

# Submission by the Caregivers' Action Centre

Ontario's Changing Workplaces Review Consultation Process

September 18, 2015



Caregivers' Action Centre

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### Caregivers Action Centre

The Caregivers' Action Centre (CAC) is an organization of current and former workers under Canada's Caregiver Program (CP).<sup>1</sup> More than half of all caregivers admitted to Canada under the Temporary Foreign Worker Program (TFWP) each year work in Ontario and more than half of them work in Toronto. Over the past 10 years we have worked with over a thousand caregivers in the greater Toronto area to improve the lives and conditions of caregivers in Ontario.

#### *The Caregiver Program: conditions ripe for abuse.*

We have experienced first-hand how the provisions of the Caregiver Program create conditions ripe for abuse. Caregivers face unique challenges that create barriers to employment rights and protections.

The Caregiver Program, under Canada's TFWP, requires caregivers to work the equivalent of 24 months (or 3,900 hours) within four years for government-approved employers. Caregivers are restricted to work providing care for children, people with disabilities and elderly in private homes. Upon completion of this employment service under the program, caregivers are allowed to apply for permanent residency.

Caregivers are generally required to live in their employer's home. This is a requirement under the Program that applies to all caregivers arriving prior to November 30, 2014. For caregivers approved to work under the TFWP after that time, living in the employer's house has become optional. That is, the employer and caregiver can determine whether the employment will be on a live-in or live-out basis. Caregivers report, however, that many employers still want caregivers to live in the workplace to ensure access to their employees on a flexible basis. Further, the prevailing minimum wage paid to caregivers, prohibits living out of the employers house for many reasons.<sup>2</sup>

The live-in employment arrangement gives substantial control over caregivers' food, space, sleep and social networks. This leaves many open to intimidation and reinforces the inequality of power between the employer and caregiver. There is often no clear boundary between being 'on-duty' and 'off-duty'. Even for live-out workers, the long hours and isolation on the job can lead to similar effects. Despite the increased risk for abuse, the traditional separation between the public and private space make the Ministry of Labour unable to proactively enforce labour standards in private homes.

Caregivers are tied to one employer. Prior to November 2014, employers would have little difficulty obtaining a Labour Market Opinion (LMO) that would enable them to hire a worker under the Live-

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<sup>1</sup> The name of the caregiver program was changed from Live-in Caregiver Program to Caregiver Program in 2014.

<sup>2</sup> Most caregivers make close to minimum wage. This makes paying for accommodation and transportation very difficult. Most caregivers dedicate a substantial portion of their wages to pay for the costs of maintaining their families back home. Caregivers may also carry a debt burden from illegal fees charged by recruitment agencies.

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in Caregiver Program. Often it would take 2 to 3 months to obtain a permit. Caregivers would then apply for a work permit tied to that employer. After the November 2014 changes to the Program, employers are required to pay \$1,000 and be approved through a rigorous Labour Market Impact Assessment (LMIA) in order to hire a caregiver under the Program.

We live precariously under the immigration system that can force us into periods of being without status to work. For example in 2010, many caregivers waited up to a year to receive open work permits after completing service required under the Caregiver Program. Between January and March 2015, 90 percent of employer applications for LMIA's required to hire caregivers were rejected by the Department of Employment and Social Development Canada.<sup>3</sup> This leaves caregivers in Canada with little choice but to work without status or to remain in abusive jobs. We must rely on our employers to acquire the documents we need to apply for our permanent residency. Backlogs and delays over which we have no control create terrible burdens on caregivers and our families who are awaiting sponsorship. The processing time for permanent residency has doubled since January 2014 to 46 months.

*"The employer who brought me to Canada released me upon arrival. That means there was no job for me. In the past 3 years, I have gotten 7 different employers. But only 3 of them got a work permit. One of them fired me because I refused to work without holiday pay. Another one fired me because I was sick. They wanted me to pay for my replacement - \$25 an hour while I earned minimum wage. Others just never completed the paperwork for the LMIA. So after 3 years, I only have 1 year of employment that counts for the program." C.*

Recruitment Agencies are another source of abuse for Caregivers. Recruiters charge caregivers fees to obtain a job under the Caregiver Program. Caregivers are routinely charged fees starting around \$1,000 and going up to \$4,000. Even though the *Employee Protection for Foreign Nationals Act* prohibited such fees in 2010, there has been little effective enforcement of this prohibition. In fact only 28 claims were filed against recruiters and a total of only \$12,100 in illegal fees have been recovered for caregivers between 2010 and 2013.<sup>4</sup> Such prohibitive recruitment fees leave many caregivers in a debt bondage that prevents them from leaving unscrupulous employers.

### Changing Workplace Review

Caregivers seek permanent residency upon arrival as a key strategy to addressing vulnerability at work. The Ontario government should advocate for this change in the federal immigration system. There is still much that can be done to improve protections for caregivers under the ESA. The Caregivers' Action Centre endorses the recommendations set out in **Still Working on the Edge: Building decent jobs from the ground up.**<sup>5</sup> In addition, there are specific measures that address the particular vulnerabilities of caregivers outlined below.

<sup>3</sup> **10% Approval Rate from Citizenship and Immigration for New Caregiver Program Applications** June 2, 2015. Union Research. <http://unionresearch.org/2015/06/02/10-approval-rate-from-citizenship-and-immigration-for-new-caregiver-program>

<sup>4</sup> Fay Faraday, **Profiting from the Precarious** Summary Report. April 2014. (Toronto: Metcalf Foundation) 36.

<sup>5</sup> Mary Gellatly, **Still Working on the Edge: Building decent jobs from the ground up.** (Toronto: Workers' Action Centre).

### *Conditions of work*

In a survey of 132 caregivers conducted by CAC in 2011, we found that 42 percent of caregivers reported working 11 hours a day or more. Of those working overtime, 74 percent did not get overtime pay. One in five workers did not even get one day off a week. Other problems cited by caregivers include: inadequate rest periods; poor or unhealthy accommodation; a lack of food or restrictions on the type of food they can eat in their employers' households; a lack of privacy; the inability to take sick leave; and, the inability to have a personal life. Further, many caregivers face a huge debt burden to recruitment agencies. Of those caregivers surveyed, 65 percent report paying fees to recruitment agencies for employment under the Live-in Caregiver Program in Ontario, paying an average fee of \$3,300. Even after Ontario's prohibition of recruitment fees (*Employment Protection for Foreign Nationals Act, 2010*), two-thirds of caregivers arriving after the Act came into effect had paid recruitment fees averaging \$3,275.<sup>6</sup>

### *Hours of work*

"They own our time". That is the view of many caregivers. As noted above, many caregivers work long days without pay for all hours worked. Living or working in an employer's house under a tied work

*"We take care of children and the elderly. We often sleep beside the children or have monitors for the elderly. We rarely only work 8 hours." Y.*

permit leave workers with little power to refuse excessive hours of work. Often these excessive hours are not paid at overtime premium pay. In many cases, they are not paid at all.

### *Recommendations*

The ESA should provide for an eight-hour day and a 40-hour work week. Employees should have the right to refuse work beyond 40 hours. Overtime at time and a half should be paid (or taken as paid time off in lieu) after 40 hours.

### *Vacation*

A key challenge for caregivers is being able to take vacation time. For those working for elderly employers, there often is no vacation time off. For caregivers working with children, employers often consider the family's vacation as the caregivers' vacation; even though the caregiver is brought along to provide care during the vacation. When the caregiver does not accompany the family on vacation, that time period is then considered vacation time or time off without pay.

### *Recommendation*

Increase vacation entitlement to three weeks per year. The employee should have the right to determine when vacation is taken.

### *Sick days*

The ESA does not give caregivers the right to take unpaid emergency leave (small business exemption). Obviously some employers want to ensure that sick caregivers have the time to recover rather than work with small children or the elderly when sick, but many others do not. As C.

<sup>6</sup> On file at Caregivers' Action Centre

notes above, she was asked to pay for her replacement while sick or lose her job. Caregivers frequently report to CAC that they cannot take time off while sick because there is no one to replace them. The nature of the work caring for small children and caring for elderly people for long hours in social isolation put caregivers at greater risk of becoming ill.

### *Recommendations*

Repeal the exemption for employers of 49 or less workers from providing personal emergency leave. Provide 7 paid sick days per year.

### *Deductions*

The ESA allows employers to deem the provision of room and meals as payment of wages. But this is only allowable if the meals have been received and the room is fit for human habitation, reasonably furnished and is private. The Federal TFWP requires that the room be private and have a door that locks. The ESA has no enforcement mechanism to ensure that food and lodgings comply with the Act. Caregivers report employers who put the baby's crib in their room. Caregivers have been put in unfinished basements. Some caregivers cannot eat the food provided or are given the food for children while the employer eats better food.

Commencing November 2014, the federal Caregiver Program prohibits employers from charging live-in caregivers for room and board (if they come under the new program). The ESA is out of step with this provision and may be used by employers to justify room and board deductions in Ontario.

### *Recommendation:*

Bring the ESA in line with the federal caregiver program and prohibit deductions for room and board for live-in caregivers.

### *Enforcement*

Improving the rights of caregivers will do little if these rights are not enforced. But Ontario's current system relies on workers to enforce rights once violations occur. This is especially the case for caregivers, as the Ministry of Labour does not do proactive enforcement in the employers' homes. Due to the constraints of the federal Caregiver Program, caregivers are not able to enforce their rights while on the job.

When a worker faces wages and working conditions that fall short of the terms set out in her employment contract or employment standards, it is the worker's participation in the Caregiver Program that is put in jeopardy (and future citizenship), not the employers'. Workers fear trying to enforce their employment standards rights before the two-year service requirement has been completed.

Enforcement measures are needed to address the specific vulnerability of caregivers to employment standards violation. Deterrence measures that compel employers to comply with the ESA are needed. Caregivers need supports to enforce their rights.

### *Recommendations*

- Establish set fines (rather than Employment Standards Officer discretion) for confirmed violations, including settlements and voluntary compliance.
- Order employers to pay interest on all unpaid wages.
- The names of employers found in violation of Employment standards should be publicized on the Ministry of Labour website.
- Under the employer registry of caregivers recommended below, conduct education to inform employers of their responsibilities and employee's anti-reprisals protections. Conduct proactive inspections of employers of caregivers.
- Authorize the Ministry of Labour to request bonds in cases where wages may go unpaid due to employer's history of previous wage claim violation or sectors at high risk of violations such as caregivers and other migrant workers.
- Amend the ESA to include protection from wrongful dismissal.
- Change the Canada-Ontario Immigration Agreement (COIA) to create an open work permit program for caregivers and migrant workers who have filed complaints against employers under the ESA and against recruiters under the Employment Protection for Foreign Nationals Act.
- To protect migrant workers from employers who reduce the conditions of work specified in their contract of employment under the TFWP, workers should be able to make claims under the ESA when conditions of the employment contract have been reduced or not complied with.

### *Caregivers need access to collective representation*

Caregivers are expressly excluded from the *Labour Relations Act (LRA)*. As caregivers are generally employed by an individual employer in the employers' homes, they cannot access the LRA's standard model of organizing. Caregivers need access to a sectoral platform for collective bargaining.

Recommendations for such a model of sectoral bargaining were made in the 1993 report by Intercede (an organization of live-in caregivers) and the International Ladies Garment Workers' Union: *Meeting the Needs of Vulnerable Workers: Proposals for Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* and remain relevant today.<sup>7</sup> Importantly, the model for broader based bargaining that would provide real protection for these workers must recognize their isolation. It cannot be dependent upon workers first accessing a bargaining unit under the existing *LRA* as such a model would continue to leave these workers unprotected.

Other migrant workers – and workers with secure immigration status – who are employed in highly precarious sectors would also benefit significantly from broader based bargaining models and this is a principle the Special Advisors should endorse.

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<sup>7</sup> International Ladies' Garment Workers' Union and INTERCEDE, **Meeting the Needs of Vulnerable Workers: Proposals for Improved Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers**. February 1993, Toronto.

### *Recommendations:*

Establish the legislative framework to enable sectoral bargaining in Ontario. The Labour relations act prohibits caregivers from organizing unions. Caregivers should be able to unionize and bargain sectorally with employer representatives.

### *Recruitment*

As Canada's temporary foreign worker program has expanded, so too has an industry of third-party, for-profit labour recruitment agencies to match employers in Canada with workers abroad. Recruitment agencies also help assist employers and workers navigate the TFWP.

Despite Ontario's *Employment Protection for Foreign Nationals Act* that prohibits charging workers fees for employment in Ontario, widespread abuse still takes place.

*"I paid an agency 8-months worth of my salary back home. When we arrive here with these debts, we need to pay back the debt while supporting our children and families back home. It makes asserting our rights very difficult. These fees are currently illegal but there is no way to prevent them from being charged." Y.*

Protecting Ontario workers without full immigration status from exploitation by recruiters and employers must be proactive.

### *Recommendations:*

"Ontario should adopt a proactive system of employer registration, recruiter licensing (including the mandatory provision of an irrevocable letter of credit or deposit), mandatory filing of information about recruitment and employment contracts, and proactive government inspection and investigation in line with the best practices model adopted in Manitoba's *Worker Recruitment and Protection Act* and the enhancements developed in Saskatchewan and Nova Scotia.

Specific enhancements to the Manitoba model that should be adopted in Ontario include:

- (a) mandatory reporting of all individuals and entities that participate in the recruiter's supply chain in Canada and abroad;
- (b) mandatory reporting of detailed information regarding a recruiter's business and financial information in Canada and abroad as developed in Nova Scotia's legislation;
- (c) explicit provisions that make a licensed recruiter liable for any actions by any individual or entity in the recruiter's supply chain that are inconsistent with the Ontario law prohibiting exploitative recruitment practices;
- (d) public registries of both licensed recruiters and registered employers;
- (e) explicit provision that makes it an independent offence for an employer to engage the services of a recruiter who is not licensed under the legislation;
- (f) explicit provisions that make an employer and recruiter jointly and severally liable for violations of the law and employment contract;

(g) protections against the broader range of exploitative conduct that is prohibited under s. 22 of FWRISA in Saskatchewan (i.e., distributing false or misleading information, misrepresenting employment opportunities, threatening deportation, contacting a migrant worker's family without consent, threatening a migrant worker's family, etc.); and (h) provisions allowing for information sharing that enhance cross jurisdictional enforcement of protections against exploitative recruitment practices, including information sharing with other ministries or agencies of the provincial government, department or agencies of the federal government, departments or agencies of another province or territory or another country or state within the country as developed in Saskatchewan's legislation."<sup>8</sup>

### *Fair Wages*

Caregivers generally earn at or near the minimum wage. Any increase in wages is usually due to statutory wage increases. Yet the current \$11 minimum wage is 17 percent (\$4,225) below the poverty line.<sup>9</sup>

The minimum wage lays the wage floor to stop employers from taking unfair advantage of workers such as caregivers with little bargaining power.

#### *Recommendation*

Raise the minimum wage to \$15 per hour and annually index by inflation.

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<sup>8</sup> Fay Faraday (2014) *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Toronto: Metcalf Foundation)

<sup>9</sup> Mary Gellatly, **Still Working on the Edge: Building decent jobs from the ground up.** (Toronto: Workers' Action Centre).