

## **The Medical Inadmissibility of Intellectual Disability: A Postcolonial Reading of Canadian Immigration Systems**

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This article builds upon existing critiques of Canada's immigration system by focusing on the medical inadmissibility of young people labelled with intellectual disabilities. In considering how the Canadian state regulates applications for permanent residency, it explores discourses and practices of citizenship which invoke mutually-constituting identity markers such as disability and race. A close reading of case studies involving family applicants, demonstrates how immigration policies and legal systems frame the needs of young people labelled with intellectual or 'profound' disabilities as a burden to Canadian society. Individuals who were initially denied admission to Canada due to their diagnostic label, experience disability-related discrimination in different ways depending on the role of their perceived racial, gender, and class identities, among others. The individuals considered in this study navigate intersectional identities and ableist legal systems in their efforts to resist discrimination and win a review of their residency applications. This analysis will show that applicants are forced to work through the logic of medical assessment processes to favourably position their children within impairment hierarchies which rank intellectual disability as 'too disabled' to be admissible.

**Keywords:** Immigration; Medical Inadmissibility; Canadian Citizenship; Intellectual Disability; Neocolonialism; Settler Colonialism; Eugenics.

### **Introduction**

Canadian conceptions of citizenship have changed over time but have nevertheless consistently identified and excluded individuals based on perceived intellectual (in)capacity and scientifically-determined notions of subjecthood. Viewed within this context, the medical inadmissibility of immigrants with disabilities is not a new phenomenon. In fact, medical assessments of moral, intellectual and economic worth closely overlapped with and were built into Canada's white settler colonial project from the very start. The invention of legal and medical disciplines for measuring deviations from historically contingent norms allowed

dominant groups to frame their targets as biologically and intellectually inferior (see Wolfe, 1999; Chunn, 2002). At one time, for example, craniology was employed, and at another, IQ testing was the favoured ‘scientific’ sorting method. The specifics of the techniques have indeed changed and continue to change, but their underlying goal – that is to root out intellectual, moral, and economic deficiency – has remained the same.

It has been well-established that the category of disability interacts closely with colonial and racist attitudes through medical discourses in these arenas, leading to the establishment of racial hierarchies and violent treatment, including the deportation, confinement and forced sterilization of First Nation, immigrant, racialized, and disabled individuals in Canada (see for example McLaren, 1990; Rioux, 2001; Chunn, 2002; Dyck, 2013; Malacrida, 2015). Pioneering studies have opened up the issue of disability and immigration for discussion and laid important groundwork (Menzies, 1998; 2002; Hanes, 2009; El-Lahib and Wehbi, 2011; Reaume, 2014; Joseph, 2015; Spagnuolo, 2016). Now, more scholarly and political attention needs to be directed at how this eugenic logic, which denigrates and seeks to eradicate disability as an undesirable form of difference, is still upheld by Canadian immigration policies and by the Canadian courts, and how it contributes to the fraught relationship between disability and citizenship and to the unequal status of people with disabilities currently living in Canada.

In *Absent Citizens*, Michael J. Prince challenges readers to ask, ‘[w]here is the Canadian state in the distribution of social inclusions and exclusions?’ (2009:4). This paper takes up Prince’s question by tracing the distributional role of federal government policy in structuring disability disadvantage, specifically by focusing on immigration law and its various interpretations and contestations in a contemporary context of medical inadmissibility. Parin Dossa (2009), in her study of racialized immigrant women with disabilities, reminds us that even within disability literature, such issues are not well discussed, and immigrants with disabilities remain invisible in ways that reflect their general social devaluation within Canadian society. Dossa’s research helps reveal how medical inadmissibility sustains power imbalances within Canada, as well as between Canada and other nations. As Yahya El-Lahib and Samantha Wehbi (2011) have shown, these practices also deepen North-South divisions that are manifest through colonial legacies on a global scale by distributing what is perceived to be public burden and economic benefit unequal ways. The consequences of medical inadmissibility are therefore far-reaching and relate not only to applicants with disabilities who are denied Canadian citizenship. These practices are symptomatic of a much deeper problem that points to the active role of eugenics and colonial forms of reasoning in shaping oppression on a national and global level; this is done through the systematic exclusion of people with (real or perceived) embodied differences.

The immigration selection process itself dates back to the earliest days of the colonial regime in Canada and arguably, it has always been informed by prejudicial, namely racist and ableist

views, and legitimized through medical discourses that pathologize target groups by labelling them as inherently unfit for citizenship. These exclusions have been based on the production of difference and the assumption that difference, coded biologically as disability, is inferior, dangerous, costly, and ultimately harmful to the health of society. As Prince (2009:15) reminds us, in their long struggle for full citizenship, Canadians with disabilities have framed their inclusion as ‘a challenge to the ideal of citizenship’. Despite this ongoing struggle, Canadian immigration systems continue to employ a eugenic logic that blatantly excludes individuals with disabilities and contradicts legislation at the provincial, national, and international levels which recognize the role of social processes in producing disability – particularly the Canadian Charter of Rights and Freedoms and the United Nations Convention on the Rights of Persons with Disabilities (El-Lahib and Wehbi, 2011:101). This paper seeks to demonstrate that the ideologies underlying such legislative inconsistencies and acts of exclusion are based on subjective views of what constitutes an acceptable and ‘normal’ level of need and mutual dependency. Through a neo-colonial framing of immigration as an opportunity for human resource extraction, ableist assumptions about productivity are able to flourish. These assumptions ignore the existing and potential contributions of disabled people and render disabled applicants ineligible. In El-Lahib and Wehbi’s words, ‘people with disabilities are not seen as potential contributors to the economic life of Canada’ (2011: 99). The category of intellectual disability is especially instructive in this regard, as it invokes one of the strongest stereotypes of dependency and incompetency available in the impairment hierarchy.

Hegemonic notions of normalcy emphasize independence and self-control, and presume that people labelled with intellectual disabilities – perhaps more so than other disabled people – are incapable of any form of self-management (see Kelly, 2016). Stemming from these degrading stereotypes are social control methods and technologies of governance which seek to make perceived intellectual differences visible, manageable, preventable and, ultimately, absent. It is these control methods and eugenic goals which connect the marginalization of Canadian citizens labelled with intellectual disabilities with immigration practices that prohibit people with these diagnostic labels from even entering the country. As a malleable category, citizenship serves as a convenient ideological repository and vehicle for facilitating exclusion, and for that very reason is rife with eugenic strategies for cultivating a so-called healthy national body. Following Ameil J. Joseph (2015) and El-Lahib and Wehbi (2011), this article is attentive to eugenics as tool of colonization and considers the confluence of race and disability in order to appreciate the social role of medicine. A survey of case law during the last ten years indicates that a degree of resistance by ‘inadmissible’ families has taken place through the court systems, with at least 20 cases requesting a judicial review of decisions made by the Department of Citizenship and Immigration between 2002 and 2012. To better understand these acts of resistance, their limitations, and ramifications, this study begins with the neo-colonial reality that shapes medical decision-making in Canada and which is most

explicit in contexts involving North-South interactions and racialized and disabled immigration applicants.

### **Legal ableism in the permanent residency application and appeal process**

Five legal cases involving heterosexual married couples with one or multiple children applying for permanent residency to Canada will be explored throughout this paper. Three of these involve families – Perez, Sapru, and Parmar – applying from racialized countries in the Global South (the Philippines and India); their experiences will be compared with two prominent cases involving three families – de Jong (Dutch citizens), Hilewitz (South African citizens) and Barlagne (French citizens). In each case, immigration authorities assumed that the family's child would cause an excessive demand to Canadian social services due to their perceived intellectual difference. Each of these families, however, was eventually successful in having their application reconsidered. A close reading will show that while these cases challenge initial assessments based on the likelihood that the costs of health and social services required by the son or daughter labelled with an intellectual disability would exceed some 'average Canadian per capita cost' (Immigration and Refugee Protection Regulations, SOR/2002-227, S. R1), their acts of resistance mirror the eugenic logic of their assessors and must be understood through a neo-colonial lens as a form of self-regulation. This is not, however, to hold the applicants to task for complicity in ableist system— instead, it must be recognized that their resistance is closely circumscribed by the faulty legal framework on offer. El-Lahib and Wehbi (2011) make a similar point when they show the limitations of options currently available to applicants. In their words, these options 'are not the answer to the structural exclusion that people with disabilities face as a social group' (ibid: 101). By focusing on intellectual disability, this paper contributes to the growing body of research on disability and immigration systems by probing in more detail the ways in which so-called intellectual deficits operate as symbols of dependency, marking the borders of normalcy and what it means to be human<sup>1</sup>. The sub-human status of people with perceived intellectual differences has informed many racist and colonial undertakings, including the settler colonial citizenship culture that has shaped Canada. A case by case analysis of medically-inadmissible immigrants labelled with intellectual disabilities will demonstrate how this influential disciplinary regime transforms supports that have been previously accorded as citizenship entitlements into a form of charity, exposing the distributional role of the state in creating disability disadvantage.

The current application appeal process is deeply coercive in that it does not provide grounds for contesting the ableist basis of inadmissibility decisions: the grounds which structure disability as burden are at the centre of these decisions but are unchallengeable within the appeal system, serving as a staple premise through which families must operate if they wish for their views to be read as legitimate and intelligible. Conversations about the contested

nature of citizenship as a concept reflecting prejudicial attitudes about disability are noticeably absent from Federal and Supreme court cases concerned with the status of child labelled with an intellectual or severe disability. Along these lines, Aimi Hamraie (2015:112), in their analysis of Foucauldian theories of biopower, ask us to consider ‘how standards of evidence are formed and by whom, and how historically-specific epistemological, political, and institutional discourses produce these intelligibilities’. This analysis considers five such standards of evidence in detail, and signals how disability, race, gender, language, class, and other markers of difference work in mutually-constituting ways to shape perceptions of eligibility and public burden. In order to unpack the eugenic logic at work in these assessments and acts of resistance, core assumptions about intellectual disability and the ‘severity’ of impairment types must be considered within an intersectional analysis of eligibility.

Indeed, an important theme throughout the case studies is the way in which a biomedical framing of disability has informed a crucial part of the application process for prospective Canadian citizens; unfortunately this scientific and deterministic framing of disability has not been problematized by the courts. This, in part, is because the application process itself is structured to support the authority of biomedical claims, closely relying on consultations between a Visa Officer and a Medical Officer aimed at predicting the effects, i.e. the costs of disability on Canadian society; Section 38.1 of the Immigration and Refugee Protection Act (hereafter the Act), empowers the Visa Officer to dismiss applications where a family member is thought to cause excessive demand<sup>2</sup>. In an article introducing their 2009 report to the Council of Canadians with Disabilities, Bakerlaw (2013) refers to this clause as discriminatory, basing their critique on the exclusionary function that the clause plays – and continues to play– in preventing immigrants with disabilities from entering Canada. The following critique takes a case study approach and expands on Bakerlaw’s claim by analyzing the hidden discourses and rationales that are not expressed within the Act. The meaning of excessive demand, as articulated in the *Immigration and Refugee Protection Regulations* (Section R1) is noticeably vague, lending itself to highly flexible and subjective interpretations which allow for disability services to be signalled out. For example, Section R1 defines social services as:

...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; health services are defined as any health services for which the majority of 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 (Immigration and Refugee Protection Regulations, “Definitions”, November 2014).

Along with the openness with which the Act itself can be applied, the power of the Visa Officer is emphasized by the limited space that is opened up for resistance by applicants attempting to respond to charges of excessive demand before these determinations are finalized by the Department of Immigration, Refugees, and Citizenship. This appeal is done through a series of Fairness Letters and Fairness Response Letters – an exchange of information between the Visa Officer, who is responsible for outlining the reasons for inadmissibility, and the applicant, who is invited to provide medical and financial evidence in response to the causes of inadmissibility that may have influenced the Officer’s decision. The terms structuring applicants’ responses are daunting: fairness responses must be submitted to immigration officers in a timely manner (within 60 days) in order for their appeal to be considered<sup>3</sup>. The onus is on the applicants to disprove assessments of burden, and they must make these arguments within the dominant discourses that have been used against them. This is often done by demonstrating ‘less disability’ and by appealing to medicalized and ableist hierarchies. As Thuy Nguyen (2015:77) explains, such strategies ‘reinforce technologies of self-governing, as the individual’s health status becomes a condition for the measurement of his or her productivity in a neoliberal state’. It is important, however, to note that applicants are coerced into these practices, and that their responses are structured by the deep-seated ableism inherent in the application process— a flaw which can be read as a form of procedural unfairness. Furthermore, as Bakerlaw points out, applicants do not have access to free legal services to assist them during any part of this process— neither in shaping their fairness responses, nor in requesting a judicial review. The result, as Bakerlaw observes, is that the impact of Fairness Responses has been low, and ‘the individuals most affected by it [decisions of medical inadmissibility] would not be eligible for publicly funded services, which tend to only be provided for refugee applications, sponsorship appeals, and deportation hearings’ (Immigration Research Report, 2009). It is also likely that the lack of free legal resources disproportionately affects applicants from racialized countries in the Global South.

### **‘Excessive demand’ and a genealogy of dependency**

The following case studies reinforce El-Lahib and Wehbi’s (2011) findings that applicants who are able to resist admissibility decisions of the Department, tend to come from high income brackets and possess a high level of education. These applicants often frame their Fairness Responses through a narrative of efficiency versus dependency, arguing for ways in which the costs of supporting their disabled child can be minimized. Fairness Responses that are rejected, as was the case for all applications discussed in this paper, lead to a request for judicial review that often requires the applicant to make the same argument before the court. The hope is that their application will be granted a review so that it may be reconsidered by a different Visa Officer— an important gain given the subjective nature of the assessments. The strategies represented in these cases reflect the denigration of disability supports as a symptom of excessive need, which resides outside the domain of social

responsibility and social citizenship entitlements. The marginalized and delegitimized nature of these supports reflects process based on what Nancy Christie (2000:158) has characterized as a 'fear of fostering dependency'. Adamoski et al. (2002) have referred to the stigmatization of disability supports as evidence of a regulatory regime that attempts to discipline disability by imagining a body politic while ignoring embodied difference (31).

As the treatment of applicants labelled with intellectual disabilities suggests, the 'normal' use of social services, as defined by the 'average Canadian per capita costs', is a requirement for Canadian citizenship which has excluded people whose needs can be categorized as falling outside of, or in excess of, this historically contingent norm. To address these injustices, Erevelles (2011:158) urges us to 'foreground the historical and material conditions that are instrumental in the social construction of Universal Reason, which is then used to distinguish people with cognitive/severe disabilities from 'normal' citizens'. She further explains that the purpose of this approach is to demonstrate the malleable nature and varying understandings of dependency, and thus to open legal categories to historical analysis rather than simply refine these categories or 'resolve the dilemma of difference as manifested in legal theory' (ibid, 2011: 158). Welfare state historians Linda Gordon and Nancy Fraser (1994) encourage a similar strategy when they contend that changing meanings of the term 'dependency' reveals its regulatory power, pointing to how 'the terms that are used to describe social life are also active forces in shaping it' (311). Stigmatized understandings of dependency, they argue, are attached to certain groups at different times and in different contexts, and construct these groups as 'deviant and superfluous' (ibid, 1994: 312). Following Gordon and Fraser, the interpretation of social services required by people labelled with intellectual disabilities as excessive also functions to stigmatize these supports as evidence of dependency, while presenting other social supports, such as unemployment insurance, as the natural entitlements of citizenship (321).

Within this context, a label of intellectual disability and its attendant supports, signals an abnormal level of need, the fear of which can challenge the prosperous status or other privileges of a wealthy household applying for membership. Edna Chadha (2008:20) points out in her study of House of Commons debates and statutory provisions relating to immigration between 1859-1927, that the rendering of entire families as inadmissible based on the medical disqualification of one member is evidence that 'the overpowering stigma' of disability extends beyond the real or perceived limitations of the individual who embodies the impairment, making entire families inadmissible. Even while many of the requests for judicial review considered below have been successful, it is a success that fails to dislodge disability stigma, as families are coerced into employing ableist assumptions and re-medicalize their children to defend their admissibility status.

While on the surface the granting of an approval for judicial review may suggest advances in thinking about disability, specifically by providing applicants with a chance to contest

medical determinations of excessive burden by encouraging more individualized assessments, a closer reading suggests the opposite: far from enforcing the individualized assessments that the courts claim are being practiced, these decisions uphold categorical thinking that equates disability with burden and that reflects discriminatory thinking towards this group as a whole. The revised standards uphold the goals of a neo-colonial capitalist state seeking to maximize human resource extraction, all the while ‘reinforcing a historical tendency of the North to profit at the expense of the South’ (El-Lahib and Wehbi, 2011: 99). Valuable human resources are those deemed ‘non-disabled’, and the moral and economic standards which govern the selection process excludes the contributions of disabled people. In this scenario, successful appeal cases are those which support the legal gesture of individualizing social costs, as the legal process does not permit a rethinking of issues of social burden, social inclusion, and even more directly, assumptions about disability as burden. In what follows, we will see how successful cases have been based on the provision of evidence of personal financial and non-financial resources and the assurance, by families, that traditional support networks will mediate the supposed costs dependency. Unfortunately, these formulations – which are the only ones available to applicants – perpetuate negative assumptions about the social contributions of disabled people and simply allow for class status or other forms of privilege to mediate disability discrimination, while leaving the principles upon which this discrimination is founded unquestioned.

### **Hilewitz v. Canada, de Jong v. Canada, and Perez v. Canada: The limitations of individualized medical assessments**

The first case we will explore is commonly viewed as a ground-breaking decision in Canadian Immigration law that occurred in 2005. While it is referenced in nearly every other case surveyed after 2005 that has been included in this study though, it presents only a limited shift in thinking about disability and, as we will see, preserves the settler colonial and eugenic technique of granting membership and privileged status only to those who meet some arbitrary criteria of moral and intellectual strength as prerequisites for a narrowly-defined form of economic productivity. The case was motivated by requests issued by the Hilewitz family, who were South African citizens, and the De Jong family, who were Dutch citizens, for a judicial review of Visa Officers’ decisions that their children were medically inadmissible due their intellectual disabilities (Hilewitz v. Canada and De Jong v. Canada, 2005, SCC 57). The progressive decision upheld in Hilewitz v. Canada recognizes that disability discrimination, and discriminatory thinking more broadly, thrives on universalizing assumptions about the traits of certain group members. In the words of the presiding judge, ‘rather than exclude persons on the basis of the condition alone, Parliament intended the medical officer to look at how the condition affects the individual’ (Hilewitz v. Canada, 2005, S.C.J. 58 at para. 90). The decision to allow for a judicial review of Mr. Hilewitz’s and Mr. de Jong’s applications can be read as an attempt to combat this practice by distinguishing

between individualized and categorical bases for exclusion. Unfortunately, the belief that disability constitutes legitimate grounds for exclusion is not fully questioned: the focus is on tackling categorical thinking about disability as *legitimate* grounds for exclusion. These limitations can be detected in the court's argument that immigration officers need to assess the individual disability/impairment in order to determine if the demand for social services potentially presented by the family member is indeed 'excessive.' A close analysis of the case reveals that the individualized assessments demanded by the court, simply encourage the inclusion of non-medical information in assessments of excessive demand; discrimination is reframed in explicitly political economic terms, rather than strictly biomedical terms. Arguably, biomedical and economic views have always co-existed and cooperated, and this decision only accomplishes the work of allowing these prejudices to surface in official discourse.

To begin, the case of Hilewitz turns on the question of whether financial considerations should inform assessments of excessive demand, and finds that personal finances *are* in fact relevant. To focus on the experience of the titular applicant, the court argued that it was 'incongruous' that the grounds on which the applicant, Mr. Hilewitz, was eligible for residency, i.e. his financial success, were not considered in assessing the admissibility of his son Gavin who was diagnosed as having intellectual disabilities (Hilewitz v. Canada, at para. 9). The case ultimately broadens ableist assessments of dependency by arguing that non-medical factors are relevant. Importantly, Mr. Hilewitz is described as 'a very well-to-do man' who has promised to privately obtain the supports Gavin would need, rather than rely on publicly funded services (Hilewitz v. Canada, at para. 55). The legal meaning of excessive demand is refined in Hilewitz as the actual need for services, rather than the simple *qualification* for their use. In other words, only poor disabled people will be assumed to need the social services for which they qualify; the use of these services is still deemed outside the borders of 'normal' citizenship. Only piecemeal progress was achieved when the court acknowledged that assessments which essentialize the need for support, 'based only on the *classification* of the impairment rather than its particular manifestation' are inappropriate, and called for individualized assessments of disability in the context of service-use (Hilewitz v. Canada, at para. 3).

In Hilewitz, the court acknowledged a history of the 'categorical exclusion' of people with intellectual disabilities and outlined this history in order to argue for a closer consideration of individual need (Hilewitz v. Canada, at para. 53). But we must ask whether this decision can really support an individualized assessment of the disabled individual, so long as disabled people and the services they are entitled to use, remain the target of discriminatory thinking? Upon closer analysis, it does not. The court in fact perpetuated categorical ways of viewing disability by upholding the assumed link between disability services as a source of economic burden. As previously suggested, Mr. Hilewitz is only successful because of his 'willingness to attenuate the burden on the public purse' of disability expected to be caused by his son

(Hilewitz v. Canada, at para. 61). This victory fails to challenge the logic, expressed during the proceedings, that families such as Mr. Hilewitz's represent a burden 'created by their intellectually disabled children' (Hilewitz v. Canada, at para. 61). The legacy of Hilewitz has simply amounted to the adoption of new strategies by immigration officers that perform the old work of individualizing the so-called burden of disability, without individualizing the lived experience of disability. The latter would require a questioning of the assumption that disability supports constitute a form of burden.

The space that Hilewitz opens up, allows for individual circumstances such as wealth and whiteness to influence perceptions of burden. Following Hilewitz, the use of disability supports and services remains an illegitimate demand, rather than an entitlement. As El-Lahib and Wehbi point out, 'the question becomes: what about those families who cannot afford to guarantee the economic support necessary to convince immigration officers that their family members would not be a burden...?' (El-Lahib and Wehbi, 2011:101). The authors argue that applicants from the Global South will face additional discrimination, asking 'what are the chances that a poor and disabled applicant from a global South country would be accepted as an immigrant?' (102). After Hilewitz, as the remaining case studies will show, application processes now involve an assessment of the willingness to pay for private disability services, as well the ability to provide an alternative medical assessment of the disabled individual's impairment and their specific needs. As the following case study demonstrates, more individualized biomedical assessments of impairment do little to contest dominant perceptions of disability as an undesired and socially disruptive category in settler colonial society. These individualized assessments reinforced the assumption that disability experience can be fully captured through medical theory alone and legitimately summarized as biomedical pathology. Importantly, this model forces the parent-applicants considered in this study to present their children as being 'less disabled' and therefore less in need of support, further re-medicalizing and stigmatizing individuals with disabilities.

In *Perez v. Canada* [Perez], the applicant, Mr. Perez, is a father from the Philippines who contested the accuracy of a medical assessment that determined that his son was 'severely' disabled and would require 'special education support' (*Perez v. Canada*, 2011, F.C.J. 1638 at para. 10). At stake in this assessment is the characterization of educational supports as wasteful investments, and the assumption that even with supports, intellectually disabled students will never contribute to society due to supposedly natural limitation (Gallagher, 2006: 65). Mr. Perez contested the Medical Officer's diagnosis, arguing that his view should be replaced by one conducted by a doctor chosen by the family. The medical practitioner favoured by Perez argued for the high productive potential of Carlos, the eight year old child in question who was initially misdiagnosed as qualifying for services targeting young people labelled with intellectual disabilities. The letter that was intended to serve as a corrective to the initial assessment emphasizes Carlos' intellectual capacity, distancing him from the label of intellectual disability in order to highlight his productive potential: 'With at least average

non-verbal intelligence, Carlos is in a position to be a functional and contributing member of society' (Perez v Canada, at para. 8).

Leaving aside the question of impairment hierarchies for a moment, one must wonder why Carlos was initially assessed as possessing a 'deficient' degree of intelligence and productive capacity. Historians of Canadian eugenics have found that perceptions of intelligence are closely linked to perceptions of racial difference and assumptions of racial inferiority—assumptions which have driven and justified white settler activity. Given the legacy of white Canadian medical practitioners interpreting racial and cultural differences as signs of lower intelligence (McLaren, 1990; Dyck, 2013), one might speculate that perceptions of race may have influence medical (mis)assessments of intellectual disability in contexts involving racialized children. Literature on the over-representation of Black and racialized children in special education (see for example Bronson, 2014) suggests that there is indeed a strong need for such analyses. In relation to immigration assessment practices, Joseph (2015) provides compelling evidence of the co-production of disability and race and their role in shaping deportation decisions related to perceptions of mental illness. He insists that further attention to the production of disability-related difference and race, is crucial to the work of combating Eurocentrism and understanding the violence involved in citizenship practices.

Another layer to Carlos' re-diagnosis involves a political economic assessment of individual worth that could raise suspicions about the predictive capacity of medicine, and in particular the negative assumptions expressed about the productive capacity of people labelled with intellectual disabilities. In Perez, as in all other cases surveyed in this paper, the individuals with intellectual disabilities are also young people (18 years of age and under) and as such they are not yet expected to participate in society through a formal role in the labour market; as such there are no measurable ways of determining their current contribution— in the narrow economic sense— to society, since no contribution is yet expected for some age groups, and is indeed forbidden under child labour laws. It is therefore crucial to highlight that predictions of productive potential submitted by the medical practitioner, do not address any existing evidence. Instead, these claims rely on essentialist understandings of individuals with disabilities which point to a hierarchical reading of impairments. Such realizations belie any claims to anti-discrimination that can be made by pointing to the individualized nature of assessments.

According to Nikolas Rose and Peter Miller (1992), the predictive exercises practiced by medical practitioners often participate in the oppressive discourse of what they term health economics which, they continue, serve to evaluate 'the costs and benefits of different treatments and decisions' (195). Miller and Rose's reminder that these predictions tend to be strictly non-clinical judgements suggests that medical practitioners engaging in health economics have overstepped their clinical mandate and the formal boundaries of their profession (195). Importantly, Perez does not challenge the predictive power or reductionist

effect of medicine, its entry into health economics, nor the legitimacy of these approaches as lenses through which to view disability. Instead, Perez is successful because the argument fits a dominant narrative of disability as burden. The defense used in Perez, which has been conditioned by the legal structure at hand, relies on a form of disability discrimination that upholds medicalized perspectives of disabled peoples' potential by appealing to a familiar narrative of intellectual disability as social burden. Perez references intellectual disability in a categorical way that denigrates members of this group. The assumption is that people labelled with intellectual disabilities have no productive potential, and that Perez's son Carlos, as someone mistakenly diagnosed with an intellectual disability, can reclaim some degree of productivity by distancing himself from a category of people who are naturally unproductive.

Through Perez's strategy of employing impairment hierarchies, intellectual disability becomes what Erevelles (2011) terms an 'inalienable Otherness', with the effect that the individual embodying this disability is more easily located 'outside the margins of 'active' citizenship' (148). Mr. Perez's claim to productivity is based on the assumption of an unproductive, intellectually disabled Other. In her discussion of the citizenship rights of people labelled with intellectual or severe disabilities, Erevelles astutely observes that universalizing, liberal discourses of citizenship value certain essentialist traits, including autonomy and competence, that are often denied to people with intellectual disabilities. She goes on to explain how various traits are ranked according to their function within a market economy, and how conceptions of citizenship are derived from criteria that: 'represent those behaviour traits that maximize benefits, minimize costs, and contribute to the efficient realization of profit' (p.158). In order to be considered as potential citizens, the applicants discussed in this paper were forced to appeal to a utilitarian rationale by distancing themselves from negative traits of dependency and inefficiency, which might allegedly detract from the 'greater social good'. Because of the biomedical structuring of disability within the immigration process, attempts to demonstrate autonomy and efficiency are often framed within diagnostic categories of impairment such as intellectual disability, creating a hierarchy of impairments that carries the implicit assumption that a certain degree of disability is a social burden.

### **Sapru v. Canada: Refining medical assessments and discounting applicant statements**

When disability is assessed in a political economic framework and viewed in strictly biomedical terms – whether this is done by incorporating personal income, as in Hilewitz, or by refining impairment hierarchies, as reflected in Perez – the social nature of disability, reflected in legislation such as the UN Convention on the Rights of Persons with Disabilities, is ignored. Canada's adoption of this and other pieces of disability-positive legislation comes across as nothing more than a PR exercise, as Adamoski et al. (2002) have observed that moral expressions of prejudice and intolerance have more recently been substituted for

technocratic expressions of the very same prejudices (27). When disability is reduced to a medical diagnosis or a biological pathology that is linked to an ‘excessive’ degree of support, the socially-informed causes of disability are implicitly condoned. These causes, which have been extensively discussed by disability scholars and activists, range from concrete environments that create barriers to the participation of people with disabilities, to economic injustice and more invisible barriers such as negative attitudes towards embodied difference (Gleeson, 1999). As Rose and Miller (1992:97) have argued, ‘the role accorded to expertise’ and medical practitioners in particular, has the effect of erasing social and structural causes of disability, ‘expelling certain issues and problems from the political to the technical domain’, in effect rendering disability a personal problem or tragedy. Through this process of personalization, disability is de-politicized, material issues of oppression are ignored, and the real or perceived support needs of immigration applicants are reduced to personal problems of health and finances which, as Rose and Miller (*ibid*, 1992:97) point out, transforms them ‘into technical, professional administrative matters’ that can be assessed by “apparently neutral criteria’.

In a case that occurred in 2011, Dr. Sapru, the mother of a boy labelled with an intellectual disability, claimed expert knowledge as a trained paediatrician, and used her status to dispute the Canadian Medical Officer’s assessment of her son Rishi’s need for social supports. The success of *Sapru v. Canada* in obtaining a judicial review appears to have hinged on the mother’s ability to convince the court that Rishi was less of a burden to society due to his ‘less significant’ degree of impairment– an approach which echoes Perez’s defense of substituting one medical opinion for another. Dr Sapru’s testimony is worth quoting as it speaks directly to the importance of challenging medical decisions on medical terms: ‘Your opinion makes it look as if my son’s condition is far more serious than it really is. His aural condition is mild as described from the two letters which I enclose herewith and which represents the advice you were given as to his general state’ (*Sapru v Canada*, F.C.J. 148. at para. 9). As in Perez, Sapru is forced to appeal to the court’s interest in refining the medical assessment process to root out ‘severe’ types of impairments, rather than challenging the legitimacy of disability as an excludable category. Unfortunately, the decision upheld in *Sapru*, does not require immigration officers to take the lived experience of disability into account, and it does not challenge hierarchies of impairments which devalue intellectual disability. Instead, *Sapru* can be read as enhancing the role of a medical practitioner who happens to be the mother of a child with a disability.

Despite the eventual success in *Sapru*, there were other factors at play in this case which sought to undermine Dr. Sapru’s professional status and class privilege. For example, the record reveals that there was a degree of scepticism and distrust towards the Sapru family. This is suggested by the framing of the family’s support plan as unbelievable. Such distrust may be read as a reflection of long-standing traditions of medical antagonism towards mothers of children labelled with intellectual disabilities, who have historically been

stigmatized as irresponsible and morally deficient (Carlson, 2010) – a belief that is also influenced by perceptions of racial difference. The court record suggests that the support plan presented by Dr. Sapru – mother to a child with an intellectual disability hailing from India, a racialized country in the Global South – failed to convince immigration authorities. Specifically, Dr Sapru was perhaps not believed when she claimed that she would stay home to support her son. The court describes the conflict in the following way: ‘the immigration officer’s concerns that Mr. Sapru had not provided a credible plan for offsetting the excessive demand Rishi would presumably place on social services. For example, the immigration officer was not satisfied that Dr. Sapru would stay at home to care for Rishi’. The initial dissatisfaction of the officer may also be taken as a sign of distrust associated with mothers of individuals labelled with intellectual disabilities. Whatever the cause, the judgement that was passed on the proposed plan, may be linked to patronizing attitudes which characterize certain relations of power, such as North-South relations, and this could help account for why the officer engaged in an assessment that the court later found to be outside their official purview.

In light of the initial rejection of Dr. Sapru’s claims, we must question the extent to which the supposed individualized remedy established through Hilewitz is even practiced. Despite their personal wealth, the perceived level of dependency associated with the impairments of certain applicants, may also depend on factors such as gender, race, and country of origin. The above discussion suggests that in some cases, other prejudicial attitudes can act as barriers to wealth-driven solutions and cast doubt on whether personal income is enough to allow for disability ‘to be dealt with in the family’ (El-Lahib and Wehbi, 2011:103). As Joseph (2015:7) explains in reference to deportation, law and practice are often applied differentially to racialized people to support a system that works in confluence with medical and other systems to disproportionately target these individuals for exclusion. Considering the medical rationale invoked during the re-assessment, the eventual success witnessed in Sapru’s case does not create the potential for the majority of parents, who are not medical experts, to create counter-narratives to those offered by the medical examiner. Sapru’s case simply affirms the trend in immigration law of interpreting disability according to a strictly biomedical model that is reflective of prejudicial understandings of race, gender, class, and other factors.

### **Barlagne v. Canada: Financial risk, ‘severe’ disability, and a two-track process**

Instead of an experiential view of disability experiences, an outsider/non-disabled perspective on life with a disability has permeated legal thinking. This trend is exemplified in *Barlagne vs. Canada*, a case involving a child named Rachel, the daughter of French family attempting to settle in Québec. In 2010, in response to the applicant, Mr. Barlagne’s demand for a judicial review of his family’s inadmissibility status based on Rachel being labelled with an

intellectual disability, the court expressed sympathy that it could not accede to this request: ‘Cases like this are always difficult to deal with especially when they involve a young girl who is intelligent and endearing, if not exceptional, according to those who know her’. Nevertheless, the court went on to state: a ‘judicial review is subject to specific rules that apply to all cases, even those where strong sympathy for the applicant and his family would favour a different outcome’ (*Barlagne v Canada*, F.C.J. 651 at para. 2). The sympathetic language used to describe the child in question and to frame the court’s denial of the applicant’s request is misleadingly kind. The court’s explanation, in fact, reveals condescending and potentially inaccurate assumptions about life with an intellectual disability as one that is ‘exceptional’ – a view that has been forcefully challenged by disability activists as patronizing and ableist. The attitude expressed in this case supports El-Lahib and Wehbi’s characterization of the decision resulting from *Barlagne* as ‘a step back to the charity model’ (El-Lahib and Wehbi, 2011: 101).

The perception that disability is tragic and that those who ‘persevere’ despite their embodied difference(s) are heroic, has been criticized for working to sustain disability discrimination. More important to this discussion is the fact that the court in *Barlagne*, as in the other cases surveyed, appears to have ignored actual experiences of living with a disability or impairment, and instead substituted this lived knowledge with their own ‘expert’ assumptions about disability experiences. Tropes about disability as tragedy, which may appear kindly and sympathetic on the surface, support a discourse of burden that holds serious social consequences and which supports the erosion of support entitlements into acts of charitable giving. Rachel, referred to as Mr. *Barlagne*’s ‘endearing child’, might be expected to absorb social services in a way thought to be excessive and unnecessary rather than entitled and appropriate. Mr. *Barlagne*, however, is not convinced that his daughter’s needs fall outside of the entitlements accorded through the contract of citizenship. *Barlagne* invoked the Charter of Rights and Freedoms in his argument, and pointing to the discriminatory nature, insisted ‘that his inadmissibility for permanent resident status is based solely on the disability and is therefore contrary to the Charter’ (*Barlagne v Canada*, at para. 58). The court failed to appreciate this charge of unconstitutionality and, echoing Hilewitz, defended their method of assessing excessive demand as being individualized, going even further by asserting that ‘the concept of excessive demand is itself an individualized assessment’ (at para. 64).

The assessment found Rachel to be medically pathological, due to a “developmental delay, a medical condition that might reasonably be expected to cause excessive demand on social services” (at para. 10). Her individualized assessment included the determination that “this applicant requires specialized education services. These services are expensive” (at para. 10). The supposed severity of Rachel’s condition combined with prejudicial views about the futility of investing in the education of disabled children and what was thought to be Mr *Barlagne*’s precarious financial position, blocked the family’s attempts to win a judicial review. A comparison of the initial failure of *Barlagne*, who argued for non-discriminatory

treatment on constitutional grounds, with the success of Perez and Hilewitz, who framed their arguments as ‘less disabled’, reveals the importance of factors that mediate disability as burden. The differential outcomes experienced at the appeal stage by families at who lack certain economic privileges and of disabled people are unable to pass as ‘less disabled’ exposes a two-track process that privileges high income earners and that upholds a hierarchy of impairments.

Eventually, after the intervention of ministers from outside of Immigration, Mr. Barlagne was granted an exemption and his deportation was reversed through ‘a Ministerial reprieve on humanitarian grounds’ (CBC News, 20 April 2011). This back-door solution is not part of the formal process, and is more open to the subjective attitudes and political whims of authorities. We are left to wonder whether Barlagne’s European background, the fact that his family is white-identified (as pictured in media stories) and that French is their first language, worked in their favour to motivate the intervention of outside authorities. Applicants from racialized countries and who do not speak French or English as their first language, may not be expected to garner as much public and ministerial support. Framed in this context, the success stories represented by Barlagne, Perez, Sapru, and Hilewitz reinforce a variety of problematic prejudices and forms of oppression that currently stratify Canadian society along the lines of impairment, class, race, gender, and other categories of difference.

### **Parmar v. Canada: ‘Severely’ disabled and ‘ineducable’**

In *Parmar vs. Canada*, a case that occurred in 2010, we can see a synthesis of some of the oppressive ideas about disability that have explicitly discouraged the inclusion of people labelled with intellectual disabilities. The Parmars, a family from India, include Inderjot, an 18 year old labelled with an intellectual disability. Like the other cases explored in this study, their application for permanent residency was initially denied based on the assumption that Inderjot would cause an excessive demand (*Parmar v. Canada*, F.C.J. 872 at para. 1). The court granted the applicant a judicial review, reasoning that the medical officer who initially assessed the young man, incorrectly assumed that he would require certain social services. The court found that these services would not be required because Inderjot was ‘uneducable’, and so ‘occupational therapy will not help him’ (at para. 7). Troublingly, the family, who promised to keep Inderjot at home, were encouraged to segregate Inderjot in order to avoid posing any excessive demands on Canadian society. The court even deliberated about the cost-effectiveness of this segregated lifestyle, asking ‘whether a parent who keeps at home a disabled child will result in that child not placing demands on social services’ (at para. 30). Disappointingly, the final decision failed to reflect on the violent legacy of eugenic segregation in Canada, and instead argued that if disability is kept as a private matter (i.e. if the person with the disability is segregated), then the individual will not pose a burden to society. The court’s decision in *Parmar* speaks to a dangerous theme in eugenic reasoning

which seeks to erase the voices, experiences, and even the very presence of people with disabilities. The assumption that Inderjot would not benefit from the stimulating opportunities (and indeed, entitlement) that education can afford, relays an extreme version of the static view of intellectual disability as incurable (see for example Carlson and Spagnuolo, 2016). Such a view has been historically linked to some of the most extreme forms of disability violence and exploitation, and should raise alarm bells for disabled people and their allies.

Confusingly, the initial assessment of excessive demand contained a mixture of what may be taken as derogatory terms used to describe Inderjot, such as ‘spastic’ and ‘retarded’ (at para. 7) alongside more rights-based language. In the end, this assessment of Inderjot placed higher value on the potential for people labelled with intellectual disabilities to participate in society than did the court’s seemingly positive decision to grant a judicial review. The assessment conveyed knowledge of current trends in disability rights which seek to expand citizenship ideals by fostering the inclusion of people with disabilities. Summarizing this trend, the assessor stated that the ‘full participation and maximum integration of all individuals with mental retardation and physical handicaps’ was now desired by Canadian society (at para. 7). Perhaps paradoxically, this trend towards inclusion was used as an argument against Inderjot’s admissibility by pointing out that these expectations would necessitate the granting of expensive social services to Inderjot in order to allow him to live an integrated and dignified life. The court, however, decided that the assessor had erred in assuming that the Parmar family would not keep Inderjot at home as promised. The fact that this segregation is both encouraged and condoned by the court is troubling but perhaps not surprising, as this reasoning parallels the ableist assumptions upon which these legal processes are arguably premised.

Parmar is also noteworthy for its sustained meditation on Hilewitz (pars. 26-30). The interpretation of Hilewitz put forth in this case, explains the court’s rationale for allowing Mr. Parmar’s judicial review, but it also clarifies that the Hilewitz decision failed to change negative stereotypes about disability and dependency. The message in Hilewitz, as we have seen, privatizes the exclusion of people with disabilities by attaching a narrow cost assessment to this form of difference. The judge in Parmar, however, praises Hilewitz and declares that this case has taught us to avoid ‘an approach that attaches a cost assessment to the disability rather than to the individual’ (at para. 30). As this statement suggests, cost assessments of the individual based on an understanding of dependency that marginalizes disability supports, are not considered problematic. Following Adamoski et al. (2002: 24), the process of constructing citizenship through the denigration of disability as a category of excessive need, exposes a form of cultural intolerance that seeks to ‘adapt people to existing structures’ rather than being responsive to the realities of individual experiences (p. 24).

## **Conclusions**

In Bakerlaw’s assessment of the impact of Hilewitz, conducted in 2009, they found that more

fairness responses— that set of information submitted by applicants to the Visa Officer in response to a fairness letter explaining their inadmissibility— were being considered by immigration officers. Optimistically, they observed that this sometimes resulted in a positive outcome for the applicants. Bakerlaw's analysis, which was based on interviews conducted with immigration lawyers, supports the general trend outlined in this paper: successful cases often depend on the applicant's ability to adopt a rationale that favours efficiency and autonomy as the quantifiable, qualifying attributes necessary for citizenship. In Bakerlaw's words, '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' (2009: 20). This trend further suggests that disability, in confluence with other markers of difference, functions as a category signifying dependency. By implication, then, the ideal citizen is 'independent' and 'non-disabled.' Despite the apparent success of many families, this analysis has shown that formal challenges to prejudicial assessments of disability tend to reinforce a discourse of 'disability as burden'. This is because the appeal process is structured in a way that forces applicants to invoke impairment categories and personal income and craft strategies that position their son or daughter as 'less disabled' and less of a 'social drain.' In this way, an ableist citizenship ideal continues shapes standards of admission and functions as a regulatory device that disciplines current residents.

As Dossa (2009:4) has noted, Canadian immigration policy ignores social causes of disability, as 'it does not articulate or acknowledge society's role in disabling people'. In other words, experiential knowledge on disability does not yet have a place in legal processes that determine whether people with disabilities are eligible for citizenship. As disability scholars have noted, the inclusion of experiential knowledge on disability has the potential to upset assumptions about disability as burden, dispelling negative views of life with an impairment. This approach can facilitate the identification of social dimensions of disability as an oppressive experience (Asche and Parens, 1999). A more experiential approach to disability which has been encouraged through recent scholarship and that is consistent with or participates in the political demands of disability movements, offers the most individualized perspective available. It is also conducive to attempts to incorporate colonial and other oppressive practices into understandings of disability. Despite the court's claim since *Hilewitz* to promote individualized assessments, the experiences considered in this study suggest that this approach, albeit deeply flawed, is not even available to applicants. Categorically, disability remains an excluded and legally excludable identity marker. Joseph (2015:16) shows that nothing short of a 'denial of care' or a withholding of support, can result from these logics, and that this is true of prospective immigrants as well as for current residents.

While the sample of cases considered in this study involve foreign-born applicants, the logic that shapes their treatment reflects broader issues of how citizenship has been imagined by

the Canadian state. Related to this, are the ways in which excessive demand has been defined through medical discourses that reinforce settler colonial citizenship cultures. Particular attention has been paid to discourses around intellectual disability as a symbol of extreme forms of dependency and a medicalized experience resulting in social burden. Key themes that have emerged through this discussion include political-economic valuations of productivity, the inter-related influence of impairment hierarchies, race, gender, language, class, and finally (and most significantly), deep continuities in eugenic thinking at the immigration policy level. It is hoped that further analysis will consider how these themes interact to influence oppressive and exclusionary forms of treatment, producing recognizable trends within immigration systems. An approach to immigration that problematizes notions of disability and dependency, can illuminate the discursive and material contexts and the intersectional complexities that shape perceptions of (in)eligibility. These barriers are profound and far-reaching: they are present within and at the borders of Canada as well as, to quote Titchkosky, ‘on the edge of all that counts as human’ (2010: 82).

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### **Notes**

<sup>1</sup> For examples of polemics characterizing people labelled with intellectual disabilities as non-human, see the still un-recanted work of Peter Singer (1996), as well as Harriet McBryde Johnson and Licia Carlon’s (2010) refutations of his arguments.

<sup>2</sup> In order to reflect the period covered in this study, the Act referred to throughout this paper contains amendments made up to but *not* including 6 February 2014 (Bill C-24).

<sup>3</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27, s.38. (1) states: 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.

<sup>4</sup> Medical Refusals and Inadmissibility, Excessive Demand on Health and Social Services (November 2014) online, Department of Citizenship and Immigration: <http://www.cic.gc.ca/english/resources/tools/medic/admiss/excessive.asp>

<sup>5</sup> The Convention on the Rights of Persons with Disabilities and its Optional Protocol (UN, 2006) explains in its preamble the importance of incorporating constructivist models of disability by ‘Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental

barriers that hinders their full and effective participation in society on an equal basis with others’.

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