 103 *Harvard L. R.* 1202. Hayman uses the terms "remedy" and "redemption" to refer to two alternative legal responses to differences in intellectual capacity. A remedial approach focuses on society's injustice towards persons who are mentally disabled. In contrast, a redemptive approach views mentally disabled persons as biology's injustice toward society.

⁹³ In *Thangarajan v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1024 online: QL (IMRE), the Federal Court of Appeal found that special education was included in the meaning of health or social services. A child with "moderate mental retardation" was inadmissible under s.19(1)(a)(ii). The reasoning was that education services for people with disabilities within the public education system occupy the role previously played by institutions in the lives of persons with disabilities. The decision reflects a complete failure to appreciate the nature of the community living movement.

authority."⁹⁴ Because the authority of doctors in the immigration scheme exists in an increasingly medically oriented society, where medicine has become an instrument of social control, its inappropriateness is not readily apparent.⁹⁵ This is especially true in the immigration system because the authority of the medical model is interwoven with an economic model of disability.

B. Hypocrisy of the Economic Explanation for Exclusion

An economic model of disability aims to increase the participation of people with disabilities in the labour force in order to reduce the social cost of disability. This model focuses on functional adaptation rather than cure, and emphasises education, job-training, and employment programs, so that people with disabilities are less reliant on public benefits.⁹⁶ The premise of the economic model is that the state has obligations to its own members. If a person is rehabilitated in a way that allows the individual to get a job, the person will not seek public assistance.

However, where a person with a disability is considered an outsider to Canada, the perceived cheapest solution is to exclude the person altogether. This economic rationale for exclusion is closely linked to the question of employability. Because new immigrants with disabilities are expected not to have paid jobs, they are expected to seek support from the state. For this reason, immigration doctors are clearly encouraged, if not instructed explicitly, to comment on an individual's employability.⁹⁷ Frequently however, assessments in the cases were grossly inaccurate. Often the medical opinion that a person was unemployable was in stark contradiction with the fact that a person was working at such jobs as manufacturing,⁹⁸ in a grocery store, a bookstore and with farm

⁹⁴ S. Sherwin, *No Longer Patient: Feminist Ethics and Health Care* (Philadelphia: Temple University Press, 1992) at 194.

⁹⁵ I. Zola, "Medicine as an Institution of Social Control" (1972) 20 Soc. Rev. 487.

⁹⁶ Traditionally rehabilitation stressed that a person was to be trained or educated for a job. The more modern view, consistent with the concept of the duty to accommodate in human rights law, is that the job should be modified for the person's needs or abilities.

⁹⁷ An example in the *Medical Handbook* illustrates the point in describing a:

30 year old construction worker ... now wheelchair dependent ... has not been employed since his accident ... has had two readmissions to hospital for decubitus ulcers ... outpatient treatment for urinary tract infections. This profile suggests a non-compliant individual. *He is unlikely to become a productive citizen without major expenditures for vocational training and further rehabilitation.* (Profile H1, D4, T4, S1, E5, M7) [emphasis added].

⁹⁸ *Huynh v. Canada (Minister of Employment and Immigration)*, [1994] I.A.D.D. No. 1003 online: QL (IMRE).

implements,⁹⁹ in domestic labour,¹⁰⁰ or producing spare parts for bicycles.¹⁰¹ Despite such direct evidence to the contrary, a cynical view continued to exist that people with disabilities, especially mental disabilities, could not be gainfully employed or could not contribute meaningfully in other ways. These attitudes were consistent with earlier legislation that banned absolutely people with mental disabilities. What accounts for the incongruity between the fact that people were working and decisions that they were incapable of working? A charitable explanation is that medical officers thought that people with disabilities could only work within the comfort and protection of their home country and culture, and they would not be able to compete or survive in the Canadian labour force. Another possibility is that medical officers could not see beyond the stereotypes of mental disability, or these activities were not valued as real jobs.

In addition to the common misinterpretations of facts in these cases, the link between employability and disability is inconsistent with the general notion of family class in the Act. Since economic immigration clearly presumes the person is able to support him/herself, the question of employability is relevant. However, family class immigration assumes that different family members have different economic roles. Not every member will be self-supporting (children are an obvious example). Where a member of the family class applies as a dependent, an applicant is not to be assessed on the basis of economic self-sufficiency.¹⁰²

The relationship between employability, family, and disability demonstrates a shifting line between when matters are considered a private family obligation and when they are a state responsibility.¹⁰³ As described above, the state requires the able family to assume care of a new immigrant relative, usually for a ten-year period. The new (able) immigrant is not entitled to public assistance for a lengthy period on the understanding that support of the new relative is a private family responsibility. In cases of disability exclusions however, neither the applicant nor the sponsor can make a pledge not to draw on public

⁹⁹ *Dewan v. Canada (Minister of Employment and Immigration)*, [1994] I.A.D.D. No. 690 online: QL (IMRE).

¹⁰⁰ *Khan v. Canada (Minister of Employment and Immigration)*, [1995] I.A.D.D. No. 1042 online: QL (IMRE).

¹⁰¹ The applicant in this case worked 6 days each week from 7:00 A.M. until 5:00 P.M. daily. *Chung v. Canada (Minister of Employment and Immigration)*, [1994] I.A.D.D. No. 318 online: QL (IMRE).

¹⁰² *Ng v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 53 online: QL (IMRE).

¹⁰³ For an overview of the literature in this area see S. Boyd, "Challenging the Public/Private Divide: An Overview" in S. Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997).

benefits,¹⁰⁴ an obvious departure from the usual policy requiring the sponsor's ten year undertaking of support. Regardless of the strength of the proposed arrangements, the person with a disability cannot "opt out" of public health care and social service systems. That is, the state will not permit the family to assume the responsibility that the state insists upon if the new immigrant is able.

I am not, however, suggesting that the test for admissibility be whether the sponsor or applicant can guarantee the necessary financial means, so that the family could opt out of the public health care and social services systems. Clearly this would allow wealthy families to bring their disabled family members when poorer families could not. My point is that there is a more fundamental rejection of people with disabilities than the economic rationale would suggest. Even when a family provides good evidence that it will not burden the public purse, Canada is unwilling to accept the person with a disability. The elasticity of family ideology, and the distinction between the private and public, demonstrates how people with disabilities "... often inhabit a unique space that hovers stateless, somewhere between the private and public sphere while they remain a burden in both."¹⁰⁵

V. PROPOSED CHANGES: WILL THEY MAKE A DIFFERENCE?

DURING THE 1990S THERE have been two significant proposals to alter the medical inadmissibility provisions: the un-proclaimed 1992 amendments and recommendations contained in *Not Just Numbers*. First, I argue that the medical and economic models continue to underpin the 1992 amendments. As a result they are no improvement for families with a disabled relative. Secondly I would encourage the government to adopt of the central recommendation in *Not Just Numbers*, the elimination of the excessive cost provision for spouses and dependants. While this major recommendation would be a welcome step, the net effect would still be uncertain.

A. 1992 Amendments

As amended, s. 19(1) would make inadmissible:

- (a) persons who in the opinion of a medical officer concurred in by at least one other medical officer, are persons
 - (i) who, for medical reasons, are or are likely to be a danger to public health or to public safety, or

¹⁰⁴ *Brito v. Canada (Minister of Employment and Immigration)*, [1993] I.A.D.D. No. 30 online: QL (IMRE); *Choi*, *supra* note 40.

¹⁰⁵ H. Meekosha & L. Dowse, "Enabling Citizenship: Gender Disability and Citizenship in Australia" (1997) 57 *Feminist Rev.* 49 at 56.

(ii) whose admission would cause or might reasonably be expected to cause excessive demands, within the meaning assigned to that expression by the regulations, on health or prescribed social service;

“Excessive demand” would mean:

(a) in the case of an immigrant, demands that the immigrant may reasonably be expected to make on health services and social services referred to in s. 22.01, the costs of which, as determined in accordance with the applicable costs or standardized methodology set out in the Medical Officer's Handbook would, in the five years following the medical examination of the immigrant, exceed five times the average annual per capita costs in Canada of health services and social services referred to in that section, as set out in that Handbook.¹⁰⁶

The new criterion for medical exclusions would place each person in a diagnostic category and project an individual's five-year potential cost to health and social services on the basis of the category. Using a standard technique of health care economics, a statistically “modal Canadian” consumer of the health care and social services system would be used as the starting point to decide whether the prospective immigrant is expected to consume too great a share of scarce resources.

The amendments were introduced for two reasons: to clarify the phrase “excessive demands,” and to address the obvious possibility that s. 19(1)(a)(ii) of the Act violates s. 15 of the *Charter* by its use of “disability.” In responding to criticism that medical officers had too much discretion and power in the system, the individual physician would have a restricted role in assessing the question of excessive demand. “Excessive demand” would be a standard tabulation by diagnosis. While reducing the discretion of the individual doctor may go some way in promoting consistent standards, the standardisation does nothing to remove the systemic impediments for families sponsoring relatives with a disability. In the new system medical categories would be absolutely decisive, so the nuances of the individual situation would be irrelevant. Particularly in cases of intellectual disability, the new system would be even more exclusionary than the current scheme because diagnosis would be the only factor relevant to the question of excessive demands, a situation reminiscent of the pre-1976 versions of the Act. In *Litt v. Canada (Minister of Citizenship and Immigration)*,¹⁰⁷ a case of an adult dependent with an intellectual disability, the Federal Court found that there was no reasonable expectation that the applicant would make excessive demands on public services because there was no evidence that family support was likely to break down. Under the new scheme the degree of family support may not have any effect.

¹⁰⁶ *Immigration Act*, *supra* note 41.

¹⁰⁷ (1995), 26 Imm. L.R. (2d) 153 (F.C.T.D.).

In the new system, Canada would quantify the limits in public spending that would be devoted to an immigrant with a disability. Even at a purely economic level, however, it would be inadequate to assess social spending solely on a cost basis. Not spending money in the area of family unification may also have costs. For example, excluding a family member with a disability from Canada may result in costs related to health of, or work interruption of, the Canadian sponsor. In other words, any associated costs of family unification should be evaluated as a necessary social investment, the lack of which has associated costs.¹⁰⁸ However, the legitimacy of a rigid cost formula as a criteria for policy reflects a changing view of the Canadian state where social spending is seen as the problem rather than part of the solution to systemic inequities.¹⁰⁹

Equally troubling, this supposedly mathematical and politically neutral formula would be selectively applied.¹¹⁰ Although many other identifiable characteristics could predict that an individual would be expensive, the new legislation singles out a person's disability (although not referring to it directly) as a potential problem that must be evaluated by a medical expert. It is a reflection of the history of stigmatisation and marginalisation of people with disabilities to highlight disability as expensive, while ignoring other traits that could be equally expensive. On an actuarial basis, various categories of prospective immigrants could be expected to draw disproportionately on health care and social service systems. Smokers, people who play dangerous sports, new drivers—all could be expected to make heavy demands on the health care system. Despite the data that these people present higher risks of accessing the systems than the modal Canadian, they would not be inadmissible by virtue of their potential demands.

In short, the new test for excessive demands simply changed the nature of the discrimination from direct to adverse affects discrimination, the more

¹⁰⁸ M. Rioux, "The CHST: From Pathology to Social Investment" in *Roundtables on the Canada Health and Social Transfer* (Ottawa: Canadian Council on Social Development, 1996); S. Day & G. Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998).

¹⁰⁹ See P.M. Evans & G.R. Wekerle, "The Shifting Terrain of Women's Welfare: Theory, Discourse and Activism" in *Women and the Canadian Welfare State: Challenges and Change* (Toronto: University of Toronto Press, 1997).

¹¹⁰ The average or modal Canadian is premised on the conception of a statistical norm. Statistics was not born outside a political context. Developed as "political arithmetic," the first use of statistics was to use data for the "promotion of sound well-informed state policy." A purportedly disinterested applied mathematics was initially designed to serve state interests. In particular, the central insight of statistics, that a population is distributed along a normal curve, is the basis of eugenics. Arguably, it is not so much that statistics made possible eugenics, but that the interests of eugenics shaped the development of the science of statistics. See T. Porter, *The Rise of Statistical Thinking, 1820–1900* (Princeton: Princeton University Press, 1986).

common way that discriminatory practices affect people with disabilities.¹¹¹ Although appearing neutral on its face, the new test would still have a disproportionate effect on persons with disabilities and their families.¹¹² In *Rodriguez v. British Columbia (A.G.)*,¹¹³ the Chief Justice found that the prohibition against assisted suicide violated the equality rights of a person with a disability because she was unable to perform the act by herself. In *Eldridge*¹¹⁴ the Court found that the failure of the British Columbia medical insurance scheme to provide interpretation services for deaf patients was discrimination and violated s. 15 of the *Charter*. It was unlawful to assist either a person with a disability or a non-disabled person to commit suicide but persons without disabilities did not need assistance with suicide. Neither hearing people nor deaf people were provided with interpreters under the insurance plan but hearing patients did not need interpreters.¹¹⁵ In both cases, the violation stemmed from a general rule that had a disproportionately negative effect on people with disabilities.

B. Not Just Numbers

Not Just Numbers: A Canadian Framework for Future Immigration, released in 1997, described the principle of family unification as an “underpinning of Canadian immigration” which “... must continue to serve as a touchstone for measuring the success or failure of our collective effort.”¹¹⁶ The Report recommended that the family class be structured into three tiers.¹¹⁷ Tier one would consist of spouses (including common-law and same-sex partners living together for more than 1 year) and dependant children; tier two would include fiancé(e)s, parents, and where parents are deceased, grandparents; tier three would include relatives or close personal acquaintances of the sponsor’s choice excluding a spouse. In redefining family along these lines, the authors tried to

¹¹¹ See *Ontario Human Rights Commission and O’Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 [hereinafter *Brooks*]; *Eldridge*, *supra* note 1.

¹¹² The fact that not all people with disabilities will be ‘caught’ or disadvantaged by the new provision does not negate the discrimination. See *Brooks*, *ibid.* and *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252. A rule that is discriminatory on the basis of pregnancy is discrimination on the basis of gender despite the fact that not every woman will be pregnant.

¹¹³ [1993] 3 S.C.R. 519.

¹¹⁴ *Supra* note 1.

¹¹⁵ *Ibid.* The Court was aware that *Eldridge* would raise the question of funding foreign language interpreters but this issue was not decided.

¹¹⁶ *Supra* note 1 at 42.

¹¹⁷ *Ibid.* at 46.

strike a balance between a description of family as the traditional nuclear family and a broader, more culturally sensitive definition of family. Although recognising the reality and significance of families that depart from the traditional nuclear form,¹¹⁸ the authors concluded that relationships within the nuclear family were the most significant. They said,

While various cultures place greater or lesser emphasis on the extended family, which includes other relatives, the unit of intimate partners often with minor children, is the core of virtually all societies.¹¹⁹

Based on its conclusion that Tier 1 relationships were the most important, the Report recommended that Tier 1 of the family class be exempt from the excessive cost component of medical inadmissibility. The Report stated:

While the Canadian public must clearly continue to be protected from contagious disease, the excessive cost provision applied to spouses and dependent children is, in our view, inhumane, slow and expensive to administer ... few Canadians would accept that the government separate them permanently from their new wife or new husband, or their six-year old child, on the grounds that they are deaf and mute, or developed cancer or a heart condition.¹²⁰

Certainly, the recommended exemption for spouses and dependent children would be an important improvement. But what the Report gave to these most intimate relationships (by Western standards) it took away from other relationships. All other members of the family class would remain subject to a disability-based excessive cost provision with no details about its definition. The definition of excessive demand would be formulated by a proposed Federal-Provincial Council on immigration and prescribed in a Regulation. Except for a statement that the definition should be transparent and objective,¹²¹ the report gave no further guidelines about what excessive demand would mean. Presumably however, parents and grandparents would be especially vulnerable to the excessive cost provision, as age is correlated with disability. In addition, the Report's recommendation to eliminate the humanitarian or equitable grounds of review compounded the problem. Negative decisions would be reviewed only on the basis of errors of law or fact. Coupled with the recommendation that eliminated the equitable grounds for review, the failure to elaborate the meaning of excessive demand is a serious omission.

¹¹⁸ *Not Just Numbers*, *supra* note 20, quoting from the decision in *Canada v. Mossop* [1993] 1 S.C.R. 544 that "it is the social utility of families that we all recognize, not any one proper form that the family must assume."

¹¹⁹ *Ibid.* at 42.

¹²⁰ *Not Just Numbers*, *supra* note 20 at 50.

¹²¹ *Ibid.* at 111–Recommendation 130.

VI. THE LIBERAL STATE AND DISABILITY-BASED FAMILY EXCLUSIONS

UNDERPINNING BOTH THE CURRENT system and the two major efforts at reform is a basic premise that certain persons are entitled to the benefits of the Canadian welfare state and others are not.¹²² Insiders have entitlements but outsiders do not. With this premise, questions about immigration are extremely problematic. The liberal state is generally viewed as a closed society where an insider is born into a community and will live in it for life.¹²³ While clearly an unrealistic view in an era of wide global migration, this concept of the state is based on the idea that there is a social contract among the insiders, and the outside alien might upset a toughly negotiated set of arrangements. Through their democratic processes, Canadians have developed systems of government and bureaucracy that distribute resources among highly competitive claims of groups in society. Adding yet another (outside) group threatens any equilibrium.

The immigration system is one way that the Canadian state articulates rules about how an outsider can become an insider. But in addition, the immigration system is a means of further distinguishing insiders from outsiders through a policy "... made by US but [applied] to THEM."¹²⁴ Although it regulates outsiders, the policy is concerned with the interests of Canada and incorporates and sustains a view of Canada by distinguishing *us* from *them*.¹²⁵ Dauvergne describes the distancing process like this:

By presenting a coherent Canadian identity, immigration discourse reflects—like a photographic negative—a portrayal of those who are other. They are less prosperous and their traditions are non-democratic. (Hence concern for their effect on democratic values.) They come from places that are unsafe and have inferior health care and legal

¹²² I use the term welfare state broadly to include legislation and policies that redistribute status, rights and life opportunities. This definition clearly includes immigration policies, as well as those programs that more explicitly assist those "in need." See L. Gordon, "The New Feminist Scholarship on the Welfare State" in L. Gordon, *Women, the State and Welfare*, (Madison: University of Wisconsin Press, 1990) at 9.

¹²³ J. Rawls, "Justice as Fairness: Political Not Metaphysical" (1985) 14 *Phil. & Publ. Affairs* 223.

¹²⁴ C. Dauvergne, "Beyond Justice: The Consequences of Liberalism for Immigration Law" (1997) 10 *Can. J.L. & Juris.* 323 at 332.

¹²⁵ A similar view is expressed in *Ho v. Canada (Minister of Employment and Immigration)* (1989), 8 *Imm. L. R. (2d)* 38 (F.C.T.D.) at 40, but with a conclusion that is rather dubious:

It is important to bear in mind that Parliament's intention in enacting the *Immigration Act* is to define Canada's immigration policy both to Canadians and to those who wish to come here from abroad The purpose of the statute is to permit immigration, not prevent it.

systems. (Hence the “uniqueness” of Canadian health and legal systems.) They seek all the good things we already have and they have no rightful claim to them.¹²⁶

Family members who live in other countries are subject to the same distancing process in immigration discourse. Dauvergne describes the marginalisation of family unification as follows: “[t]he objectives of the Act portray Canadians as humanitarian, prosperous, orderly people who sometimes have non-Canadian relatives.”¹²⁷ The immigration system thus conveys inconsistent messages about members of the family class, contradictions that are intensified when the relative has a disability. The immigrant already defined as an outsider is made more of an outsider on the basis of disability.

The problem with this conceptualisation is that the insider-outsider distinction is presented as a dichotomy, although it is more useful and realistic to conceptualise the insider-outsider dimension along a continuum. Within Canada, for example, people occupy a range of immigration statuses and their entitlements vary widely. People within one category may be eligible for provincial health benefits in one province and ineligible in another. Exactly when a person may obtain an employment authorisation and whether the employment authorisation is ‘closed’ (having to work for a particular employer) or ‘open’ (working for any employer) is almost incoherent.¹²⁸ At least some differences in entitlements reflect the degree to which a person is considered an insider. For example, permanent residents (very much insiders) may sponsor overseas relatives although they are not yet citizens. Refugee claimants waiting determination of their claims (still outsiders) are covered by federal health benefits that may be inferior to provincial health benefits.¹²⁹

Along a continuum, family class immigrants are more insiders than outsiders because of the existing connection to their sponsor in Canada. As outlined earlier, an indication that family class immigrants are more insiders than outsiders is the unique appeal right that belongs to the sponsor in Canada. However, when the family class applicant has a disability, the immigration system, supported by dominant models of disability, pushes the application toward the outsider end of the insider-outsider continuum.

In my view, the vision of a disabled relative as an outsider is not supported by Canada’s formal position on disability in other legal spheres. Because the specific goals of immigration policy may be contradictory and the general purpose so vague, other indicia are needed to interpret what is meant by the

¹²⁶ Dauvergne, *supra* note 124 at 334.

¹²⁷ *Ibid.* at 333.

¹²⁸ See D. Galloway, “Strangers and Members: Equality in an Immigration Setting” (1994) 7 *Can. J.L. & Juris.* 149.

¹²⁹ See S.M. Ion, “Refugee Claimants: What They Get and What They Don’t” (unpublished paper on file with the author).

general objective, "to promote the domestic and international interests of Canada." Two important aides to interpretation are the numerous international instruments to which Canada is a signatory¹³⁰ and the values underlying the *Charter*. Both reflect Canada's commitment to the rights of persons with disabilities.¹³¹

The particular importance of the *Charter* for immigration purposes is expressed explicitly in s. 3(f) of the *Act* that requires a non-discriminatory admission policy as a constitutional imperative. It states the need:

[t]o ensure that any person who seeks admission to Canada on either a permanent or temporary basis is subject to standards of admission that do not discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*.

Donald Galloway points out that there is a great ambiguity in interpreting what this prohibition against discrimination means in an immigration context because the standard of comparison is ambiguous.¹³² Does it prohibit discrimination of applicants in comparison to other applicants, or of applicants in comparison to those who are already members of Canadian society?

While the meaning of discrimination may be difficult to interpret as applied to independent immigrants, the prohibition is much clearer in family sponsorships. If a family class application is refused because the overseas relative has a disability, the relevant comparison is to another family sponsorship where the overseas relative does not have a disability. The family with the disabled relative is denied the benefit of family unification outlined as an objective of immigration policy, while the family that sponsors a relative without a disability receives the benefit.¹³³ That is, the family with the disabled relative is denied

¹³⁰ *Declaration of the Rights of Disabled Persons*, *supra* note 7.

¹³¹ Although some difference of opinion exists, there is high authority for using international law to interpret underlying *Charter* values. See *Reference Re Public Service Employee Relations Act* (1987), 38 D.L.R. (4th) (S.C.C) in which Dickson C.J.C (in dissent but not on this point) stated at 185 that,

[T]he *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

See also *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.), on interpreting legislation in a manner consistent with the *Charter*.

¹³² Galloway, *supra* note 128 at 160.

¹³³ I am not arguing that there is a constitutional right to family re-unification. This point is explored but not advanced by P.L. Bryden, "Fundamental Justice and Family Class Immigration: the Example of *Pangli v. Minister of Employment and Immigration*" (1991) 41 U.T.L.J. 484.

equal benefit of government policy.¹³⁴ In *Benner*¹³⁵ the Supreme Court of Canada described the immutable quality of a familial relationship with respect to an equality claim; human rights law has recognised that discriminatory effects may spread from one individual to another, especially in families.¹³⁶

If the *Charter* is viewed as not just an aspect of the social contract, but a statement of a national commitment to certain values, including providing equality for people with disabilities, the *Charter* signals the moral priorities of Canada.¹³⁷ In a similar sense, immigration rules that govern the ways an outsider becomes an insider reflect the moral priorities of the nation. Using the example of race, Galloway¹³⁸ argues that we recoil at racist admission criteria not only because of their significance to racial minorities already in Canada, but also because Canada would be treating outsiders as less than human. In doing so, all Canadians would be demeaned, not just Canadians who happen to share a particular racial characteristic. In *Vriend v. Alberta* the Supreme Court of Canada said much the same thing:

¹³⁴ In its first equality case, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174, the meaning of discrimination under s. 15 of the *Charter* was defined as having:

[T]he 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. [emphasis added]

¹³⁵ *Benner*, *supra* note 61. While being cautious not to create a general doctrine of “discrimination by association” the Court says this at 362:

The link between child and parent is of a particularly unique and intimate nature. A child has no choice who his or her parents are. Their nationality, skin colour, or race is as personal and immutable to a child as his or her own.

Put another way, by giving Mr. Benner standing to raise this claim, the Court indicates that recognising a parent child relationship may be necessary to give effect to the full ambit of discrimination.

¹³⁶ The Federal Court of Appeal has found that the Canadian Human Rights Commission had jurisdiction to investigate a complaint when an individual was denied an opportunity to sponsor a family member because sponsoring a family member is a “service ... customarily available to the general public.” See *Singh v. Canada (Minister of External Affairs)*, [1989] 1 F.C.R. 430 (F.C.A.); see also *New Brunswick School District No. 15 v. New Brunswick (Human Rights Board of Inquiry)* (1989), 100 N.B.R. (2d) 181 (N.B.C.A.). Here the father of a child enrolled in a school district was a proper complainant in alleging that the school district violated provincial human rights law by retaining a teacher who published anti-Semitic statements.

¹³⁷ It would be wrong to imply that there is complete agreement on these matters by all Canadians. However, existing law and policy on such issues as disability and multiculturalism must be taken as the prevailing views held out to the world.

¹³⁸ *Supra* note 128 at 160.

It is easy to say that everyone who is just like "us" is entitled to equality. Everyone finds it more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy. Yet, so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy. Yet if any enumerated or analogous ground is denied the equality provided by s.15 then the equality of every other minority group is threatened.¹³⁹

Preventing family unification because a family member has a disability has the same deleterious effect on the moral face of Canadians. However, the unfairness of disability exclusion may be less obvious than racially based rules because accommodations are frequently required to ensure the equality rights of people with disabilities. Since such measures often cost money, an economic justification obscures unfairness.¹⁴⁰

If viewed as a human rights issue both for the relative outside of Canada and for the Canadian family, the following principles should be applied to analyse immigration policy, resulting in the elimination of all disability-based exclusions related to cost. First, the benefit of family unification is just as important to families where a family member has a disability as it is to other families. Secondly, people with disabilities are human beings with the potential to enrich the lives both of their families and the fabric of Canadian society.¹⁴¹ Thirdly, unification of families where there is a family member with a disability is consistent with the immigration goal of upholding Canada's tradition with respect to the displaced and persecuted.¹⁴² Finally, a policy of family unification that is irrespective of abilities is consistent with underlying values of the equality provisions of the *Charter*.

¹³⁹ [1998] 1 S.C.R. 493.

¹⁴⁰ Whether the courts will accept an economic explanation for limiting *Charter* rights is an enormous question, and beyond the scope of this paper. In general, however, the economic justification has not been successful. The following cases exemplify the trend: *R. v. Askov*, [1990] 2 S.C.R. 1119 at 1124 (lack of institutional resources not a justification for unreasonable postponement of trials); *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 218 (refugee claimants denied right to hearing) (Wilson J. rejected the government's argument that the cost of hearings was too expensive); *Eldridge*, *supra* note 1 (cost of providing interpreters not a sufficient justification for failing to provide signing interpreters which violated equality rights of persons with disabilities).

¹⁴¹ In many cases, a contribution will be made through meaningful work, either paid or unpaid, with support or without. In other cases, people with disabilities teach us the values of interdependence, community, and compassion.

¹⁴² Often the potential contribution of a person is unrealised and unpredictable due to the horrific conditions for people with disabilities in their country of origin.

VII. CONCLUSION

UNIVERSAL HEALTH CARE, income replacement, social assistance programs, and access to education all are features of a national political and economic system that reflect the moral priorities of Canadian life. In part, Canada's identity arises from this country's post-war development of the social safety net, making people accustomed to looking to the state for benefits.¹⁴³ The Canadian state, however, is currently undergoing a massive transformation characterised by cutting or privatising services that Canadians have come to expect from the state. In response to this new reality, attitudes are changing about the appropriate role of the state as a source of benefits.¹⁴⁴

The economic explanation for keeping people with disabilities out of the country resonates with the current view that the social safety net in Canada is crumbling and admitting more people would result in fewer benefits for the rest of the population. Therefore, we can no longer afford to continue our generous immigration policies. The medical and fiscal justifications for keeping people with disabilities out of Canada are congruent with the current political climate but undermine the moral values of the nation. Lucienne Robillard's suggestion to remove disability-based obstacles to unification of close family members would right a significant injustice.

¹⁴³ L. Panitch, ed., *The Canadian State: Political Economy and Political Power*, (Toronto: University of Toronto Press, 1977).

¹⁴⁴ J. Brodie, "Canadian Women, Changing State Forms, and Public Policy", in J. Brodie, ed., *Women and Public Policy* (Toronto: Harcourt Brace, 1995) at 1.

