Court File No. [redacted]

FEDERAL COURT

BETWEEN:

[redacted]

HIV LEGAL NETWORK

Applicants

- and –

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

APPLICANTS' MEMORANDUM OF ARGUMENT

OVERVIEW

1. The Applicants seek leave and judicial review of the decision of an immigration officer [Officer] refusing the Applicant [redacted]s application for a study permit after the Officer determined that [redacted] was medically inadmissible pursuant to s. 38(1)(c) of the of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Officer's decision breached the principles of procedural fairness and is unreasonable.

2. The Applicants also challenge the constitutionality of s. 38(1)(c). The provision is inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms* [*Charter*] and not reasonably justified under s. 1. The provision allows for the refusal of an immigration application if an applicant's health condition may place an "excessive demand" on Canada's publicly funded health and social services. S. 38(1)(c) thus reduces people with health conditions to a cost figure, reflecting potential economic burden, without accounting for any contributions they may make to Canada. Moreover, there is little, if any, evidence that s. 38(1)(c) achieves its aim of protecting publicly funded health and social services. What remains is a provision that discriminates based on physical and mental disability, and citizenship, without achieving any meaningful purpose.

I. FACTS

3. The relevant facts are outlined in detail in the affidavits of the Applicants.[1] In addition, the Applicants highlight the following facts for the purposes of this application.

4. ███ is a citizen of ████████ who was born on █████████ He was diagnosed with HIV in June 2021 and is healthy through the use of medication.[2]

5. ███ applied for a Canadian study permit based on his acceptance to study at ███████ ██████████████ a designated learning institution in Ontario. He did not use legal representation for the purpose of the application and disclosed his HIV status on his application. His study permit was issued on March 31, 2022, and was valid until August 2, 2023. Throughout his studies in Canada, his HIV medication was paid for by the manufacturer of the medication and through his █████ health insurance plan.[3]

6. ███ applied to extend his study permit on June 6, 2023. Again, he did not use legal representation for the purpose of the application, and he disclosed his HIV status. The only correspondence he received in connection with his application was an email notifying him that his application had been transferred to Immigration, Refugees, and Citizenship Canada [IRCC] Etobicoke on July 7, 2023, and notification that his application had been refused on September 11, 2023.[4]

7. ███ contacted the HIV & AIDS Legal Clinic Ontario [HALCO] to challenge the refusal. HALCO could only meet on September 18, 2023. On that date, HALCO referred ███ to his present counsel, whom he met on September 29, 2023. ███ provided instructions to commence this application, which was filed on October 3, 2023. ███ had a continuous intention to challenge the refusal to issue the study permit, and the reason for the delay in commencing the Application for Leave and Judicial Review was his inability to promptly meet with expert legal counsel.[5]

[1] *Application Record* at Tab 4; Affidavit of the Applicant ███ affirmed February 1, 2024, *Application Record* at Tab 5; Affidavit of Sandra Ka Hon Chu, affirmed February 1, 2024.
[2] Affidavit of the Applicant ███ affirmed February 1, 2024, ("███ Affidavit"), para 2, 3.
[3] ███ Affidavit, *supra* note 2, para 3-6.
[4] ███ Affidavit, *supra* note 2, para 8-14.
[5] ███ Affidavit, *supra* note 2, para 21-25.

8. While in [redacted] [redacted] sought to avoid stigma and discrimination due to his HIV status. [redacted] knew that people with HIV are judged harshly and experience a range of consequences, including barriers to their ability to work, maintain relationships, find housing, and access healthcare. For this reason, he kept his HIV status secret.[6]

9. [redacted] chose to study in Canada, in part, because of its reputation for being open and accepting of people with HIV. He was hopeful that he would not be discriminated against and that he would have an opportunity to demonstrate that his HIV status would not affect his ability to work, study, or otherwise contribute to Canadian society.[7]

10. The refusal of [redacted]s study permit application had severe consequences. The refusal interrupted [redacted]s academic career, throwing it into uncertainty. [redacted] was also deprived of the ability to work to support himself. He is now financially dependent upon his parents.[8]

11. After the refusal, [redacted] felt that his chance to prove his abilities were taken away arbitrarily, and that he was judged solely based on his HIV status. His mental health, sense of self-worth, and self-confidence have significantly deteriorated. He has struggled to sleep and eat. His feelings of being stigmatized in [redacted] have returned.[9]

The Applicant HIV Legal Network

12. The HIV Legal Network [Legal Network] is a non-governmental organization founded in 1992 and federally incorporated in 1993 as a not-for-profit organization with charitable registration.[10] The Legal Network promotes the human rights of people living with HIV and other populations disproportionately affected by HIV, punitive laws and policies, and criminalization, in Canada and internationally.[11] The Legal Network has an extensive history of work on a wide range of legal and policy issues related to the human rights of

[6] [redacted] Affidavit, *supra* note 2, para 15.
[7] [redacted] Affidavit, *supra* note 2, para 16, 17.
[8] [redacted] Affidavit, *supra* note 2, para 18, 19.
[9] [redacted] Affidavit, *supra* note 2, para 20.
[10] Affidavit of Sandra Ka Hon Chu (Chu Affidavit), affirmed February 1, 2024, para 3.
[11] Chu Affidavit*, supra note 10*, para 5.

people living with HIV and of communities particularly affected by HIV, including the excessive demand provision under s. 38(1)(c) of *IRPA*.[12]

The Legislative Scheme

13. The medical inadmissibility regime in *IRPA* consists of a statutory inadmissibility provision, regulations which define "excessive demand" and "health and social services", and IRCC policy which provides guidance for officers applying the provisions.[13]

14. The statutory provision applies to foreign nationals, unless and until they acquire permanent residence. It results in inadmissibility for temporary or permanent resident applicants who "might reasonably be expected to cause excessive demands on health or social services" in Canada. The following categories of applicants are exempted:

- Sponsored spouses, common-law partners, and dependent children within the family class;
- Protected persons;
- People applying for visas as Convention refugees or persons "in similar circumstances"; and
- Family members of the above groups.[14]

15. The Immigration and Refugee Protection Regulations [*IRPR*] provide definitions of "excessive demand", "health services", and "social services". *IRPR* provides that, before a finding of inadmissibility based on excessive demand, an officer must consider whether an applicant can develop a feasible plan to mitigate the financial cost of the applicant's health condition (often referred to as a "mitigation plan"). *IRPR* also extends s. 38(1)(c) exemptions to conjugal partners, and dependent children, and stepchildren of sponsors.[15]

16. IRCC policy provides detailed instructions to officers in applying the s. 38(1)(c) statutory and regulatory provisions. The policy establishes an annual financial threshold for determining "excessive demand". It also provides instructions on ensuring procedural

[12] Chu Affidavit*, supra* note 10, para 7.
[13] *Immigration and Refugee Protection Act*, (*IRPA*), s. 38(1)(c), s. 38(2); *Immigration and Refugee Protection Regulations* (IRPR), R. 1(1), R. 20(3), R. 24, R. 34, R. 139(4); *IRCC, "Excessive demand on health services and on social services."*
[14] *IRPA*, s. 38(1)(c), s. 38(2).
[15] *IRPR*, R. 1(1), 20(3), 24(3), 34, 139(4).

fairness, such as advising applicants of the reasons for their potential inadmissibility and allowing applicants an opportunity to respond.[16]

II. ISSUES

17. This application for leave and judicial review raises the following issues:

i) The Applicant HIV Legal Network meets the criteria for public interest standing;
ii) An Anonymity Order should be issued in these proceedings;
iii) An extension of time to file the Application is justified in the circumstances;
iv) The decision refusing the Applicant's study permit application breached the principles of procedural fairness;
v) The decision refusing the Applicant's study permit is unreasonable; and
vi) Section 38(1)(c) of the *IRPA* violates s. 15(1) of the *Charter*, and is not a reasonable limit that can be demonstrably justified in a free and democratic society.

III. ARGUMENT

Issue i): The Applicant HIV Legal Network meets the criteria for public interest standing.

18. The Legal Network meets the test for public interest standing:

a) The case raises a serious justiciable issue;
b) The Legal Network has a real stake in the proceedings; and
c) The proposed suit is a reasonable and effective means to bring the case to court, in all of the circumstances.[17]

19. Each of the elements weighs in favor of exercising judicial discretion to grant standing.[18] Moreover, the Legal Network's standing will further the very purpose of public interest standing, by giving effect to the principle of legality and ensuring access to justice.[19]

a) The case raises a serious justiciable issue

[16] IRCC, *"Excessive demand on health services and on social services"* 12 January 2024.
[17] *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, para 2. *British Columbia (AG) v Council of Canadians with Disabilities*, 2022 SCC 27, paras 48-55.
[18] *Downtown Eastside*, *ibid*, para 20, *Council of Canadians with Disabilities, ibid,* paras 41, 56-59.
[19] *Downtown Eastside*, *supra* note 17, paras 22-25, *Council of Canadians with Disabilities, supra* note 17, paras 56-59.

20. A "serious justiciable" issue is one that raises a "substantial constitutional issue," or an "important" issue, which is "far from frivolous" and appropriate for the court to decide.[20] There is no question that the application at hand raises such an issue.

21. The Applicants challenge the constitutionality of s. 38(1)(c) of *IRPA,* arguing that the provision is discriminatory based on disability and citizenship, and thus breaches s. 15 of the *Charter*. In fact, concerns about the provision's harmful impacts on migrants living with disabilities, and their family members, led to a study of the issue by the House of Commons Standing Committee on Citizenship and Immigration in 2017, at the end of which the Committee recommended a full repeal. As further argued below, the provision's harm continues to this day and amounts to a breach of the *Charter*.

22. Consistent with the Supreme Court's ruling in *Council of Canadians with Disabilities,* the Applicants here raise a serious justiciable issue, "the constitutionality of laws that implicate – and allegedly violate – the *Charter* rights of people with […] disabilities."[21]

b) The Legal Network has a real stake in the proceedings

23. To be granted public interest standing, an applicant must have a "real stake in the proceedings" or be "engaged with the issues they raise."[22] The Supreme Court has repeatedly held that an applicant has a genuine interest in the proceedings when the applicant holds a high reputation and has shown an ongoing interest in the issues faced by those most directly affected by the litigation. [23]

24. There can be no doubt that the Legal Network has a real stake and genuine interest in the case. The Legal Network is considered an expert on issues concerning people affected by

[20] *Downtown Eastside*, *supra* note 17, para 42; *Council of Canadians with Disabilities, supra* note 17, para 98; *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651, para 312.
[21] *Council of Canadians with Disabilities, supra* note 17, para 98.
[22] *Downtown Eastside, supra* note 17, para 43*; Council of Canadians with Disabilities,* supra note 17, para 51.
[23] *Canadian Council of Churches v Canada (Minister of Employment and Immigration*), [1992] 1 SCR 236, p. 254 (cited in *Downtown Eastside*, supra note 17, para 43); *Council of Canadians with Disabilities, supra* note 17, para 101; *Canadian Doctors*, para 325.

HIV, both domestically and internationally, and has been engaged in promoting the rights of people affected by HIV for decades, including the precise issues at play in this case.

25. Specifically, since 1993, the Legal Network has been working to promote the rights of people living with HIV, and other populations disproportionately affected by HIV, punitive laws and policies, and criminalization, in Canada and internationally.[24] The Legal Network conducts research, litigation, public education, and community mobilization, on HIV-related discrimination, the application of criminal laws to people living with HIV, the accessibility of healthcare services for people who use drugs, the application of immigration law and policy on non-citizens who are living with HIV, among other issues.

26. Additionally, the Legal Network has been granted intervener status at the Supreme Court of in numerous cases, including: *R v Cuerrier,* [1998] 2 SCR, [1998] SCJ No 64; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44; *R v DC*, 2012 SCC 48; *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45; *Canada (Attorney General) v Bedford*, 2013 SCC 72; *R v Hutchinson*, 2014 SCC 19; *R v Wilcox*, 2014 SCC 75; *R v Smith*, 2015 SCC 34; *Carter v Canada (Attorney General)*, 2015 SCC 5; *R v Lloyd*, 2016 SCC 13; *Sherman Estate v Donovan*, 2021 SCC 25; *R v Kirkpatrick*, 2022 SCC 33; *R v Sharma*, 2022 SCC 39; *R v Ndhlovu*, 2022 SCC 38.

27. The Legal Network has been granted intervener status in several more cases in various courts, including *AB v Canada (Citizenship and Immigration)*, 2017 FC 1170, concerning a judicial review of a decision to deny a permanent residence application based on s. 38(1)(c) of *IRPA* because the principal applicant's family member was living with HIV.

28. In fact, the Legal Network has been concerned with the discriminatory impact of s. 38(1)(c) since *IRPA* was enacted in 2001, due to the provision's disproportionate impact on people living with HIV.[25] At a time when the "excessive demand" cost threshold was such that

[24] Chu Affidavit, *supra* note 10, paras 5-6.

[25] Affidavit, *supra* note 2, Exhibit G, ATIP Results: *A Cost-Benefit Analysis on the Excessive Demand provision in the Canadian Immigration Processing System*, Migration Health Policy and Partnership, September 2016; *Memorandum: Excessive Demand Provision under the Immigration and Refugee Protection Act*, IRCC, February 2017; *Overview of the Centralized Medical Processing Unit (CMAU)*, Dr.

almost all people living with HIV were excluded, the Legal Network found, "The assumption that all immigrants with HIV will excessively burden the public purse reinforces views of immigrants as abusers of the social welfare system, and of persons with HIV as people who are unable to contribute to society."[26] That same year, the Legal Network made submissions to the House of Commons Committee, in the lead up to the adoption of *IRPA*, with a focus on how legislative and regulatory proposals would affect people living with HIV.[27]

29. More recently, in 2017, the Legal Network collaborated with HALCO, making submissions on s. 38(1)(c) to the House of Commons' Standing Committee on Citizenship and Immigration. In their submissions, the organizations explained how the s. 38(1)(c) provision perpetuates stigma against people living with HIV.[28] Similarly, in 2021, the Legal Network and HALCO made submissions to IRCC on s. 38(1)(c) reiterating that the provision remained harmful for people living with HIV, despite the increase to the cost threshold, which meant that most people living with HIV were *not* being refused based on their projected "excessive demand."[29] In 2023, the Legal Network reiterated these concerns in a brief to the Minister of Immigration, Refugees and Citizenship.[30]

30. Notably, the Legal Network's work has been, and continues to be, informed by people who are living with HIV. For instance, at all times, a minimum of two people on the Legal Network's Board of Directors are openly living with HIV.[31] Moreover, between January 2023 and February 2024, the Legal Network communicated with over 100 people living with HIV, regarding travel and migration to Canada. Nearly half of those individuals asked the Legal Network staff whether they would be banned from visiting or migrating to Canada because of their HIV status.[32]

Arshad Saeed (Director, CMAU), October 2019; L*ooking back: The Implementation of the TPP on Excessive Demand (2018-2021), Internal Discussion*, Migration Health Branch.

[26] Chu Affidavit, *supra* note 10, Exhibit A, *HIV/AIDS and Immigration,* at p. 57.

[27] Chu Affidavit, *supra* note 10, para 25.

[28] Chu Affidavit, *supra* note 10, Exhibit C.

[29] Chu Affidavit, *supra* note 10, Exhibit D.

[30] Chu Affidavit, *supra* note 10, para 33.

[31] Chu Affidavit, *supra* note 10, para 4.

[32] Chu Affidavit, *supra* note 10, para 11.

31. The Legal Network is evidently the appropriate public interest applicant in this matter. Given its extensive record of research, legal and policy analysis, community engagement, education, and advocacy, both in Canada and internationally, the Legal Network has developed considerable expertise in the analysis of legal issues facing people living with HIV, particularly with respect to issues of HIV and immigration and HIV-related stigma and discrimination.

c) The proposed suit is a reasonable and effective means to bring the case to court

32. "Whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all the circumstances."[33] A "flexible, discretionary, and purposive approach," is thus required,[34] taking into consideration:

- The applicant's ability to bring the claim forward, including the resources and expertise they can provide;
- Whether the case is of public interest, such that it transcends the interests of those most directly affected by the challenged law;
- Whether there are alternative means, which would favor a more efficient and effective use of judicial resources, including what distinct perspective the applicant can bring to the resolution; and
- The impact of the proceedings on others who are more directly affected, including whether the failure of a diffuse challenge could prejudice subsequent challenges.[35]

33. Again, each of the factors supports the Legal Network's public standing in this case. Granting public standing will necessarily promote access to justice "for disadvantaged persons in society whose legal rights are affected" by the challenged law.[36]

34. First, the Legal Network's long-standing reputation as a leading advocate for the rights of people affected by HIV, and extensive work on immigration restrictions for people living with HIV, has allowed the organization to develop a wealth of resources and expertise, on

[33] *Downtown Eastside, supra* note 17, para 50.
[34] *Downtown Eastside*, *supra* note 17, para 44; followed *in Council of Canadians with Disabilities*, *supra* note 17, para 59.
[35] *Downtown Eastside*, *supra* note 17, paras 50-51; followed in *Council of Canadians with Disabilities*, *supra* note 17, para 55.
[36] *Downtown Eastside*, *supra* note 17, para 51; followed in *Council of Canadians with Disabilities*, *supra* note 17, para 52.

which it can rely here. That is, the Legal Network has been studying s. 38(1)(c) since it came into effect with the enactment of *IRPA* in 2001 and has continued to do so to this day. Throughout the decades, the Legal Network has partnered with legal practitioners, academics, advocacy organizations, and people directly affected by the provision, who can also provide their expertise to the case at hand.[37]

35. Second, the case transcends immediate interests, as the Applicants argue that the impugned legislation is inherently unconstitutional. As argued below, the legislation is harmful not only to those whose immigration applications are denied on the basis of s. 38(1)(c), but it is also directly harmful to those who are processed under the provision, who must spend additional resources to convince the Canadian government that they will not be a burden.[38] Moreover, the impugned provision perpetuates harmful misconceptions about people living with disabilities, and is inconsistent with Canadian values of inclusivity and diversity.

36. Granting public interest in this case will also promote access to justice for disadvantaged groups who have historically faced serious barriers to bringing such cases before the courts. In *Council of Canadians with Disabilities,* the Supreme Court confirmed that public interest standing was warranted, in part, because of the barriers that people living with disabilities have historically faced in bringing a constitutional challenge before the courts.[39] The Court posited, for instance, that "they may hesitate to expose themselves to the unfortunate stigma that can accompany public disclosure of their private health

[37] Chu Affidavit, *supra* note 10, paras 11, 24-34; see also *Downtown Eastside*, *supra* note 17, para 74; *Council of Canadians with Disabilities, supra* note 17, paras 105-106.
[38] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Draft: Excessive Demand Policy: Document for Discussion with Provinces and Territories*, IRCC, 31 July 2017; *Looking back: The Implementation of the TPP on Excessive Demand (2018-2021), Internal Discussion*, Migration Health Branch; *Excessive Demand, Implementation of the TPP since 2018*, *Internal Analysis*, Migration Health Branch; *Draft: Excessive Demand Policy, FPT Ministers Meeting,* Forum of Ministers Responsible for Immigration, September 2017; *Excessive Demand, Implementation of the TPP since 2018*, *Internal Analysis*, Migration Health Branch; *Presentation to the IRCC Excessive Demand Working Group, Internal Discussion,* Migration Health Branch, July 2021*;* see, also, CIMM Report, *supra note 64*, page 14; See also, Chu Affidavit, supra note 10, Exhibit A, p. 57.
[39] *Council of Canadians with Disabilities*, *supra* note 17, para 110.

information… though fully capable of advancing litigation, individuals with mental disabilities must overcome significant personal and institutional hurdles to do so."[40]

37. Similarly, in *Canadian Doctors*, the court accepted that people without citizenship in Canada face serious barriers in bringing constitutional challenges. In that case, "some potential applicants were simply too […] ill to mount such a challenge. Others were facing removal from Canada, with the result that they might be here to see the litigation through to its conclusion. Some were lacking in the financial or other resources to do so." Indeed, as in *Canadian Doctors,* counsel for R.A made efforts to identify additional affected individuals to join the legislation, to no avail.[41]

38. Next, there are no alternative means of challenging the impugned provision, which would favor a more efficient and effective use of judicial resources. There are no parallel cases challenging s. 38(1)(c), an issue which at times suggests that there is a more effective and efficient alternative.[42] Moreover, given the barriers faced by individuals directly affected by s. 38(1)(c), the Legal Network can provide an important perspective to the litigation. The Legal Network works for and with people living with HIV, including those wishing to travel and/or migrate to Canada, and has demonstrated itself able to advance their expressed interests.

39. Finally, granting public interest standing to the Legal Network is unlikely to negatively impact others, given that the issue here is largely about the constitutionality of the law on its face. The negative impact is also unlikely given the Legal Network expertise and experience on the issues related to s. 38(1)(c). To the extent that those who support the legislation may be impacted, we note the holding in *Council of Canadians with Disabilities*, "Support for a law should not immunize it from constitutional challenge. If the impugned provisions are unconstitutional, they should be struck down."[43]

[40] *Council of Canadians with Disabilities*, *supra* note 17, paras 113-116.
[41] *Canadian Doctors for Refugee Care v Canada (Attorney General),* 2014 FC 651, paras 339-340.
[42] See, e.g., *Downtown Eastside*, *supra* note 17, para 51; *Council of Canadians with Disabilities*, *supra* note 17, paras 113-116.
[43] *Council of Canadians with Disabilities, supra* note 17, para 117.

40. Accordingly, the Legal Network satisfies the criteria for public interest standing: the case raises serious and justiciable issues, the Legal Network has a genuine interest in the proceedings, and the application is a reasonable and effective way to have the issues heard.

Issue ii) An Anonymity Order should be issued in these proceedings.

41. On October 3, 2023, [redacted] submitted an Anonymity Order Notice, requesting the following relief:

> The Applicant [redacted] requests that the Court make an order that all documents that are prepared by the Court and which may be made available to the public be amended and redacted to the extent necessary to make the identity of the Applicant [redacted] anonymous. The Applicant [redacted] further requests that he be referred to as "[redacted] in the public record. The Applicant [redacted] further requests that this notice be treated as confidential and sealed from the public record given the facts it contains.[44]

42. [redacted]s Anonymity Order Notice was made pursuant to Rule 8.1 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, which states this Court may make an order that all documents that are prepared by the Court and that may be made available to the public be amended and redacted to the extent necessary to make the party's identity anonymous.[45]

43. The [redacted] relies upon the following submissions in support of that request in addition to the grounds stipulated in the October 3, 2023 Anonymity Order Notice.

44. Justice Grammond in *Adeleye* aptly described the open court principle, its exceptions, and how these principles apply to requests for anonymization in immigration and refugee cases.[46]

45. The anonymization of the style of cause is a minor restriction on the open court principle. This Court has adopted a generous approach in the granting of anonymization orders in the immigration and refugee context, as long as there is some evidence of a risk of harm that rises above mere inconvenience or embarrassment.[47]

[44] Application Record, *supra* note 1, at Tab 3.
[45] *Federal Courts Citizenship, Immigration and Refugee Protection Rules,* SOR/93-22 at Rule 8.1.
[46] *Adeleye v Canada (Citizenship and Immigration)*, 2020 FC 640, at paras 6-2.1.
[47] *Adeleye*, *ibid*, paras 17, 21.

46. The Federal Court has the authority to restrict the open court principle by anonymizing the style of cause when the decision contains highly personal information or information that might put ▇▇ at risk. HIV status fits into both of these categories. ▇▇s HIV status is highly personal, and he has chosen not to disclose this information to almost all of his friends and family. The disclosure of ▇▇s HIV status will also place him at a higher risk of discrimination and harm in his country of origin, ▇▇▇▇[48]

47. Applying the above principles to the case at hand, ▇▇s request for an anonymity order is warranted.

Issue iii): An extension of time is warranted.

48. Pursuant to paragraph 72(2)(b) of *IRPA*, an Application for Leave and Judicial Review must be filed with the Federal Court within 15 days after the day on which the applicant is notified or becomes aware of the matter that is the subject of the application. In the case at bar, the Applicant's application for a study permit extension was refused on September 11, 2023. Therefore, the deadline to file the Notice of Application was September 26, 2023. The Applicant filed an Application for Leave and Judicial Review on October 3, 2023, meaning an extension of time of 7 days is being requested.

49. The Legal Network became aware of the refusal on September 29, 2023.[49] No extension of time is necessary for the Legal Network.

50. When requesting an extension of time for filing and serving an application before the Federal Court, the following four factors must be demonstrated by the applicant:[50]

a) The application has some merit;
b) There exists a reasonable explanation for the delay;
c) There was a continuing intention to pursue his or her application; and
d) No prejudice to the respondent arises from the delay.

[48] *AB v Canada (Citizenship and Immigration)*, 2017 FC 629 at para 9; *XY v Canada (Citizenship and Immigration)*, 2020 FC 39, para 4.
[49] Chu Affidavit, *supra* note 10, para 34.
[50] *Canada (Attorney General) v Hennelly, 1999 CanLII 8190 (FCA),* para 3.

51. Regarding the merit of the application, the Applicants have identified serious issues related to procedural fairness, lack of evidence to support the decision, and the constitutionality of the underlying legislation. This aspect of the test has therefore been satisfied.

52. There also exists a reasonable explanation for the delay. ███ was not aware of the 15-day deadline to apply for judicial review of his refusal. The decision letter laid out ███s options to reapply for a new study permit, but it did not indicate his options to pursue an Application for Leave for Judicial Review of the refusal and that there was a deadline for doing so.[51] ███ first reached out to expert counsel at HALCO on September 13, 2023, but was unable to schedule an appointment until September 18, 2023. After this appointment with HALCO, ███ was informed that HALCO did not have enough capacity to take on his file. At this stage, ███ was referred to current counsel. ███s first meeting with current counsel took place on September 29, 2023. At this meeting, ███ was advised by current counsel of the possibility of applying for leave and judicial review. ███s Application for Leave was filed shortly thereafter on October 3, 2023.[52]

53. There has been a continuing intention on the part of ███ to pursue his application as demonstrated by the steps ███ took to arrange for counsel, which occurred well within the 15-day deadline for filing this application.

54. Finally, no prejudice arises to the Respondent given the minor delay involved.

55. In *Kotelenets,* this Court confirmed that the underlying consideration when weighing the factors set out in *Hennelly*, is that justice must be done between the parties.[53] The Court noted that this could mean that in certain circumstances an extension will be granted even if one of the factors is not satisfied. In the present case, justice would not be done if ███ is deprived of the ability to pursue his application for judicial review. ███ has continually shown the motivation to pursue his case. and has provided a reasonable explanation for the initial delay in filing his application. For these reasons, an extension of time is warranted.

[51] ███ Affidavit, *supra* note 2, Exhibit E.
[52] ███ Affidavit, *supra* note 2, paras 21-25.
[53] *Kotelenets v Canada (Citizenship and Immigration),* 2015 FC 209.

Issue iv): The decision refusing [redacted]s study permit application breached the principles of procedural fairness.

56. The decision refusing [redacted]s study permit breached the principles of procedural fairness. *IRPR*, s. 20(3) requires an officer to consider non-medical factors such as an applicant's intent and financial ability to mitigate any potential excessive demand prior to a final decision on inadmissibility. IRCC's own policy on implementing s. 38(1)(c) requires that a procedural fairness letter be sent to applicants to advise them of the potential inadmissibility and to provide them with an opportunity to respond.[54]

57. [redacted] did not receive any correspondence from IRCC advising him of the potential inadmissibility and providing him with an opportunity to contest medical findings or advance a mitigation plan. Therefore, the principles of procedural fairness were breached in the refusal of [redacted]s study permit application.

Issue v): The decision refusing [redacted]s study permit is unreasonable.

58. The refusal of [redacted]s study permit application was based on no evidence, and is therefore unreasonable. No evidence is described by the Officer regarding the nature and cost of [redacted]s medication and whether that cost exceeds the excessive demand threshold. No evidence was sought or provided regarding the source of funding of [redacted]s medication. Based on the absence of information supporting the decision, the decision fails to provide a transparent and intelligible justification.[55]

Issue vi): Section 38(1)(c) of *IRPA* violates s. 15(1) of the *Charter* and is not a reasonable limit that can be demonstrably justified in a free and democratic society.

59. Subsection 15(1) of the *Charter* ensures equality before and under the law:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[56]

[54] IRPR, R. 20(3); *IRCC, "Excessive demand on health services and on social services"*
[55] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65.
[56] *Canadian Charter of Rights and Freedoms,* s. 15(1).

60. Subsection 15(1) is infringed when a law or state action: (a) creates a distinction upon an enumerated ground or analogous ground; and (b) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.[57]

a) **Background to s. 38(1)(c)**

61. As described by the Supreme Court, Canada's exclusion of people based on their health conditions has evolved from an expansive approach to an increasingly narrow one. Indeed, prior to *IRPA*'s enactment, the *Immigration Act* authorized "excessive demands" refusals to sponsored spouses, dependent children, and refugees, which were regularly successfully appealed to the Immigration Appeal Division.[58] As noted above, *IRPA* introduced a blanket medical inadmissibility exemption for all applicants in those categories, based on "compelling humanitarian and compassionate reasons".[59]

62. The legislative narrowing of medical inadmissibility, along with records documenting Parliament's concerns about fairness, led the Supreme Court to remark upon s. 38(1)(c)'s legislative history as demonstrating an intention "to shift from an approach based on categorical exclusion to one calling for individualized assessments."[60] The Supreme Court extended that trend in *Hilewitz* by finding that medical inadmissibility findings on excessive demand require an examination of an applicant's ability to mitigate the anticipated costs of the specific health condition.[61] *Hilewitz*'s impact was expanded when subsequent jurisprudence determined that it applied to all immigration categories, and that its principles should not be restricted to social services costs.[62]

63. Outside the courtroom, investigative journalists have for years reported situations in which the excessive demands regime resulted in hardship to applicants and their families, and cast

[57] *Fraser v Canada (Attorney General)*, 2020 SCC 28, at para 27.
[58] *Hilewitz v. Canada (Minister of Citizenship and Immigration*); *De Jong v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 706, para. 53.
[59] *IRPA* s. 38(2); Canada Gazette, Volume 135, No. 50, p. 4497, December 15, 2001.
[60] *Hilewitz*, *supra* note 58, para. 53
[61] *Hilewitz*, *supra* note 58, para. 53
[62] *Colaco v. Canada (Minister of Citizenship and Immigration)* (2007) 2007 FCA 282; see also *Morales c Canada (Citoyenneté et Immigration)*, 2018 CanLII 54023.

doubt upon the data leading to medical inadmissibility findings.[63] Noting s. 38(1)(c)'s adverse effects on people with disabilities, the House of Commons Standing Committee on Citizenship and Immigration studied the provision at the end of 2017, hearing from government, expert witnesses, and members of the public. In December 2017, the Committee issued its final report on the matter [CIMM Report], recommending the full repeal of s. 38(1)(c), along with interim measures until the repeal could take place.[64]

64. In response, the government implemented a policy which severely curtailed the refusals under the provision, without committing itself to an immediate repeal.[65] First, the government tripled the cost threshold on which health conditions are assessed, from the average per capita cost of health care, to three times the average per capita cost of health care. Second, the government eliminated certain social services from s. 38(1)(c) consideration, specifically, special education, social and vocational rehabilitation services, and personal support services. That policy is now reflected in *IRPR*.[66]

65. In April 2018, the government did in fact commit to repeal s. 38(1)(c), stating that "[…] the Government agrees with the Standing Committee's recommendation to eliminate the policy and will collaborate with provinces and territories towards its full elimination."[67]

b) The distinction presented by s. 38(1)(c)

66. The only focus of the first part of an alleged violation under s. 15 is on whether a distinction has been made on an enumerated or analogous ground. The Supreme Court has held that this stage of the analysis is only intended to bar claims because they are not based on enumerated or analogous grounds.[68]

[63] Canadian Press, "Ontario professor's family may be forced to leave country because son has Down Syndrome", National Post, March 20, 2016; Global News, "Inadmissible: Canada rejects hundreds of immigrants based on incomplete data", July, 2017.
[64] "Building an Inclusive Canada: Bringing the Immigration and Refugee Protection Act in Step with Modern Values", Report of the Standing Committee on Citizenship and Immigration, December 2017.
[65] Temporary Public Policy Regarding Excessive Demand on Health and Social Services,
[66] IRPR, R. 1(1).
[67] Government of Canada News Release: "Government of Canada brings medical inadmissibility policy in line with inclusivity for persons with disabilities", April 18, 2018.
[68] *Quebec (Attorney General) v. Alliance du personnel professional et technique de la sante et des services sociaux* [2018] 1 SCR 464, para. 26.

67. Section 38(1)(c) of *IRPA* creates a distinction upon the enumerated ground of mental and physical disability. It exacerbates disadvantages faced by people with physical and mental disabilities, as well as people in Canada who have not yet obtained permanent residence.

68. "Mental or physical disability" is a protected ground under s. 15. The ground has been defined by the Supreme Court as a "mental or physical impairment" that gives rise to a functional impairment.[69] While s. 38(1)(c) refers to "health condition," those captured by the provision will in most circumstances meet the definition of "disability". For example, HIV has long been accepted as a "disability" in federal and provincial human rights legislation.[70] It has also been one of the most common "health conditions" considered under s. 38(1)(c).[71]

69. Section 38(1)(c) of *IRPA* creates a distinction based on mental or physical disability both on its face and in its impact. The provision explicitly states that a health condition will lead to inadmissibility if it is deemed to present an "excessive demand" on health and social services. People without health conditions are therefore not at immediate risk of s. 38(1)(c) inadmissibility – though in fact they are at risk until they obtain permanent residence. Section 38(1)(c) thus creates a distinction between people with mental or physical disabilities and those without disabilities on its face.

70. Government before the Parliamentary subcommittee argued that the excessive demand regime does not single out any particular medical condition and focuses instead on the cost of an applicant's medical condition.[72] However, cost is not a neutral factor. IRCC rejects immigration applications from people with disabilities, or who have family members with disabilities, due to their potentially "excessive" use of health services. As a result, people

[69] *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703, para. 36
[70] See, e.g., *Canadian Pacific Limited v Canada (Human Rights Commission)*, [1990] FCJ No 1028 (FCA); *Canada (Attorney General) v Thwaites (TD)*, [1994] 3 FC 38.
[71] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Centralized Medical Admissibility Unit (CMAU), IMPN Director Conference*, Migration Health Branch, November 2016 (showing that HIV has been one of the most common diagnoses); *Overview of the Centralized Medical Processing Unit (CMAU)*, Dr. Arshad Saeed (Director, CMAU), October 2019; *Looking back: The Implementation of the TPP on Excessive Demand (2018-2021), Internal Discussion*, Migration Health Branch; *Excessive Demand, Implementation of the TPP since 2018*, *Internal Analysis*, Migration Health Branch.
[72] Standing Committee on Citizenship and Immigration, Evidence, Tuesday October 24, 2017, at 0850.

with disabilities are unfairly disadvantaged by a law that is described as neutral, but which reduces an applicant living with disabilities to the cost of their health care.

71. Thus, even if the neutrality of the provision is accepted, s. 38(1)(c) clearly perpetuates indirect discrimination because persons with disabilities are disproportionately impacted by inadmissibility legislation associated with the cost of their supposed health services.

c) The distinction imposes burdens and denies benefits in a manner that exacerbates disadvantage.

72. As held by the Supreme Court, the second stage of the s. 15(1) analysis considers:

> [Whether] the law has the effect of reinforcing, perpetuating, or exacerbating disadvantage…. There is no "rigid template" of factors relevant to this inquiry. The goal is to examine the impact of the harm caused to the affected group. The harm may include "[e]conomic exclusion or disadvantage, [s]ocial exclusion . . . [p]sychological harms . . . [p]hysical harms . . . [or] [p]olitical exclusion", and must be viewed in light of any systemic or historical disadvantages faced by the claimant group [references omitted].[73]

73. The historical disadvantage faced by migrants with mental or physical disabilities was acknowledged by the Supreme Court of Canada in *Hilewitz*. The Court described the history of Canadian immigration law as "often resulting in the application of exclusionary euphemistic designations that concealed prejudices about, among other characteristics, disability."[74]

74. The burdens imposed and benefits denied by s. 38(1)(c), on migrants with disabilities and their family members, include:

- The additional cost of challenging procedural fairness letters, which must be completed without clear costs and procedures considered by IRCC;
- The lengthy delays in receiving decisions, compared to those without disabilities;
- The negation of all economic and non-economic contributions to Canada;
- The emotional cost of being considered an "excessive demand," including the stigmatizing views that people with disabilities are solely burdens on society and that migrants are here to simply abuse Canada's public programs; and

[73] *Fraser*, supra note 57, para. 76.
[74] *Hilewitz*, supra note 58, para. 48.

- The broad impact of leaving the country, or relying on temporary permits, particularly people who cannot afford legal counsel to respond to procedural fairness letters.[75]

75. In *Law*, the Supreme Court identified a number of contextual factors which assist in characterizing a distinction as discriminatory. One of those factors is a lack of correspondence between the differential treatment and the group's reality.[76]

76. The lack of correspondence between the differential treatment and the reality of migrants with disabilities is reflected in the CIMM Report. Government witnesses before the Committee indicated that the excessive demand evaluation process does not balance anticipated costs with economic (or other) benefits of having an applicant and her family in Canada. In particular, there is no consideration of the contribution to the economy that would be lost for Canada if the applicant is denied. There is also no consideration of non-economic benefits.[77]

77. Canada has purportedly not attempted to assess benefits of applicants because Australia attempted do so, but abandoned their attempt upon finding that it required too many unsupported assumptions.[78] Advocates have also warned against the assessment of benefits, as it adds to the current regime's complications and further dehumanizes applicants, forcing them to prove their worth and reducing their contributions to Canada to quantifiable factors.[79]

78. Viewing people solely as potential impediments ignores the reality that people with disabilities, including people without permanent residence or citizenship, make important economic and non-economic contributions to Canada. In fact, in a 2016 memo, IRCC notes that provinces and territories regularly request that s. 38(1)(c) refusals be reversed so that

[75] CIMM Report, *supra* note 64, pages. 30-39; Appendix "A", Summary of CIMM Report Evidence and Submissions; Chu Affidavit, Exhibit A, *HIV/AIDS and Immigration*, p 57.
[76] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.
[77] CIMM Report, *supra* note 64, page 14; Standing Committee on Citizenship and Immigration, Evidence, Tuesday October 24, 2017, at 0925; Appendix "A", Summary of CIMM Report Evidence and Submissions.]
[78] CIMM Report, *supra* note 64, page 14; Standing Committee on Citizenship and Immigration, Evidence, Tuesday October 24, 2017, at 0859.
[79] See, e.g., Submission to Immigration, Refugees, and Citizenship Canada on Medical Inadmissibility.

they can recruit highly skilled migrants.[80] Similarly, in a 2017 memorandum, IRCC highlights a news story, to "illustrate a number of the issues related to the current excessive demand policy," describing an American family that was denied permanent residence based on s. 38(1)(c), after having invested $600,000 into their Canadian business and paying over $20,000 in taxes and fees to the government.[81]

79. The real vulnerability of s. 38(1)(c) therefore lies in the failure, and inability, to make any meaningful assessment of applicants' contributions. As held in *Granovsky*:

> An individual may suffer severe impairments that do not prevent him or her from earning a living. Beethoven was deaf when he composed some of his most enduring works. Franklin Delano Roosevelt, limited to a wheelchair as a result of polio, was the only President of the United States to be elected four times. Terry Fox, who lost a leg to cancer, inspired Canadians in his effort to complete a coast-to-coast marathon even as he raised millions of dollars for cancer research. Professor Stephen Hawking, struck by amyotrophic lateral sclerosis and unable to communicate without assistance, has nevertheless worked with well-known brilliance as a theoretical physicist. (Indeed, with perhaps bitter irony, Professor Hawking is reported to have said that his disabilities give him more time to think.)
>
> […] The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called "disabled" individual may not be impaired or limited in any way at all. An appreciation of the common humanity that people with disabilities share with everyone else, and a belief that the qualities and aspirations we share are more important than our differences, are two of the driving forces of s. 15(1) equality rights.
>
> The bedrock of the appellant's argument is that many of the difficulties confronting persons with disabilities in everyday life do not flow ineluctably from the

[80] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results*: Memorandum to the Minister: Excessive Demand Recent Developments*, IRCC, October 2016, in annex B, part starting with "Excessive demand appears to have lost its relevance".

[81] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results ATIP doc, *Draft: Excessive Demand Policy: Document for Discussion with Provinces and Territories*, IRCC, 31 July 2017, which includes media article 'Americans denied permanent residency because of daughter's special needs' (2017). See also *A Cost-Benefit Analysis on the Excessive Demand provision in the Canadian Immigration Processing System*, Migration Health Policy and Partnership, September 2016, p 17: "We lose some valuable applicants this way… In the beginning of 2015, a physician in South Africa and her architect husband's application for permanent residents under the skilled-worker category was rejected because of her autistic son."

individual's condition at all but are located in the problematic response of society to that condition.[82]

80. Viewing people solely through the lens of their potential costs on the public healthcare system perpetuates harmful and inaccurate stereotypes, including that people with disabilities are burdens on society and that migrants are simply here to abuse public resources.[83] Similar to the discriminatory second generation citizenship policy, s. 38(1)(c) perpetuates the view that migrants, including those with disabilities, "are parasites or leeches, in the sense defined by the Merriam Webster dictionary as 'a person who seeks support from another without making an adequate return."[84]

81. In fact, a 2016 cost-benefit analysis by the IRCC demonstrates the extent to which these stereotypes pervade s. 38(1)(c) (referred to as 'XSD' in the study). First, the author claims that "applicants without the XSD problem are more productive than those who were assessed as XSD, and there are production gains resulting from the replacement of the XSD applicants." Yet, the author also notes that no study had compared "labour market performance between applicants with and without XSD issues."[85] The author also admits that the estimates of s. 38(1)(c) production gains are highly uncertain.[86]

82. Second, the author claims that migrants with health conditions have greater difficulty integrating and settling in Canada.[87] The author bases the claim on the fact that people will be influenced by healthcare accessibility when choosing where to live – failing to support this claim with evidence or to explain why such would be so detrimental to their integration. The author also claims that migrants without health conditions are more likely and able to become involved in their community, without any supporting evidence.

[82] *Granovsky, supra* note 69, para 28-30.
[83] Chu Affidavit, *supra* note 10, Exhibit A, p. 57.
[84] *Bjorkquist et. al. v. Attorney General of Canada*, 2023 ONSC 7152, para 157.
[85] [redacted] Affidavit, *supra* note 2, Exhibit G, ATIP Results, *A Cost-Benefit Analysis on the Excessive Demand provision in the Canadian Immigration Processing System*, Migration Health Policy and Partnership, September 2016, p. 27.
[86] [redacted] Affidavit, *supra* note 2, Exhibit G, ATIP Results, *A Cost-Benefit Analysis on the Excessive Demand provision in the Canadian Immigration Processing System*, Migration Health Policy and Partnership, September 2016, p. 29.
[87] [redacted] Affidavit, *supra* note 2, Exhibit G, ATIP Results, *A Cost-Benefit Analysis on the Excessive Demand provision in the Canadian Immigration Processing System*, Migration Health Policy and Partnership, September 2016, pp. 36-37.

83. Similarly, statements made in a 2019 presentation by the IRCC, entitled *What Keeps Us Up at Night?,* clearly reveal stereotypes about migrants. Specifically, the presentation notes that "TRV requirements allow clients to 'visa-shop' and avoid [immigration medical exams]" and a "significant portion of at-risk clients travel to Canada avoiding [immigration medical exams]".[88] They make these claims based on unfounded assumptions about the intentions of people wishing to travel or migrate to Canada. Even so, they recommend a wider use of s. 40 of *IRPA* – inadmissibility based on misrepresentations. Here, people with disabilities are perceived as deceptive and untrustworthy.

84. As stated by then-Citizenship and Immigration Minister Hussen, in 2018, "While the provision has been in place for more than 40 years, it no longer aligns with our country's values on the inclusion of persons with disabilities in Canadian society."[89] In 2021, the IRCC's Migration Health Branch confirmed the same: the provision is not in line with Canadian values of diversity and inclusion.[90]

International law affirms the discriminatory nature of s. 38(1)(c) of IRPA

85. International law informs the interpretation of *Charter* rights.[91] International law prohibits restrictions on mobility based upon the fact that a migrant has a disability.

86. In 2010, Canada ratified *the United Nations Convention on the Rights of Persons with Disabilities* [*CRPD*]. On 3 December 2018, Canada acceded to the *Optional Protocol* with the support of the provinces and territories.[92]

87. The *CRPD* prohibits "all discrimination on the basis of disability and guarantee[s] to persons with disabilities equal and effective legal protection against discrimination on all

[88] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *What Keeps Us Up at Night?*, Migration Health Branch, October 2019.
[89] Government response to CIMM Report, presented April 16, 2018.
[90] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Presentation to the IRCC Excessive Demand Working Group, Internal Discussion*, Migration Health Branch, July 2021.
[91] *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3, paras 46, 59-75; *Kazemi Estate v. Islamic Republic of Iran* [2014] 3 SCR 176; *Divito v. Canada (Public Safety and Emergency Preparedness)* [2013] 3 S.C.R. 157.
[92] Library of Parliament, The United Nations Convention on the Rights of Persons with Disabilities: An Overview.

grounds."[93] Notably, Article 18 of the CRPD affirms the rights of people with disabilities to migration and travel:

> 1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:
>
> a. Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability…[94]

88. Canada clearly fails to live up to these promises based on s. 38(1)(c). For instance, people who come to Canada to establish themselves in the country and work towards citizenship will have their Article 18 right put at risk if they happen to develop a disability in Canada, or if a family member is living with disability, when they apply for permanent residence.

89. Indeed, in its Concluding Observations on Canada, the Committee on the Rights of Persons with Disabilities acknowledged Canada's failure to respect the rights of migrants with disabilities, recommending that Canada:

> Set up criteria aimed at addressing multiple and intersecting forms of discrimination through legislation and public policies, including through affirmative action programmes for women and girls with disabilities, indigenous persons with disabilities and migrant persons with disabilities, and provide effective remedies in cases of such discrimination.[95]

90. Notably, the Committee on the Rights of Persons with Disabilities found that Australia's medical inadmissibility regime, which parallels Canada's own s. 38(1)(c), failed to fulfill its obligation under articles 4, 5, and 18 of the *CRPD*. In that case, the complainant had been denied an Australian visa due to a multiple sclerosis diagnosis. The Committee concluded that the country was under the obligation to provide the complainant with an effective remedy and reimburse her legal costs. Further, the Committee stated that

[93] CRPD, Article 5.
[94] CRPD, Article 5, *ibid*.
[95] UN Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Canada, 8 May 2017, CRPD/C/Can/CO/1.

Australia was under an obligation to prevent similar violations in the future, requiring Australia to remove legislation preventing people with disabilities from immigration.[96]

Section 1

91. Section 38(1)(c) violates s. 15, and the onus is on the government to justify the provision based on whether the provision has a pressing and substantial objective, is rationally connected to its objective, is minimally impairing on *Charter* rights, and has salutary effects that outweigh deleterious effects.[97]

92. The excessive demand provision under s. 38(1)(c) has been justified as necessary to prevent excessive costs to, and thus protect, Canada's public healthcare system.[98] Notably, however, the Supreme Court has held that cost savings are not a pressing and substantial objective. Specifically, the Supreme Court has held that "courts will continue to look with strong skepticism at attempts to justify infringements of *Charter* rights on the basis of budgetary constraints. To do otherwise would devalue the *Charter*."[99]

93. Even if cost savings are a pressing and substantial objective, evidence demonstrates that actual savings from s. 38(1)(c) are insignificant at best, and uncertain at worst.[100] Specifically, in 2017, the government's own evidence was that 900 to 1,000 of all applicants (0.2%) considered under s. 38(1)(c) were refused yearly, with estimated total savings of $135 million, or $27 million for each province and territory, accounting for 0.1% of provincial and territorial healthcare budgets.[101]

94. The evidence also confirms that IRCC lacks adequate data regarding health services in provinces and territories, including cost information.[102] One must query how

[96] Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 20/2014, CRPD/C/24/D/20/2014, 30 April 2021, .
[97] *R. v. Oakes* [1986] 1 S.C.R. 103.
[98] Standing Committee on Citizenship and Immigration, Evidence, Tuesday October 24, 2017, at 0850,.
[99] *Newfoundland (Treasury Board) v. N.A.P.E*. 2004 S.C.C. 66, para. 72.
[100] CIMM Report, *supra* note 64, p. 14.
[101] Standing Committee on Citizenship and Immigration, Evidence, Tuesday October 24, 2017, at 0859,
[102] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Memorandum: Excessive Demand Provision under the Immigration and Refugee Protection Act*, IRCC, February 2017; *Draft: Excessive Demand Policy, FPT Ministers Meeting,* Forum of Ministers Responsible for Immigration, September 2017.

discrimination can be justified when there is no concrete evidence regarding the effectiveness of the provision in meeting its objective.

95. As of 2017, therefore, the effects of s. 38(1)(c) were not rationally connected to its purpose of preventing excessive costs to Canada's health care system. It is difficult to claim that 0.1% of anything is "excessive". Indeed, the government's own evidence from 2016 states, "excessive demand appears to have lost its relevance," based in part on the fact that provinces and territories were requesting decisions to be reversed and to absorb the minimal additional health care costs.[103]

96. Since 2018, s. 38(1)(c) serves even less purpose. In response to the CIMM Report, the government implemented changes which:

- tripled the threshold used for determining excessive demand, from the average per capita cost of health care in Canada, to triple the average per capita cost of health care; and
- removed certain treatment costs from the determination of excessive demand, namely costs related to special education, social and vocational rehabilitation services and personal support services.[104]

97. In 2021, the IRCC's Migration Health Branch confirmed that 85% of those approved under the amended excessive demand regime would have been refused prior to the 2018 changes.[105] It further confirmed that a very small portion of applicants with medical diagnoses were being refused – explaining, for instance, that of 2,000 people diagnosed with HIV, 29% had been assessed as potentially causing an excessive demand, and less

[103] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Memorandum to the Minister: Excessive Demand Recent Developments*, IRCC, October 2016 (Annex B).
[104] Regulations Amending the Immigration and Refugee Protection Regulations (Excessive Demand): SOR/2022-39, Canada Gazette, Part II, Volume 156, Number 6, SOR/2022-39 March 4, 2022,.
[105] ███ Affidavit, *supra note 2*, Exhibit G, ATIP Results, *Presentation to the IRCC Excessive Demand Working Group, Internal Discussion*, Migration Health Branch, July 2021; see also *Excessive Demand, Implementation of the TPP since 2018*, *Internal Analysis*, Migration Health Branch

than 7% had been refused.[106] The Migration Health Branch also confirmed that there had been a limited increase in costs, which the provinces and territories had absorbed.[107]

98. Notably, in 2021, the IRCC attempted to justify the insignificant cost savings as nonetheless important on the basis that, "individual high-cost cases can have significant impacts on local hospitals, in particular in smaller centers or provinces."[108] Yet, the government's own evidence confirms that most applicants approved under the amended excessive demand regime go on to live in the largest jurisdictions, including Ontario (39%), British Columbia (17%), Alberta (14%), and Quebec (9%)[109] – the jurisdictions who agreed with the CIMM Report recommendation to repeal s. 38(1)(c).[110] Moreover, the evidence also shows that, in consultation with the IRCC, smaller jurisdictions stated that the excessive demand provision had little impact on them.[111]

99. In any case, the test under s. 38(1)(c) is a nationwide, not a local, test. It uses the average per capita cost of healthcare **in Canada** as a measurement device, not the average per capita cost of healthcare in local communities.

100. Accordingly, the excessive demand regime cannot be said to have a pressing and substantial objective, nor one that is minimally impairing on *Charter* rights. Moreover, the burdens imposed on migrants and their family members, certainly outweigh the minute cost savings to Canada's public health care system. Thousands continue to be processed, and hundreds

[106] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Presentation to the IRCC Excessive Demand Working Group, Internal Discussion*, Migration Health Branch, July 2021; see also *Excessive Demand, Implementation of the TPP since 2018*, *Internal Analysis*, Migration Health Branch
[107] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Presentation to the IRCC Excessive Demand Working Group, Internal Discussion*, Migration Health Branch, July 2021; see also *Excessive Demand, Implementation of the TPP since 2018*, *Internal Analysis*, Migration Health Branch
[108] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Presentation to the IRCC Excessive Demand Working Group, Internal Discussion*, Migration Health Branch, July 2021.
[109] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Presentation to the IRCC Excessive Demand Working Group, Internal Discussion*, Migration Health Branch, July 2021.
[110] CIMM Report, *supra note 64*.
[111] ███ Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Memorandum: Excessive Demand Provision under the Immigration and Refugee Protection Act*, IRCC, February 2017.

continue to be refused, under the excessive demand regime each year, without any consideration of the benefits they have or can contribute to Canada.[112]

IV. RELIEF SOUGHT

101. The Applicants submit that they have raised an arguable case on the merits and request that leave be granted, in addition to an extension of time to bring the application.

102. In the event that leave is granted, the Applicants request an order from this Court reflecting the relief described in the Application for Leave and Judicial Review. In addition, the applicants request an Anonymity Order, anonymizing the individual Applicant's name to "[redacted]

103. If leave is granted, the Applicants request that the hearing be held in English and the materials will be in English.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Toronto, this 2nd day of February, 2024.

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[112] [redacted] Affidavit, *supra* note 2, Exhibit G, ATIP Results, *Excessive Demand, Implementation of the TPP since 2018*, *Internal Analysis*, Migration Health Branch.

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V. LIST OF AUTHORITIES

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APPENDIX A – SUMMARY OF CIMMS REPORT

Excerpts from Report of the Standing Committee on Citizenship and Immigration, *Building an Inclusive Canada: Bringing the Immigration and Refugee Protection Act in Step with Modern Values,* CIMM Evidence, and Written Submissions Consulted

Burdens Imposed/ Benefits Denied	1. Inadmissibility under IRPA, including inadmissibility of associated family members who do not have disabilities	- CIMM Report, at page 23: example of Mr. Felipe Montoya, a professor at York University, who experienced medical inadmissibility because of his son's disability when he applied for permanent residence. - CIMM Report, at page 37: example of live in caregivers and migrant workers ➔ Per Toni Schweitzer and Mercedes Benitez, "discrimination experienced by many live-in caregivers: they are deemed good to work in Canada but not good enough to remain and establish themselves with their families because one of their family members has been deemed medically inadmissible." ➔ Per Macdonald Scott, Carranza LLP, "Mr. Scott wrote that it is unfair that migrant "workers give their labour, are separated from their families, and then subjected to discrimination when it comes time to apply to stay in Canada."" ➔ HALCO, Submissions, at page 6: "As a result of vicarious inadmissibility, both the children and the caregiver applicant would be inadmissible to Canada due to excessive demand, nullifying the caregiver's years of sacrifice and hard work in Canada." - Experience of "personal hardship" related to medical inadmissibility provisions ➔ CIMM Report, per Felipe Montoya, at page 37: "Mr. Montoya told the Committee that, because his son was deemed medically inadmissible, the permanent residence application for the whole family was delayed for more than three years." • "great uncertainty and additional costs in time, energy and money." • Numerous medical exams required by son. ➔ CIMM Report, per Mercedez Benitez, at page 38: "I was devastated. It hurts me to feel that Canada thought we were not good enough. The months of uncertainty since we received the letter have been some of the hardest months of

		my life. I had chest pains; at times I thought I was having a heart attack from the stress. There were so many sleepless nights worrying that any day I could be refused and sent back home after working so hard for so many years. I was afraid. Who would provide for my family? Sometimes it was too much to bear, and I thought of giving up, but my family relies on me for support. I am the sole breadwinner. I needed to be strong." - CIMM Report, at page 38: Committee acknowledges that "medical assessments impose hardship because add considerable delay in processing." - CIMM Report, per Peter Larley, Larlee Rosenberg, at page 38: it is physically and mentally draining to fight the medical inadmissibility determinations. ➔ "IRCC is not accountable for the delays and resulting pain and frustration caused to families." - CIMM Report, per OCASI, CSALC and SALCO, at page 38: the impact is specifically on racialized communities. ➔ Sponsoring a parent or grandparent is often just as important as sponsoring a spouse or CL partner for many racialized communities. ➔ The policy impacts adult children in Canada who will have to care for aging parents from afar. - Migrant Workers Alliance for Change, Submissions, at page 1: the policyy effectively results in denial of permanent residency status to an entire family if any member of the family is deemed to be disabled. - Migrant Workers Alliance for Change, Submissions, at page 3: Impact on family reunification, for example, where a caregiver's family members outside Canada is diagnosed or found medically inadmissible after the applicant has already applied. ➔ HALCO, Submissions, at page 7: the regulation undermines goal of family reunification. - A.J. Withers and Alex Tufford, Submissions, at page 2: described as a "punitive quality" of separating people with disabilities from loved ones or excluding from Canada. - A.J. Withers and Alex Tufford, Submissions, at page: the medical inadmissibility provisions are part of historic discrimination and eugenics discourse. ➔ "One disqualified member on the grounds of excessive demand will disqualify an entire family group. Whether intentional or not, the immigration system continues to be used to

		exclude some family lines with disabled members. Renowned eugenicist Frederick Osborn once said: "Eugenic goals are most likely to be attained under a name other than eugenics."" - Standing Committee on Citizenship and Immigration, Evidence, November 20, 2017, per Lorne Waldman, at page 2: "From the point of view of an excessive demand analysis, one also has to engage in a cost-benefit analysis. This requires us to consider the emotional hardship that occurs when people are separated from their families, and also requires us to consider the impact of a strict application of the excessive demand criteria on our ability to attract the most desirable immigrants as we move forward."
	2. Additional cost for medical/legal expert reports in order to establish admissibility, including the preparation of mitigation plans which are not tracked and are unenforceable	- CIMM Report, per Dawn Edlund, Associate Assistant Deputy Minister of IRCC, at page 14: IRCC, however, has "no authority to enforce that mitigation plan once someone becomes a permanent resident." ➔ Standing Committee on Citizenship and Immigration, Evidence, November 22, 2017, Dawn Edlund, Associate Assistant Deputy Minister, at page. 9: "It's really hard to tell if they're achieving their purpose, because we don't track or monitor them after the fact. As I said the last time I was here before this committee on this study, we don't have any enforcement mechanisms possible to see whether or not someone has actually followed the plan they put forward. We don't have line of sight on that at all." - CIMM Report, at page 29: "Mr. Mario Bellissimo, from the Canadian Bar Association, commented on the challenges faced by individuals when interacting with IRCC's excessive demand process. He noted that the language found "in fairness letters can be presumptive [and] unclear." The information found on IRCC's website also does not offer much assistance for understanding the process." ➔ This means that applicants likely require the assistance of lawyers to respond. ➔ "a lack of clarity is "contrary to the Courts' instruction [in Hilewitz v. Canada, which required] that the letters set out relevant concerns in clear language to allow all applicants (including those not represented by counsel) to understand the case against them, and how to meaningfully respond."" - Additional obstacles for low income individuals

		➔ CIMM Report, Michael Battista, Jordan Battista LLP, at page 36: "The provision is "economically biased toward those who can afford the legal fees to fight the determinations."" ➔ CIMM Report, per A.J. Withers and Alex Tufford, at page 36: "The provision is "economically biased toward those who can afford the legal fees to fight the determinations." ➔ CIMM Report, at page 36: "Individuals that are low-income and disabled face "an uphill battle not only to win [their] application, but to obtain medical care."" ➔ "Witnesses pointed out that a request for exemption from medical inadmissibility is possible under section 25 of IRPA, or under a temporary residence permit, but "these forms of relief are highly discretionary and do not address the fundamental unfairness resulting from the application of medical inadmissibility criteria."" - Migrant Workers Alliance for Change, Submissions, at page 2: Section 38(1)(c) is anti-poor ➔ "…mitigation plan requires considerable legal acumen; to submit an effective mitigation plan requires legal counsel that must be paid by most applicants directly. Effectively it prioritizes immigrants with more wealth, over those without." - Migrant Workers Alliance for Change, Submissions, at page 2: Greater impact on migrant workers like caregivers. ➔ "The overwhelming majority of Caregivers are in low waged work, and minimum wages are established by provincial laws. Thus the fact that Caregivers have less financial resources is a direct result of government policy. As a result of these poverty wages, most caregivers are therefore unable to afford legal support to prepare the necessary documents for a mitigation plan to ensure permanent residency status for their family." - Migrant Workers Alliance for Change, Submissions, at page 2: although H&C submissions are an available option, migrant workers are often unable to pay legal fees of preparing these types of applications. - A.J. Withers and Alex Tufford, Submissions, at page 2: "creates a two-tiered system for permanent residents to access social services."

		➔ "By allowing this two-tiered system to remain, Parliament is asserting that one's economic, immigration and disability status are all grounds for lesser treatment." - Standing Committee on Citizenship and Immigration, November 21, 2017, Evidence, per Chantal Deslodges, at page 14: "The problem is that it's really difficult for an average person to know how to challenge these medical assessments. Most people don't have the knowledge about how to research the costs, and frankly speaking, it doesn't cross most people's minds to question the opinion of the medical officer and do the math." - CIMM Report, at page 33: Systemic injustice due to the "additional burden of proof for individuals" to prepare mitigation plans. - CIMM Report, at page 33: Cost of preparing mitigation plan: ➔ Michael Battista, "his legal fees for a medical inadmissibility case are about $4,000 to $5,000. His estimate does not include expert opinions "from doctors, specialists, psychologists, or autism specialists" that are often required to develop a mitigation plan." - CIMM Report, at page 33: if requiring mitigation plans, should also have way to enforce. ➔ Per Michael Battista, "if the department wants to have the ability to enforce mitigation plans, it would have to "establish a mechanism for the provinces to report on individuals who create mitigation plans to track their health and social service spending in every province." ➔ CIMM Report, at page 34: If implemented enforcement of mitigation plan, "it would also create two classes of permanent residents because, currently, after becoming a permanent resident, individuals have access to health and social services as is the right of any permanent resident."
	3. The stigma of being viewed as a burden or cost while disregarding the particular individual reality or financial and non-financial contribution the person.	- CIMM Report, at page 12: Pursuant to section 38(2) of IRPA, Convention refugees and protected persons, as well as spouses and children part of a family sponsorship application are exempted from medical inadmissibility provisions. <u>Only application to economic immigration and their family members</u>. - CIMM Report, at page 14: "In response to questions from the Committee, Ms. Edlund indicated that the evaluation process does not consider the economic benefit of having the family in Canada as permanent residents and the contribution to the economy that would be lost should the family be denied."

		- CIMM Report P. 20, Professor Sheila Bennett, Brock University : “She argued that it is important that all children with diverse physical, cognitive, social, or emotional abilities have access to differentiated learning and opportunities support systems. This can lead to additional costs for particular schools but it also is an added social benefit to the entire population.” - CIMM Report, per Dawn Edlund, Associate Assistant Deputy Minister, at page 21: suggested that provinces can write a letter to support an applicant who has been considered medically inadmissible, but the province is not directly consulted. ➔ CIMM Report, per Meagan Johnson, HALCO and John Rae, First Vice-Chair of the Council of Canadians with Disabilities, at pages 21-22: “…provinces should not have “additional mechanisms to sort of circumvent [the] discrimination” created by the excessive demand provision because these will not be fairly applied throughout the country. Would create a “patchwork of eligibility”. - CIMM Report, at page 27: Economic class immigrants that are most affected. PR applications refused in this category based on medical inadmissibility between 2013-2016 were 1,444. - CIMM Report, at page 30: Inconsistency in application of humanitarian factors ➔ OCASI, Submissions, at page 3: “waivers from medical ineligibility are granted on a case by case basis without any consistency. This inconsistency leads to positive outcomes for some and negative outcomes for others in similar circumstances without any rhyme or reason.” - CIMM Report, OCASI, CSALC, and SALCO, at page 30: “decision-makers do not take into account all the humanitarian factors found in an application that could justify, for example, a waiver of the excessive demand provision. They also noted that waivers for medical inadmissibility are granted on a case by case basis without any consistency. As such, there could be similar circumstances that end with different results.” - CIMM Report, at page 31: “Even if individuals captured by the excessive demand provision prepare mitigation plans, they would be refused if their plans are costed higher than IRCC’s threshold. Mr. Battista provided the Committee with the “example of an investor with significant assets [who] was refused

		because of the cost of his spouse’s medication, which only exceeded the annual excessive demand threshold by $700.” - CIMM Report, at page 32: “costs could be absorbed by the system, but there was no assessment of “whether this applicant’s investment or contribution to the Canadian tax base would outweigh the relatively small amount by which the cost of medication exceeded the average Canadian per capita cost of health care.”” - CIMM Report, at page 32: The focus should be on creating a more inclusive Canada that is accepting of the economic, social and cultural contributions of all persons of diverse abilities. Currently, witnesses pointed out that there is no mechanism by which the potential abilities, contributions, skills and talents of individuals captured by the excessive demand provision, as well as their support network, are recognized. - CIMM Report, per Felipe Montoya, at page 34: “being twice charged for what they have already contributed to through their taxes.” - CIMM Report, per John Rae, at page 35: ““when a particular disability is identified” the process does not take into account “the particular degree of that disability nor a person's background, attributes, and how they deal with the realities of their particular disability, nor does it speak to the contributions that person might make if they come to Canada.” - CIMM Report, at page 35: “Ms. Toni Schweitzer, from Parkdale Community Legal Services, testified that “while the language of the [excessive demand] provision is in terms of cost, the way in which it is applied and interpreted is solely on the basis of a person’s disability.” - CIMM Report, per Adrienne Smithat, Jordan Battista LLP, at page 36: questioned IRCC’s premise, in particular children with disabilities. ➔ Provided example of 14 year old who was inadmissible because she was deaf. ➔ “…children should not be seen as a burden on society because given the right set of circumstances they can bring positive change and impact to their communities and contribute to their society in the long-term.” - CIMM Report, per Migrant Workers Alliance, at page 37: does not account for net benefit and contribution of migrant workers and live-in caregivers.

		- CIMM Report, at page 39: "Canada's excessive demand provision hinders our ability to attract the most highly--skilled immigrants over the long term." - CIMM Report, at page 39: students in Canada living with HIV who may be found medically inadmissible despite having skills that are in demand. ➔ CIMM Report, per Meagan Johnston, HALCO, at page 39: "This is "despite the fact that these students have skills that are in demand in Canada and, given the opportunity, would contribute to the economy, culture and society of Canada in many ways, including by paying taxes."" HALCO, Submissions, at page 6 - Migrant Workers Alliance for Change, Submissions, at page 3: "constructs disabled people and their families only in negative terms – solely as a drain on resources" ➔ "does not compute the social, cultural and economic contributions of disabled people or their families to their communities" - Impact on Citizens ➔ Migrant Workers Alliance for Change, Submissions, at page 3: "Not only does 38(1)(c) construct potential disabled immigrants and their families in negative terms, it asserts as much to disabled people who are already Canadian citizens." ➔ Migrant Workers Alliance for Change, Submissions, at page 3: "gives a daily message to disabled people across the country that the Government of Canada undervalues disabled people, that it sees them as a drain on the provincial and territorial health care and social assistance systems." ➔ Canadian Association for Community Living, Submissions, at page 3: "Canadians with disabilities are given the message that persons like them are not welcome in Canada." - Migrant Workers Alliance for Change, Submissions, at page 3: S 28(1)(c) does not account for net benefit of foreign workers before they apply for PR. - HALCO, Submissions, at page 7: parents and grandparents seen as drain, but provide important contributions to society. ➔ "providing practical support such as free childcare which allows people with children to return to work rather than rely on social assistance — a particularly important contribution since Canada does not have a

		national child care strategy, and high fees and long wait lists persist for daycare." - A.J. Withers and Alex Tufford, Submissions, at page 2: depiction of persons with disabilities as "needy" is, "far from how disabled people experience themselves – as complex, multifaceted people." - OCASI, Submissions, at page 4: Provisions are static and unchanging. Point in time assessment does not take into account long term prognosis. - Canadian Association for Community Living, Submissions, at page 4: "no mechanism by which the potential contributions, abilities, talents and skills of persons with disabilities, as well as the support networks available to them, are recognized." - Council of Canadians with Disabilities, Submissions, at page 6: "There are various groups of people that can and probably will place future "excessive demands" on health and social services: people who live an unhealthy lifestyle, extreme sports enthusiasts, smokers but these characteristics, as far as we are aware, do not trigger excessive demand evaluations. It is people who occupy the socially constructed category of disability who face such a more rigorous assessment." ➔ Most people over the course of their lifetime are likely to acquire some form of impairment. - Council of Canadians with Disabilities, Submissions, at page 6: focus on likely future costs and lack of focus on contributions ➔ Problematic when assessing evolving capacities of children with disabilities. ➔ "CRPD Article 3 (General Principles) calls for, "Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities."" - Council of Canadians with Disabilities, Submissions, at page 8: Regarding "floodgates arguments" ➔ "The World Bank estimates that only ten percent of the world's population has a disability. Those global citizens with disabilities who do apply will have to meet all the other criteria that are in place for evaluating potential new Canadians and permanent residents." ➔ Concern rooted in ableism - Felipe Montoya, Submissions, at page 3: regarding IRCC published response to media reports about son's immigration matter. ➔ IRCC response, "Canada's immigration law does not discriminate against those with illness

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<td>or disability. It does strive, however, to find the appropriate balance between those wanting to immigrate to Canada, and the limited medical resources that are paid for by Canadian taxpayers.”
➔ Ignores fact that applicant families in Canada are already paying Canadian taxes.
➔ “This unjustly discriminates against immigrant workers, who pay Canadian taxes, sometimes for years, making their taxes worth less than the taxes paid by Canadian citizens or permanent residents.”
- Felipe Montoya, Submissions, at page 3: “On a very basic level, the tax contribution of our family to Canada’s social services far outweighed the stated excessive demand our family would supposedly cost. And from a broader perspective, the incommensurable contributions (artistic, cultural, intellectual, social, etc.) of persons with disabilities and their families to their communities are not considered at all.”
- Standing Committee on Citizenship and Immigration, November 20, 2017, Evidence, per Lorne Waldman, at page 4: “A lot of times we find highly skilled people who are going to make an important contribution, but because one of the members of their family is medically inadmissible, they're not allowed to come into the country at all.”
- Standing Committee on Citizenship and Immigration, November 21, 2017, Evidence, per Roy Hanes, Council of Canadians with Disabilities, at page 6: “We talk about costs. Similar debates, I'm sure, had to do with new immigrants when they were coming here after World War II or years ago: what about the cost to train these people to speak English, to learn English, and so on and so forth; what will happen to our society? Well, what's happened is that we have a wonderful society. I want to shift that to the concept of investment. As we were saying, it's not a heck of a lot more money, so it'll shift.”</td>
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<td>Evidence of the Minimal Effectiveness of s.38(1)(c)</td>
<td colspan="2">- Standing Committee on Citizenship and Immigration, Evidence, October 24, 2017, per Dawn Edlund, Associate Assistant Deputy Minister, at page 1: “The objective of the provision is to strike a balance between protecting publicly funded health and social services and facilitating immigration to Canada, while also supporting humanitarian and compassionate objectives in Canada's immigration policy.”
- Standing Committee on Citizenship and Immigration, Evidence, October 24, 2017, per Dawn Edlund, Associate Assistant Deputy Minister, at page 2: “For the year 2014 we had a medical recommendation of excessive demand of 930; in 2015, it was 713; in 2016, it was 1,101. Generally speaking, we say it's between roughly 900 and 1,000 in any given year, which represents 0.2% of all</td>
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	applications. Remember that those are findings of medical inadmissibility, but there is a process after that point. There is a procedural fairness process, and there is a review by a visa officer, so the number of rejected applications will be significantly lower." - Standing Committee on Citizenship and Immigration, Evidence, October 24, 2017, per Dawn Edlund, Associate Assistant Deputy Minister, at page 3: "In 2014, just using that year as an example, for federal skilled workers, we had 114; Quebec skilled workers, 62; live-in caregivers, 150; provincial nominees, 101; parents and grandparents, 238; other family class, 6; students, 41; foreign workers, 36; temporary residents, 52; humanitarian and compassionate, 51; and unspecified, 64. Then there were roughly 50 who reapplied in other categories. That's the breakdown of that 930." - Standing Committee on Citizenship and Immigration, November 22, 2017, Evidence, per Ahmad Hussein, at page 1: "As my officials indicated, a cost-benefit analysis found that the total number of decisions on excessive demand made in a single year will result in an estimated savings of about $135 million over a period of five years of projected health care coverage. That amount represents just 0.1% of all provincial and territorial health spending in 2015." - Standing Committee on Citizenship and Immigration, November 21, 2017, Evidence, per Arthur Sweetman, at page 4: "As far as I can tell, based mostly on work by researchers at the University of Toronto and Ontario's Institute for Clinical Evaluative Sciences, there is absolutely no difference. In Ontario, immigrants and Canadians by birth are exactly equally likely to be high-cost users of health care." - Standing Committee on Citizenship and Immigration, Evidence, November 20, 2017, per Lorne Waldman, at page 2: "From the point of view of an excessive demand analysis, one also has to engage in a cost-benefit analysis. This requires us to consider the emotional hardship that occurs when people are separated from their families, and also requires us to consider the impact of a strict application of the excessive demand criteria on our ability to attract the most desirable immigrants as we move forward." - CIMM Report, per Dawn Edlund, Associate Assistant Deputy Minister of IRCC, at page 14: IRCC, however, has "no authority to enforce that mitigation plan once someone becomes a permanent resident." ➔ Standing Committee on Citizenship and Immigration, Evidence, November 22, 2017, Dawn Edlund, Associate Assistant Deputy Minister, P. 9: "It's really hard to tell if they're achieving their purpose, because we don't track or monitor them after the fact. As I said the last time I was here before this committee on this study, we don't have any enforcement mechanisms possible to see whether or not someone has actually followed the plan they put forward. We don't have line of sight on that at all." - CIMM Report, at page 31: Lack of transparency and accuracy of pricing. ➔ Mario Bellissimo, Executive Member, Canadian Bar Association Immigration Law Section: notes issues with "transparency and accuracy of pricing" the cost threshold, which does not fully reflect the variations in the cost of health and social services among provinces and territories. ➔ "The Canadian Bar Association noted that those with medical conditions requiring prescription drugs cost the government different amounts depending upon the province in which province they reside."

	- HALCO, Submissions, at page 7: the frequency of waivers to medical inadmissibility in H&C applications shows that the excessive demand assessment for this category is mostly a "symbolic exercise." ➔ Standing Committee on Citizenship and Immigration, November 21, 2017, Evidence, per Dawn Edlund, Associate Assistant Deputy Minister, at page 2: "we provided statistics to the committee that looked at immigration medical exams from 2013 to 2016: 224 people applied for humanitarian and compassionate consideration, and 91% of them were successful." - CIMM Report, per Dawn Edlund, Associate Assistant Deputy Minister of IRCC, at page 11: "total number of medical recommendations of potential excessive demand represent, in any given year, 0.2% of all applications (between 900 to 1000 individuals). This represents savings of at least $135 million over five years, for each year of decision, not including modeling for those who already self deselect. - CIMM Report, at page 14: "IRCC uses findings from medical officers, rather than final decisions by visa officers to establish the savings to the province of destination. Actual savings are not known and were not provided to the Committee. However, the Committee notes that anecdotal evidence provided by the Government of New Brunswick, and no other province, highlights the dearth of evidence to the potential increase of cost due to the repeal of the excessive demand provision." - CIMM Report, at page 15: "Additionally, IRCC provided the Committee with an estimated cost of $800,000 to $1,100,000 per year to run the entire administrative process related to the application of section 38(1)(c) of IRPA, especially in regards to determining excessive demand." - CIMM Report, per Professor Arthur Sweetman, McMaster University, at page 20: "there are, "no good measures of actual demand or costs for such [health and social services by the sub-set of potential immigrants who are at risk of being adjudicated as excessive cost or risk."" - CIMM Report, Canadian Bar Association, at page 30: "IRCC's guidance to officers confuses their roles, and medical officers in certain cases are still not undertaking an assessment of all factors, including financial information. This is due, in part, to a failure to acknowledge the Supreme Court and Federal Court of Appeal instruction in the cases on excessive demand. Revisions to the guidance prepared by IRCC for these officers are required." - CIMM Report, at page 30: Inconsistency in application of humanitarian factors ➔ OCASI, Submissions, at page 3: "waivers from medical ineligibility are granted on a case by case basis without any consistency. This inconsistency leads to positive outcomes for some and negative outcomes for others in similar circumstances without any rhyme or reason." - CIMM Report, per Chantal Desloges, at page 30: "also drew the Committee's attention to the lack of consistency and accuracy in the decision-making process. She added that she often saw no explanation in the fairness letter that supported the decision of the officer." - CIMM Report, at page 32: questions regarding the calculation of the cost threshold and fact that cost is understood by the average Canadian per capita cost.

	➔ Per Lorne Waldman, "the average calculation "was based upon fictitious information; there was no actual true calculation of the cost of the average person." ➔ Per Lorne Waldman, "the government's estimates are incorrect because the average cost should be based on the average cost of a person of the same age group as each age group incurs different costs." ➔ Per Disability Positive, "IRCC relies on outdated and inaccurate cost assessments of disability supports and medical conditions." ➔ CIMM Report, per Meagan Johnston, at page 33: "It seems "that the cost savings estimate [of $135 million over five year] is coming from the procedural fairness letters." However, those letters can be inaccurate; individuals can switch to a cheaper generic medication available in Canada after receiving the procedural fairness letter or can receive waivers of medical inadmissibility." ➔ IRCC does not factor into cost estimate any revisions - HALCO, Submissions, at page 8: provisions are ineffective ➔ IRCC estimate of savings of $135 million over 5 year period (reported to Standing Committee), "does not factor in applicants who may have switched to less expensive medications (e.g., generic medications), who may have access to private insurance, or who may ultimately receive a waiver from IRCC for their inadmissibility." ➔ Health care costs not predictable. Does not consider catastrophic accident after becoming PR. ➔ HALCO, Submissions, at page 9: cost of implementing procedural fairness process in every instance where there is a medical inadmissibility portion. - OCASI, Submissions, at page 4: Provisions are static and unchanging. Point in time assessment does not take into account long term prognosis. - CBA, Submissions, at page 4: difficulty of calculating special education and prescription costs ➔ "Many provinces and territories have mainstreamed special needs students in classrooms, and individualized costs tied to specific forms of need or disability are no longer available in many jurisdictions." (Per Immigration, Refugees and Citizenship Canada, Evaluation of the Health Screening and Notification Program (November, 2015)) ➔ "While medically required services are covered in full by the beneficiary's home province, outpatient prescription drug costs are not necessarily covered. Each province has criteria for who can be reimbursed and how much. The variation in amount of coverage by each province conflicts with the notion of equally distributed health care and costs for applicants. Those with medical conditions requiring prescription drugs could cost the government different amounts depending on where they reside." - Felipe Montoya, Submissions, at page 3: Questions regarding IRCC ability to accurately assess costs of social services. ➔ "If the actual school where my son studied was unable to calculate the cost of his participation, it seems improbable that CIC, so far removed from the specific case, would be able to come up with a reliable value to determine his excessive demand. It seems that there is no clear methodology to fairly measure the likely costs and potential impact on waiting lists, especially in the case of "social services"."

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- Standing Committee on Citizenship and Immigration, November 20, 2017, Evidence, per Canadian Institute for Health Information, at page 3: “Total health expenditure per person is expected to vary across the country from $7,378 in Newfoundland and Labrador and $7,329 in Alberta to $6,367 in Ontario and $6,321 in British Columbia. This variation across the country occurs for many reasons, including differences in population demographics and health status, prescribing practices, public program design, and other factors.”
- Standing Committee on Citizenship and Immigration, November 20, 2017, Evidence, per Canadian Institute for Health Information, at page 3: “Over time, the share allocated to hospitals has been decreasing and the share allocated to drug spending has increased. In 2017 spending on drugs is expected to grow at an estimated 5%, spending on hospitals at about 3%, and spending on physicians at about 4%.”
    - ➔ Standing Committee on Citizenship and Immigration, November 20, 2017, Evidence, per Canadian Institute for Health Information, at page 5: “We're seeing, I think, modest growth on both of those. We have an aging population demanding more services. We have more people of all ages with more services. We do, obviously, see wage and price inflation in there as well. That's really added up over, I would say, the last four or five years to about a 3% average increase in spending.”
- Standing Committee on Citizenship and Immigration, November 21, 2017, Evidence, per Arthur Sweetman, at page 4: “While the government's current goal is to mitigate excessive demand on health and social services, as far as I'm aware, we—and I use “we” to refer to all of us who make up the Canadian community—have no good measures of actual demand or costs for such services by the subset of potential immigrants who are at risk of being adjudicated as excessive cost or risk. Although there would be some challenges, it would not be extremely difficult to produce such estimates using mostly provincial health and social service administrative data, although it would need to be done province by province. If a complete picture for all provinces were required, the task would take a little bit of time. Overall, while some bits and pieces of evidence do exist, as far as I'm aware, we do not know how well we, at the time of screening new immigrants, are able to predict who will be high cost.”
- HALCO, Submissions, at page 3: “Federal and provincial governments incur many costs associated with immigration, such as the cost of language classes, settlement services and the education of newcomer children, but these costs are not considered in the immigration application process.”
    - ➔ People living with HIV unfairly disadvantaged by a law that appears neutral.

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<tr><td>International Human Rights Laws</td><td>

- CIMM Report, at page 22: witnesses appearing before committee argue that provision violates basic domestic and international human rights
- CIMM Report, at pages 23-24: United Nations Convention on the Rights of Persons with Disabilities:
    - ➔ Article 3 which outlines the key principles of the CRPD such as non discrimination; full and effective inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; and equality of opportunity.

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	➔ Article 4 that lists the obligations that Canada has undertaken "to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability." ➔ Include adopting legislation or abolishing those which are discriminatory or inconsistent with the Convention. ➔ Article 5 specifically applies to non citizens engaging with the immigration system. It captures indirect discrimination, such as a decision based on costs, as in reality persons with disabilities are disproportionally impacted by such legislation - CIMM Report, at page 24: United Nations Convention on the Rights of the Child
Discriminatory Impact	- CIMM Report, at page 23: "Individuals with disabilities or medical conditions cannot put forward their application through Express Entry like most other economic applicants. This intake system does not allow for applications based on humanitarian grounds, which a person with a medical inadmissibility finding would need to present to overcome the decision." - CIMM Report, at page 23: Canadian Human Rights Act prohibited grounds of discrimination include disability and genetic characteristics. - CIMM Report, at page 24: Article 5 of CRPD related to equality and non-discrimination. Application to non citizens engaging with the immigration system where persons with disabilities are disproportionately impacted by inadmissibility legislation (associated with costs) - CIMM Report, at page 25: Medical assessments for each individual applicant are done on a "case-by-case basis", but certain medical conditions specifically triggered a medical inadmissibility finding. ➔ Between 2013 and 2016, refusals included: "224 were for chronic renal failure, 163 for intellectual disabilities and 133 for asymptomatic HIV positivity" ➔ CIMM Report P. 36: Smith, questioned IRCC's premise, in particular children with disabilities. • "children should not be seen as a burden on society because given the right set of circumstances they can bring positive change and impact to their communities and contribute to their society in the long-term." - CIMM Report, at page 26: economic class immigrants that are most affected. PR applications refused in this category based on medical inadmissibility between 2013-2016 were 1,444. - CIMM Report, at page 28: Disability lens not being applied. ➔ Per Kane Boychuck, under a medical model, "persons with disabilities are seen as objects of charity, medical treatment and social protection." ➔ Per Kane Boychuck advocated for a "social model of disability: persons with disabilities are socially included and empowered, which leads to a sense of belonging as an individual and valuing their contribution to society." ➔ CIMM Report, at page 35: "The Canadian Association for Community Living argued that the stereotypes and assumptions in the immigration system are based on the medical model of disability that sees the "inherent defects" of individuals with disabilities as a burden on society and the threat of increased costs for health and social services."

	➔ Canadian Association for Community Living, Submissions, at page 2: "prejudice and paternalistic stereotypes about the quality of their lives and their ability to contribute socially or economically to society." ➔ CIMM Report, at page 35: "Ms. Toni Schweitzer, from Parkdale Community Legal Services, testified that "while the language of the [excessive demand] provision is in terms of cost, the way in which it is applied and interpreted is solely on the basis of a person's disability." - CIMM Report, at page 28: "two witnesses highlighted that attitudes of exclusion and segregation and their associated policies towards persons with disabilities are maintained by the medical model applied in the legislation and "are the antithesis of Canadian values."" (CLKD and PooranLaw) - CIMM Report, at page 29: United Kingdom's all party parliamentary group on AIDS "concluded that the UK government cannot look to exclude individuals on the basis of poor health. - CIMM Report, at page 30: "The Council of Canadians with Disabilities qualified the current process as having an "ableist bias."" - CIMM Report, at page 34: "a tax on all disabled people" - CIMM Report, at page 34: "distinguishes individuals with different characteristics or needs from others and imposes additional administrative and financial burdens on them that are not imposed on others." - CIMM Report, at page 34: additional burden of proof for disabled persons. - CIMM Report, per John Rae, First Vice-Chair of the Council of Canadians with Disabilities, at page 34: "considered excessive demand provision as inequitable because "temporarily able-bodied" individuals that put their health more at risk because of their lifestyle, such as heavy smokers, are not captured by the excessive demand provision." - CIMM Report, at pages 34-35: "based on predicting the development of a health condition, which is associated with estimating "likely future costs over time." ➔ CIMM Report, at page 35: "mitigation plans against something that has not yet occurred and may not occur." ➔ CIMM Report, at page 35: This is different than other inadmissibility provisions which are based on past facts - CIMM Report, per John Rae, First Vice-Chair of the Council of Canadians with Disabilities, at page 35: ""when a particular disability is identified" the process does not take into account "the particular degree of that disability nor a person's background, attributes, and how they deal with the realities of their particular disability, nor does it speak to the contributions that person might make if they come to Canada." ➔ Stereotyping all individuals captured by the excessive demand provision as a burden on society. - CIMM Report, at page 36: "Individuals that are low-income and disabled face "an uphill battle not only to win [their] application, but to obtain medical care." Witnesses pointed out that a request for exemption from medical inadmissibility is possible under section 25 of IRPA, or under a temporary residence permit, but "these forms of relief are highly discretionary and do not address the fundamental unfairness resulting from the application of medical inadmissibility criteria." ➔ CIMM Report, per Macdonald Scott, Carranza LLP, at page 37: Scott, example of "client that made an application under section 25, but had his

	medical condition set against his application's humanitarian and compassionate factors." ➔ OCASI, Submissions, at page 5: "SALCO works with a large population of clients facing issues of gender-based violence. In many cases, those clients have precarious immigration status. SALCO supports those clients by assisting in applications for permanent residence based on H&C grounds. In these cases, immigration officers often approve H&C applications in principal based on the horrific violence and abuse faced by the client. However, in some of those same cases, the applicant is then refused for landing based on medical ineligibility for both mental health and physical conditions that were caused by the abuse and violence at the heart of their H&C application." - HALCO, Submissions, at page 4: Reductive analysis (reducing to cost of life saving medication) - HALCO, Submissions, at page 9: delay in processing applications where there is a medical inadmissibility finding causes "tangible impact" on clients. For example, H&C applicants unable to sponsor children until they are PR or children aging out of eligibility to be sponsored as a dependent. - A.J. Withers and Alex Tufford, Submissions, at page 1: "On the 2016 International Day of Persons with Disabilities, Prime Minister Justin Trudeau's officially stated: "let us take action to break down the barriers that exclude Canadians with disabilities. We cannot rest until persons with disabilities have the same opportunities as everyone else."" - A.J. Withers and Alex Tufford, Submissions, at page 4: predominantly impacts racialized communities. ➔ "Immigrants, in general, and the majority of migrants under the Temporary Foreign Worker Program, in particular, are racialized. Additionally, globally, disabled people are mostly people of colour and, nationally, they are disproportionately people of colour. Further, in Canada, poor people are disproportionately people of colour." - Canadian Association for Community Living, Submissions, at page 2: "While the new legislation claims to be focused solely on "health conditions" that place excessive demands on Canada's publicly-funded services, this masks the adverse impact of the legislation on persons with disabilities. The scheme ignores the reality that there are a variety of conditions or circumstances that may lead to a person placing a demand on health care or social services. For example, heavy smokers, unsafe drivers and professional athletes in high-risk sports could all give rise to excessive demands on health or social services." - Canadian Association for Community Living, Submissions, at page 2: medical inadmissibility provisions ignore that "costs" are because of discriminatory barriers and social construct of disability. - Karen Boychuck, Submissions, at page 6: "Because immigration and medical officers will often find that individuals with impairments require expensive health and social services, they are disproportionately captured by this provision." - Felipe Montoya, Submissions, at page 2: "This decision exposed an underlying stigma against people with disabilities, which is based on the misconception that they are unhealthy or ill, when in fact, and according to other legislative definitions of disability, and the model of disability espoused by the United Nations Convention on the Rights of Persons with Disabilities (ratified by

	Canada in 2010), disabilities are a reflection of the failure of societies to provide accommodations for full inclusion.” - Felipe Montoya, Submissions, at page 2: fairness letter provided a pre-established (coded) red flag for Down syndrome. ➔ “The fact that the revision process of Permanent Residency applications includes specific codes for disabilities such as Down syndrome is uncomfortably reminiscent of historic and incomparably more horrific practices of segregation and discrimination based on the person´s identity, because disabilities are, indeed, part and parcel of a person´s identity, and not an illness that can be cured, as the confusingly vague term “medical condition” seems to imply.” - Felipe Montoya, Submissions, at page 3: social services subjected to excessive demand represents only a small fraction of social services (those required by people with disabilities). ➔ ““gifted” children, who will also require “special education services”, are not considered as candidates for “excessive demand”, revealing the discriminatory nature of how these regulations are interpreted and applied.” - Standing Committee on Citizenship and Immigration, November 21, 2017, Evidence, Jenny Kwan, at page 17: “I would argue that, and question that, on the very premise that a person with a different ability comes forward with an application for immigration, the entire family is flagged, and that one person who is flagged with a different ability has to undergo a different process. That in itself sets out a different standard that applies. Simply because of a disability, they have to undergo a different process. To me, that is already a violation of our basic human rights, the UN convention, our charter rights, and so on.” - Standing Committee on Citizenship and Immigration, November 22, 2017, Evidence, Ahmad Hussein, at page 1: To put it into perspective, this provision has been in place for more than 40 years. From a principled perspective, the current excessive demand provision policy simply does not align with our country's values on the inclusion of persons with disabilities in Canadian society. The current objective of the provision is to strike a balance between protecting publicly funded health and social services and facilitating immigration to Canada, while also supporting humanitarian and compassionate objectives in Canada's immigration policy. But there is now a recognized need to realign the policy, to also make it more fair and inclusive of persons with disabilities.”

<u>**APPENDIX B – ACCESS TO INFORMATION AND PRIVACY (ATIP) RESULTS INDEX**</u>

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