
*THE CAREGIVER PROGRAM: Necessary reforms for
the respect of migrant caregivers' fundamental rights in
Canada*

**Written Submissions by MigrantWorkersRights and l'Association pour la
défense des droits du personnel domestique (ADDPD)**

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ABOUT US

MigrantWorkersRights (MWR) is a Montreal-based non-profit organization operating, since 2013, as an open but coordinated network of activists aiming for — through research, legal actions and legislative processes — the abolition of slavery's legacies embedded within current Canadian and similar administrative frameworks.

MWR's mission is the respect, by national and international agencies, of the right to liberty, to physical and psychological integrity, and to non-discrimination based on the country of origin — thus of the rights to freely change employers at all time, to receive study/work permits for one's children and spouse, and to access permanent legal status, of every human being admitted under the status of 'temporary foreign worker'.



L'Association pour la défense des droits du personnel domestique (ADDPD) is a non-profit community organization founded in 1975. Through education, research, and legal/political advocacy initiatives, the ADPPD fights for fair and decent work conditions for all household workers in Quebec and across Canada.

INTRODUCTION

The need for a comprehensive review of the caregiver pathways cannot be understated. The 2014 reform of the Live-in Caregiver Program did little to address the well-documented violations of migrant caregivers' fundamental rights. Rather, the new pathways continued policies of the LCP that had been identified as placing substantial restrictions on migrant caregivers' right to access justice and right to family unity.

Improving the pathways to permanent residence will require the government to meaningfully address its role in violating these rights. The respect of these rights is necessary for the health and well-being of these individuals and their families. This will not be achieved by superficial changes to the program.

OUR RECOMMENDATIONS

1. Abolition of state-created obstacles to migrant workers' capacity to claim rights/access justice:
 - 1.1. Issuance of open work permits.
 - 1.2. Independent access upon arrival to permanent legal status for all workers admitted on temporary work authorization.

- 1.3. Federal coordination and monitoring of the financing of international labour recruitment, migration, placement and social integration of migrant workers selected for immediate incorporation into the labour market.
2. Abolition of federal violations of migrant workers' fundamental right to family unity
 - 2.1. Automatic issuance of open work permits to all the family members of working age of migrant workers admitted by the federal government for immediate incorporation into the labour market – except in case of “serious” criminality.
 - 2.2. Automatic issuance of study permits recognizing access to all provincial public education systems to all migrant workers admitted on temporary work authorization and to their partner and/or to) their children of all age – except in case of “serious” criminality.
 - 2.3. Automatic issuance of permanent legal status to all partners and children of migrant workers admitted by the federal government for the purpose of immediate labour market integration – no matter their age and health conditions – except in case of “serious” criminality.

1. Abolition of state-created obstacles to migrant workers' capacity to claim rights/access justice

The current caregiver pathways incorporate various measures that have been recognized as restricting the capacity of workers to enforce their rights and access justice. The pathways subject migrant caregiver to employer-tied legal status, imposed through employer-specific work permits and employment-based access to permanent residence status.

1.1. Employer-specific work permits

Workers who take legal action to redress a rights violation by their employer typically do so after the end of the employment relationship. However, for migrant caregivers, the end of the employment relationship means that the caregiver is no longer able to benefit from the authorization to work granted by the work permit. The loss of the right to earn a living will require the worker to exhaust savings and/or take additional debts in order to sustain themselves until reparation is obtained or before any initiative is made to seek legal justice.¹

¹ Human Rights Watch, *Hidden in the homes: Abuse of domestic workers with special visas in the United States* (2001) at 2.

Evidence emanating from the United Kingdom show that non-employer specific work authorizations facilitate migrant caregivers' capacity to launch judicial proceedings against abusive employers. In 1998 UK immigration rules allowed domestic workers employed in private households to change employers, so that even though worker entered the country with a specific employer, he or she was not tied to that employer.²

Research conducted by Kalayaan, the main UK-based NGO specialising in the labour rights of migrant domestic workers, found that visa's portability played a crucial role in allowing domestic workers to pursue legal remedies:

(..) between May 2009 and December 2010, 53 domestic workers brought employment tribunal cases against their employers; 34 of these cases had been concluded by December 2010. Taking such action would be unthinkable if the worker had to continue working for their employer (..)³

However, in 2012, the UK government introduced a visa regime that did not permit domestic workers to change employer. This change created two groups of migrant caregivers, those employed in the UK with the ability to change employers and those tied to their employer. The statistics published by Kalayaan in 2014 demonstrated the devastating impact of employer-specific work authorizations on the rights of these workers:

These showed that workers registered with the NGO who entered the UK on the new visa reported significantly worse treatment than those that were not tied to their employer during the same period of time but under the previous regime. More precisely, they found that migrant domestic workers with a visa that ties them to their employers were twice as likely to report having being physically abused to those who were not so tied (16% and 8%); that almost three quarters of workers that were tied to the employer were not allowed to leave the house unsupervised, which is again a significantly larger number than workers under a non-tied visa; that 65% of the domestic workers did not have their own rooms; that the majority work more than 16 hours a day, and a greater number of them than previously were assessed as more susceptible to human trafficking.⁴

While the employer-specific work permit issued by Canada to migrant caregivers does allow these workers to change employers, they must apply for a new work permit before changing jobs. Delays associated with administrative

² Virginia Mantouvalou, "'Am I Free Now?' Overseas Domestic Workers in Slavery" (2015) 42:3 Journal of Law and Society 329 at 335

³ Mumtaz Lanani, Ending the abuse: Policies that work to protect migrant domestic workers, Kalayaan (2011) at 6.

⁴ Virginia Mantouvalou, "'Am I Free Now?' Overseas Domestic Workers in Slavery" (2015) 42:3 Journal of Law and Society 329 at 335.

requirements mean workers might wait months before there are legally permitted to work.⁵ In practice this restricts their ability to leave abusive employment situations and pursue legal remedies.

Unrestricted open work permit: necessary to ensure access to justice and equal protection of the law.

To remove the major barriers to justice faced by migrant workers admitted as temporary residents, ‘non-employer-specific’ restrictive work permits are insufficient. To ensure migrant workers’ capacity to claim rights, seek justice and reparation in court in case of right violations, and more generally enjoy the protection of the rule of law, it is necessary for authorities to issue authorizations allowing workers to engage in – subject to sector regulations – every type of *legal work*.

The experiences of migrant workers engaged in sex work illustrate the problems caused by work permits that prohibit work in one or various sectors. At the moment, all temporary foreign workers in Canada, including individuals admitted under open/unrestricted work permits, are currently subject to deportation if found working in the sex industry. Surveys, research, and testimonials compiled by a Toronto-based advocacy group Butterfly, which provides support and information to migrant sex workers across the country, “paint a picture of a population traumatized by the constant threat of deportation”.⁶ To avoid being arrested and deported, their work is pushed “underground”,⁷ creating precarious working conditions and increased vulnerability to exploitation and violence and deterring workers from seeking supports and services, including state protection if they do experience exploitation or violence:⁸

All are trapped in a Catch-22 situation: if they are assaulted or robbed in the context of their work and report it to police, they face deportation. If they opt to avoid police, they can find themselves in dangerous—even occasionally fatal—situations.⁹

While the blanket ban on employment in the sex industry is supposed to limit the risk of sexual exploitation, in practice it operates to increase the risk of harm and abuse for migrant workers who engage in that work, sometimes even at the hands of the authorities:

5 Delphine Nakache, “The Canadian Temporary Foreign Worker Program: Regulations, Practices, and Protection Gaps” in Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) at 78.

⁶ Brigitte Noël, “How Canada’s Immigration Laws Make Migrant Sex Workers’ Jobs More Dangerous”, VICE (13 October 2016).

⁷ Brigitte Noël, “How Canada’s Immigration Laws Make Migrant Sex Workers’ Jobs More Dangerous”, VICE (13 October 2016).

⁸ Tara Santini and Mac Scott, *Migrant Sex Workers’ Labour and Employment Rights*, (October 2017) at 10.

⁹ Brigitte Noël, “How Canada’s Immigration Laws Make Migrant Sex Workers’ Jobs More Dangerous”, VICE (13 October 2016).

What's worse is that many women have shared tales of police abuse of power, according to Lam. "They come in, they show that they are the police and ask for free sex services," she said. "It's like a knife to the neck of these women: when police come in they feel they need to [cooperate] to follow the instructions."¹⁰

1.2. Employment-based access to permanent residence status

Temporary residence status creates significant barriers that impede access to justice for migrant workers. Since workers are only authorized to remain in Canada for a limited time, "moving through adjudicative processes can be stalled or effectively terminated when and if they have to leave Canada".¹¹ Also, the limited amount of time they are allowed to remain in Canada means migrant workers are dis-incentivized from leaving their employer and foregoing earnings in order to launch a legal claim¹² that they may not be able to conclude before they must leave the country. For these reasons, access to permanent residence status is increasingly characterized as fundamental to the right to access justice for migrant workers.

However, the type requirements that a migrant worker must satisfy to transition to permanent residency are a deciding factor in whether access to permanent residence status translates into access to justice. Migrant workers' capacity to claim rights and seek justice and reparation in court is actually significantly jeopardized by 'employment-based' permanent status recognition schemes. In the case of migrant caregivers, the desire to complete the required 24-months of authorized work provides strong incentives to stay with abusive employers so that they may apply for permanent residency.

The decision to stay with an abusive employer and complete the require 24-months may limit or eliminate the legal redress for rights violations that migrant caregivers can seek through provincial labour protection legislation:

In the fall of 1996, further changes were made to the Employment Standards Act (ESA) which further restricted workers' rights. Up until 1996, there were no official limits on the amount of financial claims workers could make. In 1996, a \$10,000 cap was placed on claims that Employment Standards Branch (ESB) would handle. The only way around this limit would be for workers to go to courts, which is punitively expensive and intimidating. Another change to the

¹⁰ Brigitte Noël, "How Canada's Immigration Laws Make Migrant Sex Workers' Jobs More Dangerous", VICE (13 October 2016).

¹¹ Bethany Hastie, "The Inaccessibility Of Justice For Migrant Workers: A Capabilities-Based Perspective" (2017) 34:2 Windsor YB Access Just 20 at 35.

¹² Bethany Hastie, "The Inaccessibility Of Justice For Migrant Workers: A Capabilities-Based Perspective" (2017) 34:2 Windsor YB Access Just 20 at 37.

ESA involved shortening the deadline within which claims had to be made. Up until 1996, workers had two years to make a complaint. With new legislation, the deadline came in 6 months. Interview with a staff lawyer at a community legal clinic revealed that the \$10,000 limit, as well as the 6 months deadline for Employment Standards claims have particularly negative impact on caregivers. As Caregivers are less likely than most other groups of workers to leave an employer immediately upon breach of contract (due to concern about meeting immigration requirements), they often wait a long time (often until after they complete their 2 years of work and leave their employer), if they do at all, to make an Employment Standards claim. By this time, caregivers' claims often involve big sums of money, up to \$40,000 according to the staff lawyer. [Emphasis added]

Furthermore, employment-based access to permanent residence provides employers with tools to retaliate against workers who do take legal action. 'Employment-based access to permanent status' policies rely, by definition, on government records of the workers' employment in the country, which are submitted to authorities by employers. Employers may refuse to produce the necessary records of employment or falsify records so that caregivers cannot demonstrate that they have accumulated the necessary amount of work experience:

Tita, a caregiver from Thailand, signed an offer of employment, when she was still in Thailand, for \$300 a month salary. The offer of employment also stated "insubordination and rude behaviour" would result in immediate termination and repatriation to Thailand. During her first year, \$100 a month was also deducted by the employer for Tita's salary to send her back to Thailand if/when needed. ... Tita had ... was intimidated with the "repatriation" clause even after she realized how small her salary was. She worked for two years with this employer and then left. Her application for permanent residence was delayed significantly as this employer refused to provide records of employment, and Tita could not otherwise prove 24 months of live-in work (Tita, 1994 Case Files, as cited by Arat-Koc: 2001, 56)¹³ [Underline in the text; emphasis added]

This dependency of migrant caregivers on employers to access permanent residency results in workers forgoing or desisting any legal action in order to

¹³ Salimah Valiani, *The Shift in Canadian Immigration Policy and Unheeded Lessons of the Live-In Caregiver Program* (2009) at 18.

avoid further delays or disruptions, especially when those delays mean prolonging the length of family separation they must endure:

The candidate to immigration has been raped by her employer. But she does not want us to contact the police. She says she cannot not escape him just yet: she needs her employer first to provide the immigration authorities with a correct record of her past 24 months of legal employment in Canada. She simply cannot risk further delay before being recognized permanent legal status or, more importantly in this case, the right to family unification in Canada. She cannot not bear any additional risk of increased separation period from her child.¹⁴ [Emphasis added]

More often than not, employers have no need to actually retaliate, migrant caregivers' *fear* alone is sufficient to prevent them from claiming their rights and accessing justice.

Inputs from employers should be taken into consideration within immigration policies in a way that does not increase the dependency of the worker on the employer.

When employers' input is given value in the process to grant permanent residence status to specific individuals, the resulting imbalance in bargaining power restricts workers' access to justice in the country.

Instead, employers' preferences on permanent status recognition should be incorporated into immigration policymaking as part of a general labour market analysis, *only* with regard to the establishment of priorities, if applicable, based on work experience abroad for the processing of exceptional fast-track emergency temporary permits and permanent legal status recognition applications filed by families and individuals still outside of the country:

1.3. Federal coordination and monitoring of the financing of international labour recruitment, migration, placement and social integration of migrant workers selected for immediate incorporation into the labour market.

Exorbitant fees paid to recruitment and placement agencies continue to be a problem for migrant workers. To pay these fees, entire families go into debt. This burden of debt makes it difficult for the worker to protest or complain about contractual breaches, changes to or withholding of salary, unsanitary and indecent living conditions, inadequate nutrition, illegal deductions, abusive or unsafe working conditions, control over their movements and communication, or denial of medical care, since they must continue working in order to satisfy the debt:

The various experiences of debt bondage, surveillance, extortion, threats, and intimidation that arise from exploitative

¹⁴ MigrantWorkersRights, Témoignages de travailleurs communautaires : Cas de violations de droits de travailleurs migrants observés au Québec (2010) at 4.

recruitment practices undermine workers' capacity to enjoy their rights at each stage of their labour migration cycle and fundamentally eviscerate migrant workers' capacity to exercise voice, experience social inclusion, experience social security, and pursue effective enforcement of their legal rights.¹⁵

Various studies, including in Canada, have confirmed, however, that the mere regulation of recruiters and placement agents combined with normal monitoring initiatives – even facilitated through mandatory registration – is insufficient in minimizing workers' risk of ending up in a condition of servitude/debt bondage during the process of securing a work permit or permanent status.¹⁶

Enforcing the regulations on employment and international recruitment and placement activities is difficult because either the transnational recruiter or agent conveniently disappear or legal loopholes typically allow recruiter/agents/employers to secure legal impunity by shifting the blame on others in the case of workers' right violations or work accidents.¹⁷ Since law enforcement can only ensure a minimum monitoring and day-to-day supervision of the international recruitment and placement activities, employers must be formally declared liable for the abuse caused by the recruiter and/or agent. In this way, employers would be strongly incited to correctly 'do their homework' and verify the recruitment and placement practices of a third party instead of specifically choosing the cheapest international recruiter/agent available, and/or the one providing the most submissive workers.

Furthermore, state involvement in the initial job placement and social integration of migrant caregivers would greatly reduce their dependency on private recruiters and placement agencies, which would in turn reduce the risk of exploitation and abuse at the hands of these private actors.

Canada should ensure that (I) government-run newcomer placement services are accessible to the migrant caregivers and families, and that (II) upon arrival they are recognized equal coverage under basic social programs (such as legal aid, health care, social security benefits, etc.) but also with basic services tailored for newcomers in the country.

2. Abolition of federal violations of migrant workers' fundamental right to family unity

The principle of family unity is a key part of Canada's permanent immigration system, and yet prolonged family separation is a defining characteristic of the country's labour migration program for caregivers.

¹⁵ *Fay Faraday, Canada's Choice: Decent work or entrenched exploitation for Canada's migrant workers? Metcalf Foundation (June 2016) at 43.*

¹⁶ *Karen McCrae, Holding to Tight to a Double-Edge Sword, Action Coalition on Human Trafficking Alberta (November 2016) 173-174.*

¹⁷ Metro, "15 chose à savoir sur les agences de placement (5 December 2016).

Canada must recognize migrant caregivers are full human beings, with a need for family support and connection. State policies, such as the failure to automatically issue the necessary work and study permits to family members of migrant caregivers, mean migrant caregivers are forced to leave their family behind in order to work in Canada. It is well-documented that the family separation experienced by migrant caregivers and their families is a source of grave psychological suffering, marital dissolution, development and adjustment problems in children¹⁸ (including, but not limited to, damaging the parent-child dynamic)¹⁹, as well as having negative impacts on the integration and adaption of family members to Canada once they are able to join the migrant caregiver. The following two policy reforms are necessary to respect migrant caregivers' right to family unity and their right to be free from state-induced psychological harm:

2.1. Automatic issuance of open work permits to all the family members of working age of migrant workers admitted by the federal government for immediate incorporation into the labour market – except in case of “serious” criminality.

2.2. Automatic issuance of study permits recognizing access to all provincial public education systems to all migrant workers admitted on temporary work authorization and to their partner and/or to their children of all age – except in case of “serious” criminality.

Migrant caregivers' right to psychological integrity is not respected by state-induced family separation, nor is it in the best interest of their children. It is imperative that the federal government adopt policies that facilitate family unity.

2.3. Automatic issuance of permanent legal status to all partners and children of migrant workers admitted by the federal government for the purpose of immediate labour market integration – no matter their age and health conditions – except in case of “serious” criminality.

Finally, the inability to sponsor a spouse or child because of a health condition or age is probably one of the cruelest aspects of the current pathways, causing severe mental and emotional distress for migrant caregivers, especially since many have endured years of family separation and exploitative work conditions, all for the purpose of one day being reunited with their family members in Canada:

Perhaps most harsh are the stories of live-in caregivers who are not reunified with their children due to the regulation that only children under the age of 19, or those enrolled in full-time education may join their mother in Canada. In the words of one

¹⁸ Salimah Valiani, *The Shift in Canadian Immigration Policy and Unheeded Lessons of the Live-In Caregiver Program* (2009) at 13

¹⁹ Richard N. Lalonde, Andrea Smith & Simone Johnson, "Serial Migration and Its Implications for the Parent-Child Relationship: A Retrospective Analysis of the Experiences of the Children of Caribbean Immigrants" (2004) 10:2 *Cultural Diversity and Ethnic Minority Psychology* 107 at 107-108.

LCP worker: There should be no limit in the age of children we can sponsor, because they are our children. Just because they are older does not mean we don't want to be together (...). (as cited by Arat-Koc: 2001, 32)²⁰ [Emphasis added]

Six long years after arriving in Toronto, Danieles was shocked to learn she would be denied permanent residency because officials have deemed her older daughter to have "intellectual retardation." "I felt like I (was) dying when I was denied."²¹ [Emphasis added]

Migrant caregivers make huge financial and personal sacrifices to come and care for Canadians, many who require their services because of health issues or disabilities. To deny these caregivers and their family access to permanent residency is unacceptable.

CONCLUSION

In 2014, the federal government of Canada missed an opportunity to make meaningful reforms to the Live-in Caregiver Program that would concretely address concerns about widespread and systemic exploitation of domestic migrant workers.

However, apart from the removal of the live-in requirement, the changes actually intensified insecurity for migrant caregivers by reducing access to permanent residency through annual caps, increased language and education requirements and increased restriction on the type of work experience they could accumulate towards the 24-months needed to be eligible for permanent residency (caregivers can no longer combine work experience caring for children and caring for the elderly, for example, in their 24-months of work).

Any improvements to the pathways to permanent residency for migrant caregivers can only be called such if they introduce policies that respect the fundamental rights of these individuals. At the moment, Canada's commitment to principles such as the rule of law, human dignity, and the right to every individual to the equal protection under the law is not reflected in the design of the current program.

²⁰ Salimah Valiani, *The Shift in Canadian Immigration Policy and Unheeded Lessons of the Live-In Caregiver Program* (2009) at 18.

²¹ Nicholas Keung, "Ottawa urged to grant permanent status to migrant workers upon arrival", *The Star* (September 11, 2016).