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June 15, 2023

The Hon. Sean Fraser, P.C., M.P.
Minister of Citizenship and Immigration
House of Commons
Ottawa, Ontario
K1A 0A6

VIA EMAIL: Sean.Fraser@parl.gc.ca

The Honourable Marci Ien
Minister for Women and Gender Equality and Youth
Women and Gender Equality Canada
P.O. Box 8097, Station T CSC
Ottawa, ON K1G 3H6

VIA EMAIL: Marci.Ien@parl.gc.ca

Dear Minister Fraser and Minister Ien:

RE: Immigration, Refugees and Citizenship Canada (IRCC) HIV Automatic Partner Notification Policy

We represent the following organizations regarding the above-noted policy: the HIV & AIDS Legal Clinic of Ontario (HALCO), the HIV Legal Network, and the Coalition des organismes communautaires québécois de lutte contre le sida (COCQ-SIDA).

We are writing to request that IRCC's Automatic Partner Notification Policy ("the Policy") be immediately revoked as it violates s. 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"). It also affects rights to privacy and security of the person guaranteed under s. 7 of the Charter. In particular, the Policy is discriminatory, arbitrary, ineffective, and unnecessarily steps into the jurisdiction of local public health programs focused on the prevention and control of certain communicable medical conditions. Moreover, like other coercive policies, the Policy can be expected to have a disproportionate impact on gay, trans, Black and other racialized people, due to the heightened impact of the HIV stigma on these communities.

IRCC's Automatic Partner Notification Policy ("the Policy")

The Policy has been in place for several years but has been inconsistently applied. Recently, however, there has been stricter adherence to the Policy, causing the detrimental consequences described below.

The Policy applies to applicants in the family and refugee classes. It originally required consent of an HIV positive applicant for Canadian immigration authorities to contact their spouse/partner in Canada to obtain acknowledgement that the family member is aware of the applicant's HIV

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positive status and did not wish to withdraw their sponsorship of the applicant.

The Policy was updated on September 6, 2016 to remove the requirement that sponsors respond in writing to either continue or withdraw their sponsorship after being informed that the applicant is HIV positive. It was determined at that time that "there is no need to prompt the sponsor to explicitly consider this option in the case of an HIV-positive applicant."

In its current incarnation, the Policy offers three choices to HIV positive applicants in family class sponsorship applications and to dependents of refugees: (1) inform their sponsor (spouse/partner in the case of refugees) of their diagnosis and provide proof of this to IRCC within 60 days, (2) withdraw their application, or (3) take no action, knowing IRCC will inform their sponsor/family member of the diagnosis after 60 days elapse.

While the vast majority of applications in the family and dependent refugee classes proceed without interviews, the Policy requires that cases of HIV positive applicants be scheduled for interviews in all cases. The Policy states:

> "Applicants will then be required to attend an interview with a visa or immigration officer, where they will be informed of the Automatic partner notification policy for HIV-positive applicants in the family and dependant refugee classes and will be asked to sign the Acknowledgment of the automatic partner notification policy for HIV-positive applicants in the family and dependant refugee classes to indicate they've been informed of this policy."

Currently, the scheduling of interviews in these applications can add one year or more onto the processing of applications, in addition to regular processing times. Moreover, when an interview is scheduled, the applicant is not advised that the purpose of the interview is to implement the Policy. This leads to unnecessary stress for applicants, who are led to believe that there are problems with the merits of their applications.

The Policy violates s. 15(1) of the Charter

One of the requirements of the *IRPA* is for the Act to be applied in a "manner that ensures that decisions taken under this act are consistent with the *Charter,* including its principles of equality and freedom from discrimination…".

Equality rights are laid out in s. 15 of the *Charter*. Section 15(1) states that "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."

The test for a s. 15(1) violation has developed throughout the years into a two-step test, most recently affirmed in *R v Sharma* 2022 SCC 39. To make out a s. 15 violation, a claimant must demonstrate the impugned law:

> 1. Creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and

2. Imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.

Once a violation of s. 15 is established, it must be determined whether the violation is one that can be demonstrably justified in a free and democratic society pursuant to s. 1 of the *Charter*.

For the reasons that follow, it is our view that the Policy violates section 15 of the *Charter* in a manner that cannot be justified under section 1.

1. The Policy draws a distinction between those living with HIV and those who are not.

The Policy requires those living with HIV to choose between revealing their diagnosis to their partner or terminating their application for Canadian permanent residence. While immigration applicants are tested for many illnesses during their medical examination, IRCC only requires those living with HIV to choose between revealing their health condition or withdrawing their application. IRCC does not impose this requirement on applicants living with any other health conditions, including other sexually transmitted or blood-borne infections ("STBBIs"). Yet many of these other health conditions are being addressed by provincial and territorial governments without IRCC intervention. It is recognized that provincial and territorial public health authorities are best positioned to address these issues.

The other practical distinction made by the Policy is to stream applications from HIV positive applicants into the interview stream, causing lengthy delays, stress and uncertainty. These effects are not present in applications made by people with other health conditions.

2. The distinction drawn by the Policy reinforces and perpetuates existing stereotypes and disadvantages against people with HIV.

While medical treatment has transformed HIV into a chronic manageable medical condition, people living with HIV still face extremely high levels of social stigma. This stigma arises from various factors, including fear of contagion, moral judgements, misconceptions of HIV, homophobia and racism. Despite the science surrounding HIV today, it is stigmatized by many, particularly by those outside of communities that have been disproportionately impacted by HIV. This is primarily a result of HIV's association with the AIDS epidemic and with historically stigmatized communities.

In addition to social stigma, people living with HIV face other challenges that stem from their HIV positive status. For example, people living with HIV are at a greater risk of domestic and other violence, and often face discrimination, particularly in employment and housing, due to their HIV positive status. Though public awareness campaigns and sexual education have sought to alleviate stigma and discrimination against people living with HIV, HIV remains one of the most stigmatized medical conditions today.

The Policy perpetuates myths and stereotypes that people living with HIV are less worthy than other applicants.

First, the Policy perpetuates a stereotype that people with HIV are morally blameworthy and irresponsible in taking precautions to prevent the transmission of HIV. While IRCC panel physicians use post-test counselling to ensure that applicants are aware of methods to prevent the spread of HIV, the Policy coerces applicants into confirming notification of their family member at the price of being forced to withdraw their application. This perpetuates the negative stereotype that people with HIV are inherently dangerous and deceptive, and may choose not to advise their partner of their health condition.

The Policy is also based on stereotypes about risks of HIV transmission, which are much lower than commonly expected. While HIV can only be transmitted through specific activities, (e.g., HIV cannot be transmitted sexually by people with suppressed viral loads or when a condom is used properly and does not break), the Policy treats every applicant as posing a high risk of transmission.

Finally, the Policy rests on the assumption that a positive diagnosis could have a negative effect on the applicant's relationship with the sponsor/family member. The assumption is that having HIV makes an individual less desirable as a partner, so much so that their partner would withdraw their sponsorship because of it. This perpetrates a stereotype that people with HIV are legitimately less valued as family members.

3. <u>There is no valid justification for the Policy</u>

The purpose of the Policy is not explicitly stated, but the following statement implies that the purpose is containment of risk of transmission of HIV:

> "*Applicants in the family class and the dependent refugee class who test positive for HIV may not be assessed as medically inadmissible due to excessive demand on Canada's health care system. Their sexual partners residing in Canada must be made aware of the risk this serious medical condition may place on their health."*

In 2019, the text of the Automatic Partner Notification Policy was updated to add a "note" that attests that the policy is "not intended to inflict unnecessary hardship on applicants or sponsors. Rather, it is a measure to protect the health and safety of spouses and partners (residing in Canada) of applicants in the family and dependent refugee classes who test positive for HIV."

If the risk of transmission is considered a compelling justification of the policy, its scope is arbitrary. Family class and dependent refugee class applicants represent a fraction of newcomers to Canada. HIV positive applicants in the economic classes, HIV positive foreign workers, HIV positive international students and other HIV positive people entering Canada are not subject to the Policy. Yet they are just as likely to have sexual relationships in Canada which could transmit HIV.

Even if the Policy were effective in mitigating the spread of HIV in the family and dependent refugee classes (which has not been demonstrated or established), its application to only a fraction of admissions to Canada is divorced from any public health rationale and thus arbitrary.

The Policy contradicts IRCC's position regarding the threat of transmission of HIV and departs from the approach of public health authorities who are responsible for limiting the transmission of certain communicable medical conditions. Unlike some other medical conditions , HIV is correctly not classified as a danger to public health under s. 38(1)(a) of the *Immigration and Refugee Protection Act*. Yet, the Policy only applies to applicants living with HIV.

Further, the Policy steps into the jurisdiction of local public health authorities and contradicts their approach to minimizing the spread of HIV. Each province and territory has specific procedures to be followed after a positive HIV diagnosis. All such procedures seek to uphold the privacy interests of people in Canada who test positive for HIV (the state will not disclose their name), as opposed to permanent resident applicants subject to the Policy who are subject to an invasion of privacy (advise your partner or else abandon the possibility of immigration).

The Policy is arbitrary, ineffective, and inappropriate in light of public health approaches to the issue.

Conclusion

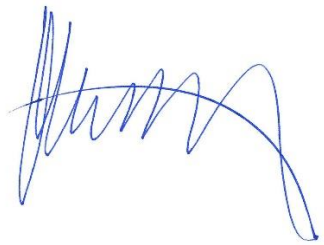
IRCC's Automatic Partner Notification Policy results in the discriminatory treatment of those with HIV, violating their right to equal treatment under s. 15(1) of the *Charter*, in a manner that cannot be justified under s. 1 of the *Charter*. Not only does the Policy significantly extend the length of processing of immigration applications for people living with HIV, it also perpetuates myths and stereotypes that people with HIV are deceptive and are less worthy of intimate relationships than people who are not living with HIV, and that HIV is easily transmissible.

For these reasons, we respectfully request that IRCC's HIV Automatic Partner Notification Policy be immediately revoked.

Please be advised that if we are not notified within 30 days from the date of this letter of the revocation of this Policy, we will advise our clients on pursuing litigation in the Federal Court or other venues for a declaration that the Policy violates the *Charter*, and a writ of mandamus ordering that the Policy be rescinded.

Yours truly,

BATTISTA MIGRATION LAW GROUP



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