



# Repeal Section 38(1)(c)

***Submission by the Migrant Workers  
Alliance for Change and Caregivers  
Action Centre to the Standing  
Committee for Citizenship and  
Immigration (CIMM)***

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## I. WHO WE ARE

These submissions are being jointly made by the Migrant Workers Alliance for Change (MWAC) and the Caregivers Action Centre (CAC).

The Caregivers Action Centre (CAC) is a grassroots organization based in Toronto, Ontario, made up of current and former caregivers, newcomers and their supporters. Since 2007, CAC has been advocating and lobbying for fair employment, immigration status, and access to settlement services for caregivers through self-organizing, research, and education.

MWAC includes Alliance for South Asian AIDS Prevention (Toronto), Asian Community Aids Services (Ontario), Butterfly - Asian and Migrant Sex Worker Support (Ontario), Caregivers Action Centre (Ontario), Caregiver Connections Education and Support Organization (Ontario), Chinese Canadian National Council Toronto Chapter, FCJ Refugee House (Ontario), GABRIELA Ontario, Income Security Advocacy Centre, Industrial Accident Victims' Group of Ontario, Injured Workers Consultants, Justicia for Migrant Workers (Ontario, BC, Mexico), Legal Assistance of Windsor, Migrant Ontario, No One Is Illegal – Toronto, OCASI - Ontario Council of Agencies Serving Immigrants, OHIP for All, Parkdale Community Legal Services, Social Planning Toronto, UNIFOR (Canada), South Asian Legal Clinic of Ontario, United Food and Commercial Workers (Canada), Workers United (Canada) and Workers' Action Centre (Toronto).

## II. RECOMMENDATION ON MEDICAL INADMISSIBILITY

1. Immediately repeal Section 38(1)(c) of the *Immigration and Refugee Protections Act*
2. Immediately grant permanent residency to everyone who was denied permanent residency on the basis of Section 38(1)(c) in the last 10 years.

## III. REASONS FOR REPEAL OF SECTION 38(1)(c)

### (1) Section 38(1)(c) is discriminatory

Section 38(1)(c) of the *Immigration and Refugee Protection Act* effectively results in denial of permanent residency status to an entire family if any member of the family is deemed to be disabled. This is discrimination. The excessive demand regime excludes people with disabilities, including those living with HIV. These exclusions are in direct contravention of the *Charter of Rights and Freedoms*.

The excessive demand regime focuses on costs associated with life-saving medication, as well as on key supports to ensure quality of life, and as such punishes disabled people for the fact that they are disabled. That is it excludes disabled people — in this case, from citizenship — for being disabled, which is the key test to assess contravention of the *Charter*.

## **(2) Section 38(1)(c) is anti-poor**

The current provisions of medical inadmissibility allow for permanent residency status to be granted to applicants that can provide a mitigation plan to offset health care and social services costs associated with a person living with disability. Such a 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 Caregivers are the only NOC C & D migrant workers who have a federal pathway to permanent residency<sup>1</sup>. 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.

Once denied permanent residency based on Section 38(1)(c), a migrant worker or potential immigrant may be eligible to apply for permanent residency on humanitarian and compassionate (H&C) considerations. Many of our members, and other poor immigrants, are unable to afford the costs associated with legal counsel to assist in preparation of this secondary application. H&C is a discretionary path with low success rates. Many therefore have no choice but to either leave Canada or continue to stay as undocumented migrants.

## **(3) Section 38(1)(c) constructs disabled people and their families only in negative terms – solely as a drain on resources**

The current medical inadmissibility framework is a cost-benefit analysis. According to evidence presented by Mr Michael MacKinnon, Senior Director, Migration Health Policy and Partnerships, Migration Health Branch on October 24th to CIMM, this analysis defines costs as processing and litigation costs for Immigration Refugee and Citizenship Canada, and a projected benefit in terms of estimated savings to provincial and territorial health care and social services systems.

This analysis does not compute the social, cultural and economic contributions of disabled people or their families to their communities. As such it is an imprecise measurement that is based on faulty economic logic.

Any individualized assessment of a family's contributions in economic, social and cultural terms vis-a-vis the health care costs associated with one member of the family would produce a markedly different result. However, such an assessment would be extremely onerous and

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<sup>1</sup> When the Live-In Caregiver Program was ended in 2014, caregivers lost their direct pathway to permanent residency. Since the two streams were introduced, only some caregivers (capped at 2,750 in each stream) will have a pathway after finishing their required work hours, and even then the increased education and language requirements are proving prohibitive for caregivers to access Permanent Residency.

require projections about labour market needs, advancement in healthcare technologies, and other projections that are not viable. As such, while the current mechanism is based on faulty logic, individualized assessment is also not possible.

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. The continued presence of Section 38(1)(c) 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. The continued presence of Section 38(1)(c) in law goes against Canada's commitment to supporting disabled people, most recently articulated in Prime Minister Justin Trudeau's statement on the International Day of Persons with Disabilities, Dec 3 2016, where he stated, "We cannot rest until persons with disabilities have the same opportunities as everyone else." Any individualized changes to Section 38(1)(c) will continue to send this discriminatory and exclusionary message to disabled people in Canada who are citizens or permanent residents. It must be repealed.

#### **(4) Section 38(1)(c) devalues migrant work**

It is CAC and MWAC's position that all migrant workers must have full immigration status on arrival. At the same time, Section 38(1)(c) incorrectly fails to account for the net benefit and contributions by migrant workers to Canada *before* they apply for permanent residency. This means that migrant workers are punished and denied permanent residency after they have already worked in the country with the expectation of being able to reunite with their families and live here permanently.

Many Caregivers are unaware that they will be rejected until their applications are made. In a number of instances, our CAC members' children were only diagnosed by the panel physician identified by Immigration Canada. Upon learning of Section 38 (1)(c), these caregivers have expressed dismay that Canada has such legally embedded discrimination against people with disabilities. Migrant caregivers' expectation for family reunification and their contributions to Canada are collectively unaccounted for.

Many migrant Caregivers are taking care of Canadian citizens or permanent residents with disabilities, and are therefore extremely equipped to do so. That they are denied the ability to live in Canada and care for their families in the way that they care for their employers is extremely unfair. Many Caregivers provide an essential service, and are yet facing exclusion on the same basis.

## **IV. IMPACT OF MEDICAL INADMISSIBILITY ON MIGRANT WORKERS**

In 2014, according to the evidence presented to this committee, 150 Caregivers were denied permanent residency under Section 38(1)(c). A number of these are our members. Here are some of their testimonies:

*I felt like I am dying when I was denied. I don't know what to do and where to go. I felt so hopeless. I wanted to scream. My mind was flying. I tried to get help but everyone told me it would be very difficult.*

*Even though my lawyer tells me I have a big chance but I am still uncomfortable. Still in my mind, still thinking about my daughter's future. Every night I stay up with my pinched heart. I spend so many years away from them.*

These are the words of Josarie Danieleles, a member of Caregivers Action Centre, who has been separated from her two daughters for ten years because one of her daughters, diagnosed with developmental delays, has been deemed to cause excessive demand on the immigration system.

Ericson Santos De Leon is a Caregiver who has been working in Canada and also waiting to rejoin his life with his family. Mr De Leon, a member of Migrante Canada, remains unable to start his life with his family as he awaits a decision. He says:

*In 2013 I applied for permanent residency, and in 2016 I received a letter saying my application was rejected because my son who has a mild case of Down's syndrome was medically inadmissible. I was surprised because I had already received my CSQ from the Quebec government. I had already saved money for my family's arrival and rented an apartment for us when I received this news.*

*Immigration officials wrongly assume that all people born with disabilities are a burden. They ignore what the doctors are saying, that my child is leading an independent life. Why is my child being treated differently from normal children? Their decision discriminates against people with disabilities and against caregivers like me who live apart from their families for many years, work hard, and sacrifice so much because of the promise of Canadian citizenship.*

Mercedes Benitez, another Caregiver, explains:

*My second son, Harold, has an intellectual disability. They said our whole family would be refused because of Harold, unless we had \$23,000 a year to support him.*

*This was such a shock. We can't do that. We cried. I love Canada, and all of us were dreaming to come, and now, after working for almost 10 years, this impossible situation.*

*They said Harold will cause an "excessive demand" to Canada's social services. I don't believe he will. We will continue to take care of Harold as we always have. Our family knows best what Harold needs. We have no intention of using all the services indicated in the Immigration letter.*

*Being told that I cannot stay in Canada, and that my family cannot come here and live with me, makes me feel that we are being punished for Harold's*

*disability. Like Canada is saying we are not good enough. How can it be that in the best country in the world I am good enough to work, caring for your sick and elderly, but not good enough to stay, just because my son has a disability? This is not the country that I thought Canada was.*

## V. The need for broader analysis of medical inadmissibility

While the current CIMM study is focussing on medical inadmissibility at the permanent residency stage, it is imperative that a broader study be taken of the medical inadmissibility regime in relation to the temporary foreign worker program. This includes:

- **Abolishing the second medical examination imposed on Caregivers in November 2014**, which goes against the letter and spirit of the Juana Tejada Law: The Juana Tejada Law eliminates the requirement for live-in caregivers to undergo a second medical examination when applying to become permanent residents. The change was being implemented in honour of the late Juana Tejada, a live-in caregiver and migrant worker leader who developed cancer and was deemed inadmissible as a result. However, since November 2014, Caregivers are being asked to submit to a second medical examination.
- **Ending the medical repatriation regime for agricultural workers**: Between 2001 and 2011, 787 migrant farm workers were terminated and sent back to their country of origin for medical reasons. More than 41 per cent of those workers were sent back because of medical or surgical conditions, including cancer, neurological conditions, back problems and gastrointestinal problems such as stomach pain, hernias and appendicitis. While one-quarter of these workers were fired because of injuries such as tobacco poisoning or broken limbs, three female workers lost their jobs after they became pregnant. This use of injury, pregnancy or disability to exclude migrant workers during their time in Canada requires further study and legislative oversight.

## VI. FURTHER RECOMMENDATIONS FOR MIGRANT WORKER RIGHTS

We also urge the Standing Committee on Citizenship and Immigration to develop legislation that:

### 1) Ensures permanent immigration status for all migrant workers

Status for All, Status on Arrival: All migrant workers must be able to immigrate to Canada as permanent residents immediately, independently and permanently without depending or relying on the sponsorship or good will of their employers or third party agencies. This program should include migrant workers already in Canada, those that have worked here and left and those arriving in the future. Migrant workers who have been granted permanent residency should get comprehensive settlement services that will ensure their success.

- This recommendation is distinctly separate from a provision of 'pathway to permanent residency'. A 'pathway' is a two-step process that Caregivers had until November 2014 --- the current two-streamed program contains a more restrictive pathway --- and even then was shown to have the same forms of abuse and vulnerability that are found in other parts of the program.
- Permanent residency ensures services: Many labour rights and basic services in Canada like healthcare and post-secondary education are tied to permanent immigration status. Migrant workers pay for all these services through taxes and deserve access to them.
- Permanent residency is the norm: Most immigrants – refugees, spouses, high-waged immigrants - arrive to Canada with permanent resident immigration status, which gives them peace of mind, the ability to re-unite with their families and the tools they need to lay deeper roots and build our society further as soon as they arrive.
- Permanent residency re-unites families: Landed status on arrival would also allow caregivers to enter Canada with their families, thus eradicating family separation (which averages 6-8 years) while caregivers complete the program and wait for their permanent residence applications to be processed.

## 2) Ensures access to all social services and benefits

Ensure access to Canada Pension Plan, Employment Insurance and other federal entitlements to migrant workers already in Canada and portable benefits to migrant workers who are no longer here.

These two recommendations above are being supported by Coalition for Migrant Worker Rights Canada (CMWRC). CMWRC is the representative body of migrant workers in the country. Members include Cooper Institute in Prince Edward Island, Caregiver Connections Education and Support Organization (CCESO), Migrant Worker Solidarity Network in Manitoba, Migrante Canada, Migrant Workers Alliance for Change in Ontario, Radical Action with Migrants in Agriculture in Okanagan Valley, Temporary Foreign Workers Association in Quebec, Temporary Foreign Workers Coalition in Alberta, Vancouver Committee for Domestic Workers and Caregiver Rights in Vancouver and West Coast Domestic Workers Association in Vancouver.

These recommendations have also been endorsed by AIDS Committee of Durham Region, Jesuit Refugee Service, Retail Action Network BC, Refugees Welcome Fredericton, SAME Brock Chapter, MigrantWorkersRights Canada, BC Employment Standards Coalition, Migrante BC, PINAY Quebec, People's Health Movement Canada/Mouvement populaire pour la santé au Canada, Maritimes-Guatemala Breaking the Silence Network, Migrant Worker Health Project (International Migration Research Centre), Gabriella Ontario, AAFQ (association des aides familiales du Québec/Caregivers Association of Quebec) and Inter Pares.