A HEALTHY DEBATE:
MEDICAL INADMISSIBILITY

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1. INTRODUCTION

The Immigration and Refugee Protection Act (IRPA) at Sections 33 through 43 inclusive sets out who is inadmissible to Canada. Those who pose security threats to Canada, human or international rights violators, criminals and those with health concerns are all inadmissible to Canada.

This paper attempts to provide some helpful background, the sources of information, case summaries of the most recent noteworthy 2010 and 2011 court and tribunal decisions and some helpful practical tips for the immigration law practitioner interested in inadmissibility on health grounds.

2. BACKGROUND

2.1 The 2010 Numbers

280,000 foreign nationals became Canadian permanent residents in 2010 all of whom were required to undergo a Canadian Immigration medical examination prior to becoming a Canadian permanent resident (Paragraph 16(2)(b) of the IRPA).

96,000 foreign students came to Canada and 182,000 foreign workers entered Canada in 2010 many of whom were required to have a Canadian Immigration medical examination.

In total approximately 450,000 Canadian Immigration medical examinations are performed each year.

Of the 450,000 medical examinations each year approximately 1,500 – 2,000 foreign nationals are determined to have a health condition that would make them inadmissible to Canada under Section 38 of the IRPA, almost all under Paragraph 38(1)(c) of the IRPA for a health condition that “might reasonably be expected to cause excessive demand on health or social services”.

2.2 Excessive Demand Cost Threshold and the 2011 Figure

Each applicant is to be assessed on an individual basis. When determining whether an individual is likely to cause an excessive demand, a medical officer employed by the Department of Citizenship and Immigration Canada (CIC) compares the costs of anticipated publicly-funded health or social services for that individual against the Canadian per capita average over a period of five consecutive years from the date of the person’s most recent medical examination. However, in cases where there is evidence that significant costs are likely to be incurred beyond that period, the period is no more than ten consecutive years.

The officer also assesses whether the anticipated health or social services requirements would add to existing waiting lists, and would increase mortality and
morbidity in Canadian citizens or permanent residents as a result of the prevention or delay of the provision of those services.

The combined average per capita cost of health and social services in Canada is the “excessive demand cost threshold”. When calculating whether a person exceeds this threshold, the CIC medical officer multiplies the average Canadian per capita health and social services costs by the number of years used for the medical assessment window of the individual applicant.

To calculate the dollar amount of the:

1. health services component of the excessive demand cost threshold, CIC uses the Canadian Institute of Health Information (CIHI) figure on per capita costs for health services; and

2. social services component of the excessive demand cost threshold that is not captured in the CIHI figure, CIC has used information from Statistics Canada, provincial governments, and the Canadian Home Care Association.

CIC's Health Management Branch 2011 excessive demand cost threshold is $5,935.

3. SOURCES OF INFORMATION

3.1 The Law

The Immigration and Refugee Protection Act (IRPA) and the Immigration and Refugee Protection Regulations (IRPR) relevant sections are:

A16(2)(b) – requirement to submit to a medical examination

A38(1)(c) – inadmissibility “on health grounds if their health condition might reasonably be expected to cause excessive demand on health or social services”

A42 – inadmissibility on grounds of an inadmissible family member

R1(1) – definitions of “excessive demand”, “health services” and “social services”

R20 – assessment of inadmissibility on health grounds

R29 – R34 – conduct of medical examinations

3.2 Citizenship and Immigration Canada Material

3.2.1 Manuals

Overseas Processing Manual Chapter OP 15 Medical Procedures
3.2.2 Operational Bulletins

Assessing Excessive Demand on Social Services

Operational Bulletin 063 – September 24, 2008
Assessing Excessive Demand on Social Services

Operational Bulletin 037 – September 7, 2007
Assessing Excessive Demand on Social Services for Business Class Applicants

3.2.3 Medical Officer’s Handbook (1992)
Available at: http://www.cba.org/CBA/sections_cship/pdf/medical_officers.pdf

3.2.4 Designated Medical Practitioner Handbook
Available at: http://www.cic.gc.ca/english/resources/publications/dmp-handbook/

4. 2010 and 2011 CASE LAW
http://www.canlii.org/en/ca/fca/doc/2007/2007fca282/2007fca282.html ) held individualized assessments of all applicants and a consideration of all evidence presented by an applicant is required before making a decision on inadmissibility due to excessive demand on social services is required.

Much has been written and presented on at conferences on the Hilewitz and the Colaco seminal and all important decisions. 2010 and 2011 decisions of interest include:


2. Companioni v. Canada (Minister of Citizenship and Immigration) 2009 FC 1315, 87 Imm. L.R. (3d) 271 Federal Court December 31, 2009


4. Rashid v. Canada (Minister of Citizenship and Immigration) 2010 FC 157, 88 Imm. L.R. (3d) 165 Federal Court (February 16, 2010)

5. Sökmen v. Canada (Minister of Citizenship and Immigration 2011 FC 47 Federal Court (January 17, 2011)

6. Masoumeh(Tara) Babapour Amirabadi IAD File Number: TA9-17555 (February 9, 2011)


4.1.1 Facts

Vithal Sapru, an engineer by profession, applied for status as a permanent resident in Canada as a member of the Skilled Worker class. Included in his application were his wife Amita, a pediatrician, and their children Radika and Rishi.

A medical officer reviewed the results of the medical examinations. She completed a Medical Notification (IMM 5365) in which she diagnosed Rishi as suffering from an intellectual disability. Based on her review of the results of the medical examination and all the reports she had received, the medical officer concluded that Rishi "has a health condition that might reasonably be expected to cause excessive demand on social services" in Canada.

The medical officer went on to provide a detailed list of the social services she believed would be required by Rishi and their costs.

In reaching this opinion, the medical officer did not conduct an individualized assessment of Rishi's likely demand for social services (as opposed to his eligibility for such
services). This individualized assessment of likely demand was mandated by the Supreme Court of Canada in *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706.

After a designated immigration officer (immigration officer) received the Medical Notification, he wrote to Mr. Sapru advising of the concern that Rishi was a person whose health condition might reasonably be expected to cause excessive demand on health or social services in Canada (Fairness Letter). The Fairness Letter repeated verbatim from the Medical Notification the diagnosis and particulars of the medical condition that Rishi was said to suffer from and the social services he was said to require. The Fairness Letter invited Mr. Sapru to submit additional information.

A detailed Fairness Response was provided to the Fairness Letter.

The Fairness Response was sent to the medical officer for review and consideration. A Procedural Fairness assessment was then completed by the medical officer and sent to the immigration officer. In the Procedural Fairness assessment the medical officer listed the additional documents she had reviewed in the Fairness Response. She then wrote:

> I have reviewed our medical file for the above-named Foreign National along with the additional material listed above and it is my opinion that no information has been provided which would indicate that the original immigration medical assessment was incorrect. Therefore there is insufficient evidence to support a change or re-evaluation of this Foreign National's medical assessment at this time. Hence remains M5.

The tribunal record contains no letter, note, e-mail or other writing that explains how the medical officer analysed the information provided in the Fairness Response or her basis for concluding that the Fairness Response contained no information that would lead the medical officer to the view that her original assessment was incorrect.

**4.1.2 Issue and Decision**

The Judge of the Federal Court certified as serious questions of general importance:

> Is a Medical Officer under a duty to provide adequate reasons for finding that a person is inadmissible on health grounds pursuant to paragraph 38(1)(c) of the Act, which is independent from the Visa Officer's duty to provide reasons and which is therefore not satisfied by the Visa Officer providing reasons that are clearly adequate?

The Federal Court of Appeal held:

> When assessing whether a foreign national's health condition might reasonably be expected to cause excessive demand, a medical officer is under a duty to provide sufficient information to an immigration
officer to allow the immigration officer to be satisfied that the medical officer's opinion is reasonable.

4.1.3 Reasons

The Federal Court of Appeal at Paragraph 36 states:

*The medical officer must provide the immigration officer with a medical opinion about any health condition an applicant has and the likely cost of treating the condition. When an applicant submits a plan for managing the condition, the medical officer must consider and advise the immigration officer about things such as the feasibility and availability of the plan. In every case, what is required of a medical officer will reflect the information before the medical officer.*

The Federal Court of Appeal at Paragraph 41 states:

*Having reviewed the respective roles of the immigration and medical officers, it follows from the obligation placed on an immigration officer to review the reasonableness of a medical officer's opinion that a medical officer must provide the immigration officer with sufficient information to enable the immigration officer to be satisfied that the medical officer's opinion is reasonable.*

The Federal Court of Appeal at Paragraph 43 states:

*What is important is that at the time the immigration officer makes his or her decision on admissibility, the immigration officer must have sufficient information from the medical officer to allow the immigration officer to be satisfied that the medical officer's opinion is reasonable.*

4.2 Companioni v. Canada (Minister of Citizenship and Immigration) 2009 FC 1315, 87 Imm. L.R. (3d) 271 Federal Court December 31, 2009

4.2.1 Facts

Ricardo Companioni, together with his common-law partner, Andrew Grover, would be admissible to Canada as members of the skilled worker class, were it not for the cost of out-patient prescription drugs to control their HIV. The cost of their prescriptions totals some $33,500 per year.

4.2.2 Issue and Decision

Whether the reasoning in *Hilewitz* is equally applicable to assessments concerning out-patient prescription drugs.

Mr. Justice Harrington concluded that “the principles enunciated in *Hilewitz* are equally applicable in any consideration as to whether the cost of out-patient drugs would constitute an excessive demand on health services”. 
4.2.3 Reasons

There was some evidence Mr. Companioni had a personal insurance policy which covered prescription drugs, and Mr. Grover had an employer-based group policy which did the same.

Mr. Justice Harrington states at Paragraph 27 of his decision: “In my view, what the Officer shold have done was follow her own dictates and go back to Mr. Companioni to call upon him to provide a viable plan”.

4.3 Jafarian v. The Minister of Citizenship & Immigration 2010 FC 40 Federal Court (January 14, 2010)

4.3.1 Facts

Seyed Mostafa Jafarian a citizen of Iran, was selected by Quebec as an investor. Unfortunately, his daughter Atousasadat is afflicted with multiple sclerosis. Although the disease is degenerative, it has been controlled by the drug Rebif. In Canada, Atousadat’s prescription would cost some $15,000.00/year.

The visa officer came to the conclusion that the family was inadmissible because Atousasadat’s condition “might reasonably be expected to cause excessive demand on health…services”, within the meaning of sections 38 and 42 of the Immigration and Refugee Protection Act (IRPA). The record does not indicate that the visa officer carried out any independent analysis, particularly as regards conflicting medical opinions, or predictions, as to the prognosis of the disease. He simply endorsed the Health Canada doctor’s opinion.

4.3.2 Issues and Decision

There are three main issues:

1. Would most of the cost of Rebif be government funded?

2. If more than half the cost of Rebif would be government funded, the second issue is whether Mr. Jafarian’s ability and willingness to defray the cost of out-patient prescription drug medication is a relevant consideration in assessing whether the needs presented by a family member’s health condition constitutes an excessive demand;

3. Whether the tenets of procedural fairness were observed in the visa officer’s assessment of Atousasadat’s medical condition given that the doctors were not at idem.

Application for judicial review granted.
4.3.3 Reasons

4.3.3.1 Issue 1 – Is Medication Government funded in Quebec?

The Federal Court at Paragraph 14 states:

However, neither the visa officer, nor the Health Canada doctor upon whose opinion he relied, nor Mr. Jafarian, actually looked at Quebec law. If they had, they would have realised that the premise that Rebif “would be provided by provincial medical care plans” is not necessarily correct.

The Federal Court at Paragraph 14 states:

That information was incorrect. The answer lies in an Act Respecting Prescription Drug Insurance, R.S.Q. c.A-29.01 and regulations thereunder. In Quebec, all permanent residents must be insured to a minimum level called “the basic plan.” There are two classes of underwriters: private insurance companies and the government itself. If an individual is eligible for private insurance, such insurance must be taken out. If not eligible, the public underwriter, the Régie de l’assurance médicale du Québec, provides the coverage.

The Federal Court at Paragraph 18 states:

Thus the question, which was neither considered by Mr. Jafarian nor by the visa officer, is whether Mr. Jafarian and/or his daughter would, as Quebec permanent residents, be eligible to take out private insurance.

The Federal Court at Paragraph 21 states:

All we know is that Mr. Jafarian has been approved as an investor. Because the right questions were not asked, there is no indication whatsoever in the record as to whether Atousasadat’s medication would be paid for by private insurance. If it would be, then the majority of the cost of Rebif would not be government-funded and so the cost thereof would not be an “excessive demand” within the meaning of IRPA.

4.3.3.2 Issue 2 – Willingness and Ability to Pay

The Federal Court at Paragraph 28 states:

These circumstances are quite unlike Hilewitz, where, as a matter of Ontario law, the cost of most if not all of the social services in question were recoverable, irrespective of Mr. Hilewitz’s representations. If the majority of the cost of Rebif is not covered by the Quebec government, this issue is moot. If the majority is so covered, then his intentions, and good faith, are simply not relevant. The law does not permit him to opt out. If this
latter scenario is the case, the refusal to grant permanent resident visas to Mr. Jafarian and his family was correct in law.

4.3.3.3 Issue 3 – Procedural Fairness

The decision is the visa officer’s to make and not the Health Canada doctor (Paragraph 29).

4.4 Rashid v. Canada (Minister of Citizenship and Immigration) 2010 FC 157, 88 Imm. L.R. (3d) 165 Federal Court February 16, 2010

4.4.1 Facts

Al-Karim Ebrahim Rashid, the applicant, applied for a permanent resident visa under the Federal Skilled Worker Program at the High Commission in Nairobi, Kenya, on January 13, 2004. Mr. Rashid is HIV positive and asymptomatic, meaning the virus is present but does not manifest any visible symptoms. He contracted HIV in 1996 from contaminated blood in Tanzania.

Medical Officer Kerry Kennedy found that Mr. Rashid was on a regimen of medication that cost about USD $10,000.00 per year.

4.4.2 Issue and Decision

The sole issue is whether the visa officer's decision, through the assessment of the medical officer, constitutes a reasonable finding that the applicant is inadmissible pursuant to paragraph 38(1) (c) of the IRPA.

The visa officer's determination that the applicant does not meet the requirements for immigration to Canada, pursuant to paragraph 38(1)(c) of the IRPA, the Federal Court concluded was reasonable and within the range of possible and acceptable outcomes.

4.4.3 Reasons

Mr. Justice Mosley considered the facts in Companioni and distinguished them at Paragraph 23 of the decision:

The facts of this matter are distinguishable from those in Companioni, in my view. In that case, one of the two applicants had a personal insurance policy that covered prescription drug costs and the second was covered by an employer-based group policy, either or both of which might have continued to apply if the applicants relocated to Canada. In the present matter, the applicant is relying on the personal commitments of his sister and two others. It is trite law that they can't be held to those commitments.

At Paragraphs 24 and 25 Justice Mosley adds:
Mr. Rashid would be eligible for coverage under the provincial Trillium Drug Program if he was to become resident in Ontario, as intended, once a valid Ontario Health Card is issued to him and upon demonstrating high prescription drug costs in relation to his net household income.

The visa officer did not ignore the new financial support documents submitted by the applicant in March 2007 and May 2008, nor did the medical officer make any unreasonable error of fact when he found that the new documents did not change the notification of medical inadmissibility previously signed by his colleague. The medical officer's opinion, adopted by the visa officer, that the estimated cost of Mr. Rashid's medication would be well in excess of the health cost threshold and that it would constitute an excessive demand was a personalized assessment based on the evidence.

4.5 Sökmen v. Canada (Minister of Citizenship and Immigration 2011 FC 47 Federal Court January 17, 2011

4.5.1 Facts

In this case, the applicant, a Turkish citizen, submitted an application for permanent residence in the economic category as an investor. The applicant and his family were selected by Quebec.

The applicant’s son Bariş, born on February 15, 1992, presents a tetralogy of Fallot, a congenital heart disease. He has been treated in France for over fourteen years by Dr. Emre Belli, an eminent cardiologist. Fortunately, the Sökmen family has the financial resources to support Bariş because his condition has required a number of interventions in the past. Despite their plan to move to Canada, the Sökmen family still prefers today that Bariş be treated and followed in France by Dr. Belli.

Bariş’ condition is stable and controlled, which is confirmed by his treating physician, Dr. Belli. The pulmonary prosthesis, which was implanted percutaneously in London in 2008, allows Bariş to enjoy the same pace of life as all boys his age. He goes to school full-time, performs daily tasks and plays various sports such as tennis. Bariş takes inexpensive medication, one 20 mg enapril tablet and one aspirin per day. He does not need the assistance of social services.

4.5.2 Issue and Decision

Did the immigration officer properly consider all the evidence provided?

Application for judicial review allowed.

4.5.3 Reasons

The Federal Court found that Baris’ particular situation was not adequately considered.
The Federal Court at Paragraph 32 states:

However, given Dr. Belli’s two reports, Dr. Hindle’s conclusion that “the prognosis for this medical condition is for continuation and deterioration. Ongoing specialists attention, associated tests, further hospitalizations and surgical interventions are indicated” is clearly a generic conclusion about the tetralogy of Fallot, not Bariş’ particular situation.

The Federal Court at Paragraph 34 states:

In terms of finances, the impugned decision does not contain any analysis of the applicant’s proposed plan. It must be noted, under paragraph 38(1)(c) of the Act, that it is only where a medical condition might reasonably be expected to cause excessive demand that the person is inadmissible. This indicates that some demand is acceptable; a full analysis is therefore required to determine whether the demand is “excessive”.

4.6 Masoumeh (Tara) Babapour Amirabadi IAD File Number: TA9-17555 Date of decision: February 9, 2011 February 16, 2011 (written reasons)

4.6.1 Facts

Masoumeh (Tara) Babapour Amirabadi (the appellant) sponsored her father, Darvishali Babapour Amirabadi (the applicant) to Canada. Her father’s application for a permanent resident visa was refused by a visa officer at the Canadian Embassy in Singapore. The visa officer found that the applicant was inadmissible in Canada on health grounds, specifically renal failure – chronic – post renal transplant, pursuant to Section 38(1)(c) of the Immigration and Refugee Protect Act (IRPA) in that his health condition might reasonably be expected to cause excessive demands on health or social services.

4.6.2 Issue and Decision

At issue was whether or not the visa officer’s decision was valid in law.

Board Member Harvey Savage found the refusal not valid in law.

4.6.3 Reasons

“The medical officer erred when he failed to consider the applicant’s individual circumstances when he found that he would have access to the Trillium program. His individual circumstances as discussed exclude him from receiving benefits under that program.”

“As indicated, the visa officer also erred when he did not seek clarification on the applicant’s medication. The medical officer erroneously noted that the applicant was taking a dosage of Cellcept of at least twice what he was actually taking according to all of the testimony and the medical letters filed in evidence.”
“The credible testimony of the appellant, applicant and her spouse that they are able and willing to pay for the applicant’s medications cannot be discounted and in my view carries significant weight in this case. The applicant has, as indicated previously, a pattern of covering the costs of the medication and none of the evidence presented has satisfied me that the applicant will automatically be eligible for medication coverage. It is evident that prescription drugs are not treated in the same way as other health services covered by the Ontario Health Insurance Plan (OHIP) in this province where entitlement is automatic if you are a resident of Ontario and you cannot opt out. According to the information received in this case, in order to be eligible for drug benefit programs, you still have to apply and qualify.”

“Given that the appellant has presented persuasive evidence that the applicant is not automatically entitled to public funding for his medications, credible evidence that the applicant is willing and able to continue to pay for his medications along with a well-documented emergency contingency support back-up from the appellant, and having regard to certain errors made by the officer which are above noted, I find that the appellant’s appeal must succeed and the visa officer’s decision is not valid in law.”

5. PRACTICAL TIPS*

5.1 Tip 1 – Be Fully Informed from the Start

When you first meet a client who is interested in visiting, studying, working or immigrating to Canada it is incumbent on the immigration practitioner to directly address from “get go” with the client if she or he might be inadmissible to Canada on any of the inadmissibility grounds set forth in Section 33 through 43 inclusive of the IRPA. Armed with the facts and information from the start can in the application process in many situations avoid surprises down the road.

5.2 Tip 2 – Research and Brainstorm

With the facts in hand research the medical problem and become knowledgeable by way of:
1. the internet
2. the immigration bar (including professional listservs (such as the CBA, AQAADI (in Quebec))
3. the medical community

5.3 Tip 3 – Medical Specialist

Consult and strategize with a medical specialist ideally someone you have quick and easy access to (for example a relative or family friend) for the five or ten year medical window. Have the medical specialist assess the progression of the condition.

5.4 Tip 4 – Big Budget Costs – Deal with Before Applying to enter Canada
Consider if surgical intervention or other big budget costs have already been covered in the home country or could be covered before applying to enter Canada.

5.5 Tip 5 – Research what Social Services are Covered

Research what social services are covered by the provinces or federally and what can be opted out of.

5.6 Tip 6 – Research what Pharmaceutical Costs are Covered

Research what pharmaceutical/medical costs are covered by the provinces and which provinces and what can be opted out of or what can be covered by group and/or private insurance plans.

5.7 Tip 7 – Research Generics

Research whether generic or different medications can be substituted for the medicines in question.

5.8 Tip 8 – Research the Case Law

Research the case law and discuss with experienced colleagues who have faced similar challenging cases.

5.9 Tip 9 – Access to Information Requests

Do repeated access to information requests to have ALL the up to date information held by the Canadian visa office and the medical officers including email exchanges between the Canadian medical officer and visa officer.

5.10 Tip 10 – Be Thorough and Creative, Meet Deadlines

Think out of the box, be thorough, creative and advocate convincingly and in a timely fashion for your client. Consider where appropriate a well documented and specifically addressed request for a Temporary Resident Permit and admission on humanitarian and compassionate grounds. Where meeting the deadlines provided by the government are not possible request in writing an extension.

*These 10 practical medical inadmissibility tips have been inspired by similar lists prepared in past erudite articles authored by Mario Bellissimo, Esq. an expert in the field.
6. CONCLUSION

The medical inadmissibility field has evolved tremendously over the last decade. While the relative number of “excessive demand on health or social services” refusals each year is small (less than 1/2 of one percent of all applicants) the consequences for your client and their family members are devastating. With professional, thorough and timely efforts you can often creatively and effectively advocate for the client who is not of perfect health.

In 2010 Mr. Justice Harrington of the Federal Court wrote in Jafarian (Jafarian v. MCI 2010 FC 40): “Those who are qualified are welcome to immigrate to Canada; unless they are sick; except if they are rich – maybe!” I would add, that effective, diligent, thorough and caring immigration counsel can in many a case be the “richness” needed to tip the scale in favour of the desirable and well intentioned good, but not of perfect health, immigrant!