Elderly Immigrants and Equality Rights: Never the Twain Shall Meet?

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Abstract

This paper explores the circumstances of elderly immigrants in Canada, and finds that they are one of the country's most vulnerable groups. Three policies that disproportionately affect them are: restrictions on their eligibility for Old Age Security; restrictions on their admissibility to Canada on medical grounds and; restrictions on the ability of families to sponsor their elderly relatives. All of these policies either perpetuate the poverty of elderly immigrants or maintain harmful stereotypes that the elderly are a social burden. Nonetheless, most of these policies have been found not to offend the equality guarantee of the *Charter*. However, given the recent direction that that the Supreme Court of Canada has taken in equality jurisprudence, it is time to review these policies once more to determine if they withstand scrutiny under a substantive equality analysis.

Introduction

Elderly immigrants are one of Canada's most vulnerable groups. They are also one of the groups least likely to get legal protection. Barriers to access to justice, such as language and cultural differences and low incomes, mean their issues are rarely heard by the courts. Meanwhile, they are often targets for age-related discrimination under s. 15 of the *Charter*.[1] Policies that are not carefully crafted often cause prejudice to elderly immigrants and lead directly to the disproportionate poverty that many of them suffer. Unfortunately, the jurisprudence has by and large adopted a formal equality analysis that focuses on distinctions based on immigrant status and residence and obscures the real questions before the courts. If discrimination against elderly immigrants is to be alleviated, it is vital reconsider the former case law and adopt a substantive equality analysis to deal with future claims.

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

The policies that have a particularly devastating effect on the living standards and financial, physical and emotional wellbeing of elderly immigrants include restrictions on their eligibility for Old Age Security (OAS), restrictions on admissibility to Canada based on medical grounds, and restrictions on sponsorship by family members of their elderly relatives. Apart from the most recent changes to the sponsorship of relatives, previous court decisions have upheld these policies as constitutional.

The lack of recognition of the discrimination against elderly immigrants in existing case law is partly a reflection of the problems in all of the jurisprudence under s. 15: a lack of attention to adverse effects discrimination; a misapplication of the concept of "human dignity"; a very narrow conception of comparator groups and; in claims where the remedy involves the expenditure of public funds, a tendency to find that there has been no differentiation on a protected ground and thus no infringement of s. 15, rather than an analysis under s. 1 of whether the costs create an undue hardship and the claimant cannot be accommodated.

In light of recent case law from the Supreme Court of Canada, which indicates the Court's continuing intent to embrace substantive equality, these policies must be reconsidered to see if they meet constitutional standards.[2]

Because the prejudice is such an important part of the analysis of equality claims, it is first of all important to highlight the circumstances of elderly immigrants in Canada.

The Circumstances of Elderly Immigrants in Canada

All sources point to a fairly grim picture of the living standards of elderly immigrants in Canada. In 2001, 28% of people aged 65-74 and 29% of people aged 74-84 were immigrants.[3]

2 See for example *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*]; *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 [*Withler*].

3 Martin Turcotte & Grant Schellenberg, *A Portrait of Seniors in Canada: Chapter 7. Immigrant Seniors* (Statistics Canada, 2006) at 271 [Turcotte & Schellenberg].

This represented only 3.4% of overall immigrants during that time period and only 9% older than 45 when they immigrated.[4] As authors point out, the immigration regime actively discourages the immigration of seniors.[5] Most persons aged 55 or older do not qualify as economic class immigrants and therefore as much as 83% arrive in Canada because of family sponsorship.[6]

Overall, indicators show that immigrant seniors are some of the poorest of the poor in Canada, especially if they are recent immigrants. A full 26% of recent immigrant seniors fall into the lowest income quartile in the country.[7] In 2005, immigrant seniors that had lived in Canada for less than 20 years had low income rates, at around 28%, as opposed to 13% for Canadian-born seniors.[8] The situation is particularly dire for women and those who live alone, without family support.[9] If one considers the living standards of immigrant seniors as a function of family income, their outcomes improve slightly. However, they are still significantly more likely to live in poor households than other Canadians.[10]

In a study of the incomes of immigrant seniors, Baker et al find that outcomes for older immigrants have been deteriorating with time. Overall immigrant seniors are: less likely to have insurance, have higher unemployment, lower earnings and retire later than non-immigrants.[11] Immigrant seniors have lower incomes than Canadians and Canadian seniors. As Baker et al point out:

> Elderly native-born earn about $30,600 per year, compared to about $17,100 for recent immigrants, and $22,800 for medium-term immigrants. Long-term

4 Sandra Elgersma, *Immigrant Seniors: Their Economic Security and Factors Affecting their Access to Benefits, In Brief* (Library of Parliament, 2010) at 1 [Elgersma].
5 Michael Baker, Dwayne Benjamin & Elliott Fan, *Public Policy and the Economic Wellbeing of Elderly Immigrants* (Canadian Labour Market Skills Network, 2009) at 25 [Baker et al].
6 Elgersma, *supra* note 4 at 4.
7 Elgersma, *supra* note 4 at 1.
8 Garnett Picot, Yuqian Lu & Feng Hou, *Immigrant low-income rates: The role of market income and government transfers* (Statistics Canada, 2009) at 19-20 [Picot et al].
9 Turcotte & Schellenberg at 281.
10 Baker et al, *supra* note 5 at 4, Turcotte &Schellenberg at 283.
11 Turcotte & Schellenberg at 281-284.

> immigrants have almost identical incomes to the native-born. For elderly immigrants who have not been for at least 20 years, there is thus a sizeable difference between their incomes and similar aged-native-born.[12]

Baker et al also find that the outcomes of elderly immigrants show that elderly immigrants are sub-population of the elderly poor.[13] Just like for the Canadian-born, increases in government transfers reduce the low-income rate among immigrant seniors - as much as 33 percentage points in 2005.[14] The authors conclude that the situation of elderly immigrants is compounded (though not caused) by ineligibility for age-related transfer programs. Thus, those elderly immigrants who are not eligible for OAS/GIS have extremely low incomes and are often forced to rely on social assistance.[15]

There are also immigrant-specific age effects. Baker et al describe these:

> … Total income drops for everyone as they age: about $11,600 for A6064, and $20,400 for A65P. For recent immigrants, the "age penalty" is even greater among men aged 60 to 64. In other words, while acknowledging that older men have lower incomes than younger men, and newer immigrants have lower incomes than the native born, recent immigrants aged 60-64 have even lower incomes. For recent immigrant men over 65, their incomes only drop as much as the native born: in other words, their immigrant status does not compound with their age: like younger immigrants their incomes are much lower than natives, and like older natives, their income is lower than young immigrants.[16]

The above research illustrates how important the effects of age are for the financial circumstances of elderly immigrants. The older people are when they arrive in Canada, the more they experience age-related barriers to earning income through employment (which is why most are not eligible as economic class immigrants), and have reduced access to employment related retirement programs such as CPP. As they age, their income levels drop further, as do those of all elderly persons, and more so if they are not eligible for OAS/GIS.

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12 Baker et al, *supra* note 5 at 19.
13 Baker et al, *supra* note 5 at 2.
14 Picot et al, *supra* note 6 at 20.
15 Baker et al, *supra* note 5 at 24.
16 Baker et al, *supra* note 5 at 14, 23.

Because of these poor outcomes, elderly immigrants are often perceived as non-contributing members of society who rely on their entitlement to government programs to the detriment of public funds. For example, a recent memorandum from the federal government has accused them of being an unfair burden on health services.[17] Needless to say, this memorandum gave no suggestions for alleviating the disproportionate poverty and lower living standards of elderly immigrants in Canada. In fact, the government decided to act on its concerns by entirely suspending the sponsorship program of elderly parents and grandparents.

An Overview of Some Trends in s. 15 *Charter* Jurisprudence

When looking at the previous case law relating to elderly immigrants, it is evident that it displays the same problems that have plagued other equality jurisprudence under s. 15: a lack of attention to adverse effects discrimination; a misapplication of the concept of "human dignity"; a very narrow conception of comparator groups and; in claims where the remedy involves the expenditure of public funds, a tendency to find that there has been no differentiation on a protected ground and thus no infringement of s. 15, rather than an analysis under s. 1 of whether the costs create an undue hardship and the claimant cannot be accommodated. It is apposite to review these trends briefly.

Adverse effects discrimination

Currently the law recognizes two types of discrimination: direct and adverse effects. Direct discrimination occurs when a person or group with certain protected characteristics (such as age or disability) is singled out for harmful differential treatment based on stereotypes or assumptions attributed to them due to those protected characteristics. On the other hand, adverse

17 Tobi Cohen, "Newcomers over age 50 costly: memo", *Immigration Canada* (19 May 2012). Online at http://nexuscanada.blogspot.ca/2012/05/newcomers-over-age-50-costly-memo.html [Cohen].

effects discrimination is less overt. It occurs when widely accepted and unquestioned social norms form the basis of policies that cause prejudice and disadvantage to groups with certain characteristics, which are protected under the *Charter*.[18] For example, buildings that are built for "average" people may not have wheelchair ramps and thus reduce access for people with disabilities, which perpetuates their social exclusion.[19]

The recognition that discrimination is a complex phenomenon and is often the result of exclusive social norms rather than direct and explicit assumptions, was a big step forward for vulnerable groups. Eventually the courts accepted that there is no social or legal difference between direct and adverse effects discrimination.[20] Both are harmful forms of prejudice antithetical to substantive equality. The willingness of courts to scrutinize social norms themselves, has lent hope that society can find space to accommodate the characteristics that had previously caused disadvantage to vulnerable groups, and to alleviate their hardship and poverty.

Unfortunately, with time, some cases began to drift away from the recognition of adverse effects discrimination, for various reasons. First, adverse effects discrimination is based on widely accepted norms and is therefore difficult to accept. Second, adverse effects discrimination may be masked by a more direct reason for the differentiation, which ostensibly has nothing to do with differentiation based on a prohibited ground and which masks the disproportionate prejudice suffered by members of a protected group. Third, many courts continue to look for an intent to discriminate, although this has never been a necessary element in the analysis.[21]

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18 *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [*Law*]; *Kapp*, supra note 2; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*], *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657 [*Auton*].

19 *Canadian Odeon Theatres Ltd v Huck* (1985), 6 CHRR D/2682 (SKCA), leave to appeal to SCC refused, (1985), 60 NR 240.

20 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*]; *Law*, *supra* note 13; *Kapp*, *supra* note 2; *Withler*, *supra* note 2.

21 *Eldridge*, *supra* note 18 at para 62.

Equality seeking groups have argued vigorously before the courts in order to maintain the existence of adverse effects discrimination. In important decisions such as *Kapp*[22] and *Withler*,[23] the Supreme Court of Canada confirmed that discrimination means any differentiation based on a protected ground that attributes to an individual arbitrary or stereotypical characteristics based on group membership or perpetuates the disadvantage that such a group has historically suffered. This articulation of the test signals the desire of Canada's top court to reaffirm its commitment to substantive equality.

Human dignity

A substantive analysis of claims under s. 15 of the *Charter* is still associated with the seminal Supreme Court of Canada case, *Law v. Canada (Minister of Employment and Immigration)*.[24] In this case, the Court re-affirmed that the purpose of s. 15 is to protect the human dignity of vulnerable groups. In order to evaluate whether differential treatment has caused injury to the human dignity of a claimant belonging to a protected group, the Court adopted four factors which could be considered in the analysis: a) pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; b) the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others; d) the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society and; d) the nature and scope of the interest affected by the impugned law.

While the Court intended that human dignity be an overarching concept behind the *Law* analysis, subsequent cases took an overly formalistic approach, treating the *Law* factors as a rigid

22 *Supra* note 2.
23 *Supra* note 2.
24 *Law*, *supra* note 18.

test.[25] Furthermore, courts began to require that, over and above proving differential treatment based on the factors, claimants prove a violation of their human dignity. As a result, cases often hinged on "abstract and subjective notions"[26] rather than deciding, based on objective reality, whether or not a law or policy perpetuated the pre-existing disadvantage of a protected group.

The Supreme Court of Canada addressed this situation in *Kapp*. The Court confirmed that the protection of human dignity is the overarching purpose and spirit of s. 15. However, a claimant does not need to establish a specific violation of human dignity in order to meet the *Law* test. The factors in *Law* were not meant to constitute a formalistic analysis all elements of which had to be satisfied in every case. Rather, they were some of the factors that a court could take into account when deciding whether or not discrimination had occurred. The Court affirmed that discrimination is defined as a differentiation on a protected ground that is made on stereotypical or arbitrary assumptions or perpetuates the pre-existing disadvantage of a protected group.[27]

Comparator groups

Another significant problem for claimants in equality jurisprudence has been an overly formalistic approach to comparator groups. Comparator groups are classes to which the claimants are compared to see whether the distinction between groups made by a law or policy is based on a protected ground. While the concept seems simple, it has proven to be notoriously difficult to apply in reality.

Hodge affirmed that equality is an inherently comparative concept, so finding a group to compare the claimants to is essential in every s. 15 case. This can be done by comparing the

25 *Kapp*, *supra* note 2 at para 22.
26 *Kapp*, *supra* note 2 at para 22.
27 *Kapp*, *supra* note 2 at paras 23-24.

treatment of a group with the protected characteristic to that of a group without the characteristic and has been referred to as the mirror comparator group analysis.[28]

However, conceptual problems arise quickly even in seemingly straightforward cases of direct discrimination. In some cases where only a subset of a group with the protected characteristic suffers a prejudice, it can be unclear whether to compare the group to the "average" population or to the rest of the group with the protected characteristic. In other cases, where the alleged discrimination is that of adverse effects, it may be difficult to identify any appropriate comparator group because the legislation in question may purport to treat everyone the same.[29]

The choice of comparator group is often based on circular reasoning that decides the issues before any merits of the case are ever heard. The analysis has derailed many equality cases and has become a serious impediment to the achievement of substantive equality.

While the issue is not fully resolved, the Supreme Court of Canada has recognized that the formalistic analysis of comparator groups has often taken the focus off of the real issues at hand. The Court has shown an intention to move away from this type of reasoning. In particular, in *Withler* the Court stated that rather than focusing on finding a precise comparator group, courts should aim to incorporate a comparative analysis into the first two steps of the *Law* test, namely, whether the law or policy creates a "distinction" based on an enumerated ground and whether such a distinction prejudices the claimants through stereotyping or perpetuating their pre-existing disadvantage.[30]

Costs and the duty to accommodate to the point of undue hardship

28 *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 SCR 357 [*Hodge*]; *Auton*, *supra* note 18.
29 *Withler*, *supra* note 2 at para 64.
30 *Withler*, *supra* note 2 at paras 61-67.

Many equality cases involve claims to public funds. However, one of the cornerstones of modern jurisprudence and substantive equality is the recognition that before the excuse that public funds are scarce will be allowed to justify some discrimination, the government must show a genuine effort to alleviate the disadvantaged situation of vulnerable groups. In other words, there is a positive duty on the government to accommodate claimants to the point of undue hardship.[31] However, concerns about public funds and the legislature's right to allocate them are always influential, and have often caused courts to avoid making a finding of discrimination even when appropriate.

Summary

The recent cases decided by the Supreme Court of Canada reveal the Court's intention to re-affirm its commitment to substantive equality and eschew analyses that deprive equality seeking claimants of real remedies due to technicalities. Given the direction the Court is taking, it is time to re-evaluate the cases that have upheld the policies that have a proven detrimental effect on elderly immigrants such as ineligibility for OAS, medical inadmissibility and restrictions on sponsorship, to see if they continue to align with the Supreme Court's recent analysis and, more importantly, substantive equality.

Old Age Security

The Old Age Security (OAS) regime is a safety net, intended to protect vulnerable seniors in Canada. However, eligibility requirements severely restrict access to the program for immigrant seniors.[32]

31 *Eldridge*, *supra* note 18 at paras 79, 94.
32 While the rules differed somewhat prior to July 1st, 1977, this paper aims to discuss the OAS regime currently in force.

OAS is generally available to all those who are aged 65 and over and have resided in the country for at least 10 years since the age of 18. If a person comes from a country with which Canada has a social security agreement they may become eligible for OAS before 10 years have passed. However in all cases, to be eligible for the full amount of OAS, one also has to have resided in Canada for 40 years since the age of 18. Otherwise, one is only eligible for partial OAS, determined as a fraction of the years one has resided in Canada since the age of 18, divided by 40.[33] The result is that most immigrant seniors, particularly if they are recent immigrants, receive significantly fewer OAS benefits than do those born in Canada. According to Baker et al:

> The native-born elderly receive on average $7,000 per year. Because they are not generally eligible, very few recent immigrants (YSM0-10) receive OAS benefits, and the unconditional mean benefit is only $850 (a difference of over $6000).[34]

A small part of the discrepancy in income between immigrants and the native born is addressed by the General Income Supplement (GIS). GIS is available to those who are eligible for OAS, which usually means only those who have resided in Canada for at least 10 years.[35]

When one is only entitled to partial OAS, GIS can top off the amount that OAS will not cover (known as "Super-GIS"). However, the requirements to qualify for GIS are stricter, necessitate a more searching review of applications and require annual re-application. Such onerous requirements mean that fewer people achieve full eligibility, particularly if they are seniors who do not speak much English, but must make their way through complex applications, forms and bureaucracy.

Furthermore, there are a number of exceptions to GIS, the most important one being that it is not generally available to a senior if a sponsorship undertaking is in effect (typically 10 years when the senior is sponsored by their children). This means it may not be available to top

33 *Old Age Security Act*, RSC 1985, c O-9 s 3 [OASA].
34 Baker et al, *supra* note 5 at 19.
35 OASA s 11(7).

off any partial OAS an individual sponsored to Canada may become entitled to.[36] As pointed out above, this provision would affect most elderly immigrants as they arrive in Canada by way of sponsorship. Other immigrants, who become entitled to OAS before the expiration of 10 years because of Canada's social security agreement with their home country, are only entitled to partial GIS.

As is obvious, access to OAS and GIS is carefully restricted by residence requirements. When these were enacted they were actually a reduction from the previous residency requirement of 20 years for any eligibility for OAS, and no partial eligibility. However, the residency requirements were still intended to restrict eligibility for OAS/GIS with the justification that it is those who have contributed to Canada over the years, who deserve to collect these benefits the most. Upon introducing the changes in 1975, the Minister of National Health and Welfare said:

> The bill was motivated by two factors: first immediately to simplify eligibility to pensions in Canada, and to tie in more closely this right to the contributions of persons who by their labour and residence in Canada have helped to build the coun[t]ry….[37]

The restrictions to OAS and GIS cause the affected elderly immigrants direct and substantial financial prejudice and contribute to their disproportionate poverty. Given the ample evidence that this poverty is caused just as much, if not more, by their age as by their immigrant status, any restriction on a government program designed to alleviate such poverty is suspect. The residence requirement legislation must therefore be examined very carefully, to determine whether it is innocuous or whether it is contrary to s. 15 of the Charter, on the basis that it

36 OASA s 11(7)(e)(ii), some minor exceptions listed in the *Old Age Security Regulations*, CRC c 1246 s 22.1.
37 *Minutes of Proceedings and Evidence of the Standing Committee on Health, Welfare and Social Affairs*, No 23 (24 February 1977) at 23:18 (Hon Marc Lalonde); see also *House of Commons Debates*, Vol III, 2nd Sess, 30th Parl, at 2834-2836.

perpetuates a historical group-based disadvantage for the elderly and therefore discriminates on the protected ground of age.

Some existing case law that has addressed the matter has found that the residency requirements are not contrary to s. 15, although the issue has never been fully dealt with by the Supreme Court of Canada.

In *Pawar*,[38] Federal Court and then the Federal Court of Appeal examined whether or not the 10-year residency requirement for eligibility for OAS violates s. 15 of the Charter. The case was a class action undertaken by some immigrant seniors to have s. 3 of the OASA (that sets out the restrictions) declared invalid for infringing their equality rights. At the trial level, the respondent government applied to have the claim summarily dismissed on the basis that the OASA did not make a differentiation between the immigrant seniors and others on the basis of enumerated or analogous ground in s. 15. While the Federal Court accepted that the ineligibility for OAS constituted a denial of a benefit provided by law, and that the 10-year residency requirement was arbitrary, it nonetheless upheld the application to dismiss because the distinction was based on residence, which was not an enumerated or analogous ground. The Federal Court of Appeal, in a very short judgment, upheld the appeal for the same reason.

In *Shergill*,[39] the Federal Court of Appeal confirmed the ruling in *Pawar* by dismissing an action filed by a senior who had been a member of the class in *Pawar*, without further analysis.

Canada (Attorney General) v Pattinson[40] was a Federal Court of Appeal case that dealt with a calculation of partial OAS. The claimant alleged that the legislation discriminated against

38 *Pawar v Canada*, [1999] 1 FC 158 (TD) affirmed (1999), 67 CRR (2d) 284 (FCA) leave to appeal refused, [2000] 1 SCR xvii [*Pawar*].
39 *Shergill v R*, 2003 FCA 468, 246 FTR 160 (FCA) leave to appeal refused, 330 NR 397 (SCC) [*Shergill*].
40 (1990), 123 NR 156 (FCA) at para 10.

her contrary to s. 15. However, the Court dismissed the claim in one paragraph, ruling that the distinctions the OASA makes between the various applicants for OAS pension did not to violate the *Charter* because they were not based on an enumerated or analogous ground.

Sell v Canada[41] involved a claimant who had entered Canada in 1979. He asked the Old Age Security Review Tribunal and the Federal Court to declare that the provision of the OASA that provides for partial OAS, was contrary to s. 15 of the *Charter* and that he was entitled to full OAS. Once again the legislation was upheld, because the both the Tribunal and the Court dismissed the claim, prior to adjudicating the merits, on the basis that ruling for the claimant would involve a retroactive application of the *Charter*.

Very recently in *Singer*,[42] a senior whose application for immigration to Canada was cleared some weeks before and finally approved mere weeks after the new rules for partial availability of OAS came into force, claimed she had been unfairly granted only a partial OAS benefit and not a full one. The claimant submitted that her case required careful scrutiny as she was raising a sub-constitutional argument, specifically, that to construe the OASA as requiring actual residence as opposed to clearance for immigration would discriminate between immigrants and non-immigrants. Relying on *Pawar* and *Shergill* as correct statements of the law on the constitutionality of s. 3 of the OASA, the Federal Court rejected Mrs. Singer's claim that the case had a constitutional dimension and dismissed her claim. The ruling was upheld on appeal.

In none of these cases, did the courts consider the age of the claimants, or the vulnerability of the elderly as factors relevant to their analysis.[43]

41 *Sell v Canada (Attorney General)*, 2007 FC 1313 [*Sell*].
42 *Singer v Canada (Attorney General)*, 2010 FC 607 affirmed 2011 FCA 178 [*Singer*].
43 It is also worth noting that in all of the cases but *Pawar* and *Singer*, the claimants were self-represented and did not have legal counsel on record. In the case of Mrs. Singer her counsel was her husband.

If one compares these analyses to the substantive equality analysis from the Supreme Court of Canada, it is clear that some important elements were not considered in these cases. To begin to analyze these problems, it is sensible to begin with first principles- the *Law* test.

In *Law*, the Supreme Court of Canada laid down the following test whether a distinction amounts to discrimination:[44]

> A. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
> B. Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds? And
> C. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

In its essence the *Law* test asks whether or not there has been a direct and prejudicial distinction or an adverse effect to individuals who belong to the protected groups enumerated in s. 15. Subsequent case law reaffirms that this test is animated by a spirit of substantive equality, which acknowledges that while not every distinction is discriminatory, some distinctions that cause or perpetuate disadvantage based on protected grounds are veiled, because, instead of being founded upon stereotypical or arbitrary assumptions, they perpetuate widely-accepted social norms that fail to make social benefits accessible to marginalized groups.[45] That is, a distinction may create or perpetuate disadvantage for a historically marginalized group simply by upholding the status quo that creates the disadvantage in the first place. This means that a court has to look below the surface of formal distinctions, to discover the true effects of a policy.

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44 *Law*, *supra* note 18.
45 *Withler*, *supra* note 2, *Kapp*, *supra* note 2.

It is against this backdrop that the above-mentioned decisions regarding OAS must be examined.

One of problems immediately discernible in all of the above OAS cases is the failure of courts, for various reasons, to recognize that an overt differentiation based on residence is not the only effect the legislation. The residence requirement masks a bigger problem- that the lack of availability of OAS perpetuates the historic disadvantage of seniors by exacerbating the poverty of a subset of the elderly population who also happen to be immigrants. Therefore, the courts simply fail to acknowledge that this is in fact adverse effects discrimination on the protected ground of age.

One reason why this occurs is that the analysis of the courts is based exclusively on the first part of that *Law* test, that is, whether or not a formal distinction is made that singles out a protected group based on stereotypical or arbitrary assumptions. The residency requirement is not based on any explicit stereotypes about the elderly, so this branch is not fulfilled. Yet, this is not the end of the analysis. A narrow focus on residence obscures the prejudice that a lack of OAS income causes to the elderly who also happen to be immigrants. It must be noted the very existence of OAS is a response to the recognized vulnerability of the elderly, whose age limits their opportunities to acquire income to support themselves.[46] Thus ineligibility for OAS for any elderly persons directly affects their standard of living and perpetuates a historical disadvantage, as is confirmed by the facts presented above. It does not matter that not every elderly person is singled out by the law, or that the law does not reveal an explicit intent to discriminate. What matters is that immigrant seniors, just like all the elderly persons in Canada, suffer from poverty due to age related social barriers and the OAS law maintains those barriers.

46 *Collins v Canada (CA)*, 2002 FCA 82 at para 22.

Another reason why a focus on residence is too narrow is because it causes courts to compare immigrant seniors to an inappropriate comparator group - non-immigrant seniors. The problem with such a comparison exemplifies the s. 15 problems relating to comparator groups described earlier. First of all, it is universally acknowledged that OAS is a program intended to alleviate the historical age-related disadvantage of seniors as a group, that prevents them from having the same living standards as the "average" population. Most Canadian seniors benefit from this program except those that are excluded or restricted by the residence requirements. Looked at it in this way, a comparison of immigrant to non-immigrant seniors is not appropriate, because it obscures the age-related disadvantages suffered by both groups and the role of OAS in correcting them. Comparing a subset of the elderly to other elderly masks adverse effects discrimination. This is the same as a situation where a building provides access to persons in wheelchairs, but does not have braille in the elevators. A building that is inaccessible to those with disabilities causes them prejudice, and the discrimination on the basis of disability against those that cannot see is not lessened because some other persons with disabilities receive a benefit that helps them. In these situations, the problem is that social norms fail to accommodate the difference of vulnerable persons. The real comparator group is thus the group that reflects the social norm – the person of "average" age. Prejudice in comparison to the "average" population is established by showing that elderly immigrants belong to a wider group, elderly persons, who have historically suffered discrimination. This is precisely the import of *Withler*.[47] When the case is about benefits like OAS that remedy the historical disadvantage of a group designated under s. 15, there is no need for a claimant to establish a precise mirror comparator, or to compare claimants to other vulnerable persons - the social inequality has already been recognized.

47 *Withler*, supra note 2. *Withler* is especially applicable as it was also a case about age discrimination in pension schemes.

What is missing from the above cases is the recognition that the poverty of immigrant seniors is caused primarily by lack of work opportunities and income due to their age, and that that situation is perpetuated by their ineligibility for OAS. This is no less true just because they are immigrants who lack residence in Canada, which factor only adds further disadvantage to their already vulnerable situation. The prejudice occurs whether a claimant is fully deprived of OAS for 10 years or partially deprived for 40. Furthermore, this poverty is precisely the type of social inequality that s. 15 intends to remedy. In *Withler*, the Supreme Court of Canada discussed the availability of pension benefits and said at para. 67:

> In cases involving a pension benefits program such as this case, the contextual inquiry at the second step of the s. 15(1) analysis will typically focus on the purpose of the provision that is alleged to discriminate, viewed in the broader context of the scheme as a whole. Whom did the legislature intend to benefit and why? In determining whether the distinction perpetuates prejudice or stereotypes a particular group, the court will take into account the fact that such programs are designed to benefit a number of different groups and necessarily draw lines on factors like age. It will ask whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required. Allocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered.

When one considers that the aim of the OAS scheme is to alleviate the poverty of seniors and, subsequently, the crushing and prolonged poverty of immigrant seniors, that substantive equality analysis reveals that s. 3 of the OASA infringes the *Charter*.

The real question in these cases should therefore be whether or not the s. 15 infringement can be saved by s. 1 of the *Charter* which has a somewhat unique application in the s. 15 context. As illustrated in the leading case, *Eldridge*, the cases often turn on the question of whether rights

have been minimally impaired in accordance with the *Oakes* test.[48] *Eldridge* illustrates that rights will be minimally impaired only when the claimants have been accommodated to the point of undue hardship, which means that the government has genuinely attempted to remedy the discrimination against the claimants. It is at this point and not before that costs to the public purse may be considered, although they are not necessarily determinative.[49]

The residency requirements in the OASA do not meet the *Oakes* test. Management of public funds is no doubt a pressing and substantial objective for the government. However, there is no rational connection between the restrictions on OAS and this objective. First, the rationalization that OAS benefits only those who have contributed to it over the years is flawed. OAS is managed on a pay-as-you-go model, from general tax revenues. There is no reserve fund.[50] Thus, all seniors currently benefitting from it have never contributed to it and those taxpayers who contribute to it now may not benefit from it later. There is thus no valid justification for excluding seniors from the program for ten years, especially if they contribute indirectly to the economy by providing services such as childcare for their families. Second, not providing OAS does not save public funds, it merely transfers costs to other programs such as GIS (when available) or social assistance. This only serves to show the disadvantage of immigrant seniors- it does not disappear if supports for seniors are not accessible to them. Third, the infringement does not minimally impair the equality rights of immigrant seniors because it does not achieve accommodation to the point of undue hardship. For example, there is no policy

48 *R v Oakes*, [1986] 1 SCR 103 [*Oakes*]. According to *Oakes*, a policy will be saved under s. 1 if the government enacts it with a view to achieving a pressing and substantial objective and it meets a standard of proportionality between means and ends, that is, it is rationally connected to achieving the objective, it minimally impairs rights and there is a proportionality between its effects and the objective.
49 *Eldridge*, *supra* note 18 at paras 79, 87.
50 Service Canada, "More information on why changes to the Old Age Security pension are deemed necessary" (2012). Online at http://www.servicecanada.gc.ca/eng/isp/oas/changes/moreinfo.shtml

in place to address the direst situations of recent immigrant seniors who are female or live alone, and usually have the worst financial outcomes.

What about partial OAS? Presuming the same infringement argument applies as does to the entire deprivation of OAS, partial OAS affects the elderly in a disproportionate way and perpetuates their historical disadvantage. When one subsequently considers a s. 1 analysis and the justification that OAS is a reward for years of contribution to Canada, then partial OAS for 40 years appears even more unfair, and less rationally connected to the government's objective of managing public funds then the 10-year ineligibility. This restriction would capture a lot of people, even those that have contributed to Canada's economy and to taxes for most of their adult lives, but have not accumulated 40 years of residence. While for some, GIS tops off OAS, this option is not available to sponsored persons for the duration of the sponsorship undertaking and the administrative requirements for receiving GIS are more onerous than those for OAS. Nor does the 40-year residence requirement minimally impair rights because it shows no effort to accommodate persons to the point of undue hardship and does not reflect the reality of when immigrants begin to contribute to Canada. The figure is simply arbitrary.

In conclusion, ineligibility for OAS causes elderly immigrants undue and disproportionate poverty. However, other provisions affecting them discriminate by undermining their worth as human beings. This is the case with medical inadmissibility, which is examined next.

Medical inadmissibility

Under the immigration regime those who are not citizens (that is those who only have foreign national or permanent resident status) may be inadmissible for various reasons listed in

ss. 34-43 of the *Immigration Refugee Protection Act*.[51] If a permanent resident or foreign national in Canada falls within the criteria listed in these sections a removal order may be issued against them, at which time they no longer have legal status in Canada and may not legally remain in Canada. If a permanent resident or foreign national is outside of Canada and falls within the criteria listed in the sections they may not legally enter Canada and gain status. If they are being sponsored the inadmissibility of one family member, makes all of the sponsored family members inadmissible.[52]

One of most troubling sections in this regime is inadmissibility based on health grounds in s. 38(1)(c). This section reads that:

> Health grounds
> **38.** (1) A foreign national is inadmissible on health grounds if their health condition…
> (*c*) might reasonably be expected to cause excessive demand on health or social services.

While the provision applies to all immigrants in the economic class, s. 38(2) of the IRPA confirms that it does not apply, in the family class, to the spouse or child of a sponsor, thus making it applicable to the only other persons who may be sponsored in the family class – parents and grandparents.

The *Immigration Refugee Protection Regulations*[53] define "excessive demands," "health services" and "social services" as follows:

> Excessive demands means
> a) the costs of publicly-funded health or social services for a potential immigrant would likely exceed the Canadian *per capita* average, looking at a period of five to ten consecutive years from the date of the person's most recent immigration medical examination; OR

51 SC 2001, c 27 [the IRPA].
52 IRPA s 42.
53 SOR/2002-227 [IRP Reg].

b) the health or social services required by a potential immigrant would add to existing waiting lists and increase the rate of mortality and morbidity in Canada as a result of the prevention or delay of those services…

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

"Social services" means any social services, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,

a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically or vocationally; AND
b) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies.[54]

Several conclusions can be drawn from looking at the provisions. First, these definitions appear to assume that individuals who fall under them will pose excessive costs when the costs exceed *per capita* Canadian averages. Second, these provisions can be used to exclude from Canada a) all people with disabilities meeting the excessive demands provision, who do not qualify as the spouse or child of a family class sponsor and b) all parents and grandparents in the family class and other elderly persons in all immigrant classes who have medical conditions that may be found to meet the excessive demands provision. The section is thus constitutionally suspect under s. 15 on two grounds- age and disability.

While it is beyond the scope of this paper to discuss the serious prejudice s. 38(1)(c) causes to persons with disabilities, there is inevitably some overlap between the two protected grounds in this case. What is more, most of the case law and discussion dealing with the constitutional issues this section poses has done so on the basis of disability only. The Canadian

54 IRP Reg s 1.

Council of People with Disabilities has often criticized this provision for being discriminatory.[55] Perhaps the lack of voice of immigrant seniors in this matter is telling of their access to justice, as those who are caught by this provision often suffer a double disadvantage from their disability and their age. Furthermore, while some exceptions exist for children and spouses with disabilities in the family class caught by this section, there are no such exceptions for the elderly.

A preliminary issue that raises some questions in the case law, but is beyond the scope of this paper is the *Charter* duty, if any, that the government owes to persons who have made applications for residence from outside Canada. This discussion assumes that the affected persons are in Canada or that it is their sponsor who is claiming discrimination based on being unable to sponsor their relatives due to a discriminatory sponsorship regime.

From examining the case law, a similar scene emerges as has already been witnessed with the OAS provisions, and more broadly in s. 15 jurisprudence. When dealing with s 38(1)(c) of the IRPA, courts have largely failed to recognize adverse effects discrimination of the basis of age, and have misapplied the substantive equality analysis.

The leading case and perfect example of the effect s. 38(1)(c) has on elderly immigrants is *Deol* from the Federal Court of Appeal.[56] In this case, a daughter (Ms. Deol) living in Canada attempted to sponsor her elderly father (Mr. Singh), who suffered from degenerative osteoarthritis and would potentially require very expensive knee surgery in Canada. He, and by extension the rest of the family, were found inadmissible on health grounds. The Court was faced with the question whether s.19(1)(a)(ii) of the old *Immigration Act*,[57] the predecessor of s.

55 Council of Canadians with Disabilities, "Canada Deports Chris Mason Because He Has a Disability" (2009). Online at http://ccdonline.ca/en/publications/voice/2009/01; *Chesters v Canada (Minister of Citizenship & Immigration)*, 2002 FCT 727.
56 *Deol v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 271 leave to appeal refused, 29371 (20 February 2003) [*Deol*].
57 *Immigration Act*, RSC 1985, c I-2.

38(1)(c) of the IRPA, violated s. 15 of the *Charter* because it discriminated against Mr. Singh and Ms. Deol on the basis of Mr. Singh's disability. Because the applicant was outside Canada, the Court asked whether or not the provision violated the rights of the sponsor, the applicant's daughter, because it precluded her from sponsoring an elderly family member with a disability. The Court accepted that the impugned provision made a differentiation based on disability and accepted that this differentiation perpetuated a disadvantage for people with disabilities. However, the Court decided that the section did not violate s. 15, because the applicant was unable to demonstrate a violation of her human dignity, as it she could not prove that being unable to sponsor her family due to her elderly father's disability was an effect that s. 15 meant to correct.

When considered in light of substantive equality analysis, the Court's reasoning in *Deol* and subsequent cases lacks several key insights. Particularly, when compared to the analysis of the Supreme Court of Canada in *Kapp*,[58] equality rights are not given sufficient effect because of the Court's failure to a) address discrimination on the basis of age as well as disability; b) correctly apply the law, especially the concept of human dignity; and c) recognize the government's positive duty to accommodate every applicant to the point of undue hardship, an example of which analysis can be seen in the Supreme Court of Canada case *Hilewitz*.[59]

The section must be evaluated under the *Law* test,[60] keeping in mind its purpose to achieve substantive equality.

With regard to the first two steps of the *Law* test, the Court in *Deol* accepts that there has been a differentiation on an analogous ground, namely disability. However, the Court provides

58 *Supra* note 2 at paras 22-24.
59 *Hilewitz v Canada (Minister of Citizenship and Immigration)*; *De Jong v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 SCR 706 [*Hilewitz*].
60 Set out above at page 15.

no analysis on the differentiation based on the protected ground of age, even though it is obvious from reading the section that it has a broad and adverse effect on the elderly, because of the positive correlation of age and medical conditions. In fact, the section may even draw a direct distinction in the case of seniors in the family class (incidentally most elderly immigrants), who are specifically singled out by this provision.

Regarding the last part of the *Law* test, the Court accepts that the differentiation at issue either stereotypes or perpetuates the disadvantage of people with disabilities.[61] The same can be said for differentiation on the protected ground of age, as the provision disproportionately affects the elderly and perpetuates the unfair notions that they cause excessive costs to public services. The Court indirectly accepts this reasoning, because it decides that the definition of "excessive demands" intends to compare the costs of seniors' medical care to the costs of services for the average person in their age group, not to the Canadian of average age, or the section would work to exclude seniors every time.[62]

Despite accepting that s. 38(1)(c) makes a differentiation on a protected ground and perpetuates a group-based disadvantage, the Court decides that the provision does not discriminate against Ms. Deol, because she is not the person suffering from the disability and she is thus not able to prove that her human dignity has been violated by the separation of her family due to the government's stereotypical notions about persons with disabilities (and the elderly).[63]

Had the claimant in the action been Mr. Singh, the Court might well have found that he had been discriminated against. Nonetheless, the Court's reasoning is not entirely in line with recent guidance from the Supreme Court of Canada which has confirmed that under the *Law* test, there is no freestanding requirement that the applicant prove a violation of their human dignity.

61 *Deol*, *supra* note 56 at para 51.
62 *Deol*, *supra* note 56 at para 31.
63 *Deol*, *supra* note 56 at paras 56, 58, 61.

In *Kapp*, the Supreme Court of Canada explained that the *Law* factors were never intended to impose upon the complainant a burden of proving a violation of human dignity.[64] In fact, the factors enumerated in *Law*, are all a part of the overarching analysis of whether or not an impugned provision makes a distinction that is stereotypical or perpetuates a historical group-based disadvantage, either situation being in itself a violation of human dignity. That is, if the claimant establishes that the Law factors are met, or if the claimant shows, without raising the *Law* factors, that a law perpetuates a historical group-based disadvantage, that is in itself equivalent to a violation of human dignity.[65] No further analysis needs to be undertaken.

Thus the analysis of the Federal Court of Appeal in *Deol* is flawed because it required the claimant to prove and independent violation of human dignity, when none was needed. The Court agreed that there had been a differentiation based on an enumerated ground that perpetuated a historical disadvantage on the basis of disability. It also perpetuates disadvantage for the elderly, who are deprived of family contact and support in contravention of the IRPA's goals of family reunification, and are considered a burden on state resources and thus less valuable as human beings. The violation of human dignity was established as soon as the Court accepted those facts, and thus the Court wrongly decided that there was no infringement of s. 15 of the *Charter*.

The Court's real analysis should have focused on whether or not the infringement of s. 15 by s. 38(1)(c) could be saved under s. 1. As noted, in order to minimally impair the claimant's rights, the respondent must have accommodated the claimant to the point of undue hardship.[66] It is important to note that "excessive demands" which is a central concern of s. 38(1)(c) can be dealt with at this stage of the analysis, as it is an aspect of undue hardship. However, the only

64 *Kapp*, *supra* note 2 at para 22.
65 *Kapp*, *supra* note 2, *Withler*, *supra* note 2.
66 *Eldridge*, *supra* note 18 at para 79, 87, 94.

way that s. 38(1)(c) can be *Charter*-compliant is if it allows for a genuine attempt to accommodate the claimant, before costs preclude them from coming to Canada. This accommodation could include an individualized assessment. The Court in *Deol* was wrong to consider whether Mr. Singh has received an individualized assessment as part of its analysis whether discrimination had occurred.[67] That factor should have been considered along with an examination of whether the government had met its duty to accommodate. Similarly, some subsequent case law is wrong in deciding that there is no duty on Visa officers considering applications which engage s. 38(1)(c) to investigate how excessive demands can be minimized.[68] All these steps are part of the duty to accommodate and vital to preserving equality rights.

One example of the duty to accommodate at work in the context of social services under s. 38(1)(c) comes from the Supreme Court of Canada case *Hilewitz*,[69] which ruled the claimant's or their family's ability to contribute to the costs must be considered before a person is determined to be inadmissible. While some cases continue to conclude that *Hilewitz* applies only to social, not health care services,[70] the analysis should apply to all of s. 38(1)(c) before the latter can minimally infringe s. 15 of the *Charter*. This is especially so, because the only other accommodation available in the immigration regime for persons falling under s. 38(1)(c) is an application to the Minister to exempt them from the inadmissibility on humanitarian and compassionate grounds (an "H&C application").[71] However, such applications are entirely discretionary. It is clear from the Operational Manual on H&C applications that the considerations under the current H&C regime focus primarily on the costs the person will cause

67 *Deol*, *supra* note 56 at paras 60, 63.
68 *Sapru v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35.
69 *Supra* note 59.
70 See for example *Lee v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1461; *Aleksic v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1285.
71 IRPA s 25.

to Canada.[72] Furthermore, it is entirely on the applicant to pay the substantial fee to make such an application and present all of the evidence to be considered. Without the *Hilewitz* analysis, which imposes duties on the government consistent with a positive duty to accommodate claimants, there is nothing in the immigration regime that serves as an impetus for government to remedy the disadvantage created to elderly immigrants by s. 38(1)(c) of the IRPA.

Sponsorship

The final worrying aspect of the policy affecting elderly immigrants is the sponsorship policy, because most seniors (83%) arrive in Canada through sponsorship in the family class. Once again, this discussion will not focus on the duties, if any, the government owes to those who are abroad.

Firstly the government has traditionally taken a much longer time to process sponsorship applications for parents and grand-parents. In November 4, 2011, it decided that it would stop processing these applications altogether and instead replace them with a special temporary residence permit granted to parents and grand-parents - the Super Visa. In order to qualify for the Super Visa, the family of the elderly person must provide an undertaking of support and the elderly person must be able to show that they have purchased adequate private medical insurance to cover at least $100,000 worth of medical expenses valid for at least a year from their date of entry into Canada. The Super Visa is a multiple-entry visa. The duration of a person's stay in Canada upon each entry is limited to 2 years, for a total time of 10 years.[73] Just as with all

72 Citizenship and Immigration Canada, *IP 5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (2012) s. 11.7. Online at http://www.cic.gc.ca/english/resources/manuals/ip/ip05-eng.pdf.
73 Citizenship and Immigration Canada, "Operational Bulletin 350 - November 4, 2011, Fourth Set of Ministerial Instructions: Temporary Pause on Family Class Sponsorship Applications for Parents and Grandparents" (2011). Online at http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob350.asp; Citizenship and Immigration Canada, "Operational Bulletin 357 - December 1, 2011, Parents and Grandparents Extended Stay Temporary Resident Visa (*Super Visa*) and Authorized Period of Extended Stay" (2011). Online at http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob357.asp.

temporary residence permits, the applicant must convince a Visa officer that they will leave the country upon the expiry of the Visa. Unlike for sponsored persons, no other dependents in the home country are eligible to join the applicant. Furthermore, absent a valid work permit, the elderly person is prohibited from working in Canada for the duration of their stay. Thus there is almost no way at all that such a person can achieve permanent residence or citizenship in Canada. Even if such persons could make an H&C application under s. 25, they are unlikely to succeed because they are precluded from having employment and thus achieving establishment in Canada, which is a crucial factor in an H&C application.

The Minister of Citizenship and Immigration justified the new policy with the following remarks:

> "This [the minimal funds requirement for relatives of applicants for a Super Visa] is to ensure that Canadian tax payers don't end up having to support visiting relatives through our welfare and other generous social benefits."[74]
>
> "One idea has been to require families to put down some kind of a health care bond for sponsoring parents or grandparents. They would pay up front for a portion of the health care costs that their parents would use in Canada…Family sponsorship is a privilege, not a right. We are committed to family reunification within our system, but it has to be linked to our scarce public resources. It's not fair for us to raise taxes on Canadians to pay for future health care costs for folks who've never lived in the country or paid taxes in it."[75]

These new policies single out parents and grandparents who are, by necessity, older than other family class members whose visas continue to be processed. The distinction that the government is making is therefore based on age.

It seems impossible to justify the policy of not processing applications at all under s. 15. When the Minister's comments above are considered, the choice not to process the applications of the elderly is clearly based on the stereotypical assumption that older immigrants do not

74 South Asian Generation Next, "Super Visa Applications Being Accepted as of Dec 1st", (7 December 2011).
75 Cohen, *supra* note 17.

contribute to Canada and are a burden on the social system. This policy blatantly infringes s. 15 of the *Charter*.

It cannot be said that this differentiation is justified by s. 1, because it does not minimally impair rights. There are alternatives to a blanket prohibition on the sponsorship of parents and grandparents that could accommodate individual claimants and address the government's concerns about costs. Stopping all processing of applications is arbitrary and has no rational connection to the government's stated goal of family reunification.

Nor can it be said that the new Super Visa provisions alleviate the hardship caused by this policy. While the government describes this policy as facilitating family reunification, in fact the opposite is true. The inability of parents and grandparents to acquire permanent residence or citizenship in Canada leaves them vulnerable to separation from their families, deportation, medical inadmissibility and disproportionate poverty. Furthermore, the new policy assumes that all elderly individuals "would use" government health care and will cause disproportionate costs to public funds. The assumption that all elderly immigrants will require health care that will cost around $100,000 is arbitrary and not based on any individual assessment. It thus perpetuates a historical disadvantage on the basis of age and is plainly based harmful stereotypes about the elderly being a social burden and having less value as human beings. It almost certainly infringes s. 15.

The infringement cannot be saved by s. 1. There is no rational connection between this policy and saving money, making the immigration system more fair and efficient or reunifying families. The policy is not consistent with cost savings because it does nothing to help senior earn a livelihood in order to ameliorate their situation, contribute to their own health care costs and acquire some establishment in Canada. Furthermore, there is neither minimal impairment of

rights, nor accommodation to the point of undue hardship as assumptions about cost are allowed to govern and exclude claimants before they have any real chance to apply to come to Canada or present their individual response. Alternatives are available. Even setting the required level of insurance coverage after performing an individual assessment of an elderly person who is making the application, would do more to accommodate claimants than the government's current position.

Conclusion

To date, when faced with s. 15 claims from elderly immigrants, courts have tended to focus too narrowly on their immigrant status and years of residence they have accumulated in Canada, rather than the prejudice they suffer due to their age, just like all elderly persons. The result is that courts have upheld many policies that cause elderly immigrants real prejudice and exacerbate their already vulnerable social position and are therefore discriminatory. It is time that these policies were reviewed once again, given the Supreme Court of Canada's renewed commitment to substantive equality. The only policies that can comply with the modern promise of substantive equality under s. 15 of the *Charter* are those that: aim to integrate and accommodate seniors rather than isolate them; no longer rely on harmful stereotypes about the burden that elderly immigrants cause to society and; aim to eliminate age-related discrimination that causes the historical vulnerable position of the elderly of which immigrant seniors are a part.

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