

Submission to the Ministry of Labour - December 31, 2017

Phase 1 Review of ESA and LRA Exemptions: Domestic Workers

By the Caregivers Action Centre



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Introduction

The government announced on May 30, 2017 that it would conduct a review of Employment Standards Act (ESA) exemptions and special rules. Phase 1 of the review was launched October 18, 2017 to review eight occupations with exemptions and special rules under the ESA and Labour Relations Act (LRA), including Domestic workers. The government has rightly followed the Changing Workplaces Review (CWR) recommendation to conduct a review of exemptions expeditiously.

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, we have been advocating and lobbying for fair employment, immigration status, and access to settlement services for caregivers through self-organizing, research, and education. This submission focuses on the exemptions for Domestic workers, specifically live-in and live-out caregivers, many of whom come to work in Ontario on tied work permits. Domestic workers include people with and without regularized immigration status and migrant workers employed through the Temporary Foreign Worker Program. CAC endorses the [joint submission](#) made by Workers Action Centre (WAC) and Parkdale Community Legal Services (PCLS), as well as that of the [Migrant Workers Alliance for Change \(MWAC\)](#).

Exemptions disproportionately affect racialized, migrant and women workers. Limits on access to employment standards are a feature of precarious employment and compound existing labour market disadvantage. Caregivers, and particularly those who come to Canada under the former Live-In Caregiver Program, under the Temporary Foreign Worker Program, or on other restrictive work permits, need access to full labour rights. This will not only protect this group of primarily racialized, poor and working class women; it will also improve the standards of the caregiving sector, the work that makes all other work possible.

CAC has consistently heard from caregivers across Ontario that access to unionization and to all of the same employment standards as other workers in the

province are necessary steps towards being able to live and work in dignity¹. Caregivers see these as two key steps toward the recognition of caregiving and other Domestic work as real work.

CAC broadly recommends that the Ministry strike both the ESA and LRA exemptions for Domestic Workers. CAC further recommends that the Ministry work closely with workers and advocates to develop a model of broader based bargaining for Domestic Workers.

We urge Ontario to eliminate these exemptions and to take the necessary steps to ensure that caregiving work is free of exploitation and abuse, including by implementing the kinds of “broader based bargaining” strategies that would make collective action and worker power a reality for caregivers.

In the next phases of this exemption review, we would also recommend that the Ministry of Labour prioritize those industries where workers are most vulnerable, including sectors that rely heavily on migrant labour. In particular, we urge Ontario to ensure that the agricultural sector is included in the next phase of the review.

Migrant Caregivers in Ontario: Context

Amabel² worked for the same employer for two and a half years, from the time she arrived in Canada until she obtained her required work hours to apply for Permanent Residency. According to her contract with her employer, she was to work 8 hours per day, 5 days per week, taking care of two children. Her contract stated that she would be paid the minimum wage, and that she would be compensated for overtime hours at time and a half. The reality of her situation was quite different however. Amabel did the cooking, cleaning, snow and leaf removal, laundry, full spectrum childcare, and shopping for the entire family. She worked 6 and sometimes 7 days a week, from 7:00 am until 10:00 pm, and was paid \$300 per month. She slept in a cold basement on a mattress on the floor. By the end of her contract, she had hundreds of unpaid hours, unpaid overtime, and was owed

¹ See *Caregivers Speak Out! International Domestic Workers Day 2017*, You Tube, <https://www.youtube.com/watch?v=Ap7LozQd4Bw>

² Name and identifying features have been changed to protect the privacy and anonymity of the caregivers in the case studies.

vacation pay. When Amabel tried to assert her rights, her employers threatened her with violence, fired her and sent her out the door in the middle of the Winter with nowhere to go.

Amabel's experience harkens back to Canada's long history of immigration programs and indentured labour practices designed to fill care work needs in private homes. From the 1600s to the 1800s, slavery was practiced in "New France" primarily in the form of domestic work by enslaved Indigenous peoples and peoples of African descent. At the dawn of the twentieth century, the new nation of Canada began bringing in women from Finland, England and Ireland as domestic workers. These women were granted permanent residency.

Post WWII and as the government began turning towards the Caribbean for domestic workers, Permanent Residency became conditional on the completion of a specific work requirement through the Live-In Caregiver Program (1992-2014)³. This legacy carries into the realities of Domestic work in Ontario today: an industry that is largely fed by temporary work programs that bring racialized women from the Global South to labour under restrictive conditions with temporary migration status. Amabel's story, unfortunately, is all too common.

Today, almost 92,000 people in Ontario perform labour on temporary work permits, and there are an estimated 200,000 workers in Ontario with no immigration status. Migrant caregivers work in their employer's homes providing care for children, the elderly and people with medical support needs and disabilities. Migrant caregivers are overwhelmingly racialized women from the Global South, with over 90% originally migrating from the Philippines. Nearly half of all migrant caregivers who come to Canada work in Ontario.⁴ Most of these care workers have university degrees. Many are trained as nurses, midwives, other medical professionals and teachers. Yet, they are denied basic rights in Ontario, such as the right to unionize or full access to minimum wage protections. They are typically paid at or near the minimum wage, and in practice many are paid well below the minimum

³ See Fay Faraday, *Made in Canada: How the Law Constructs Migrant worker Insecurity* (Metcalf Foundation, 2012); Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Metcalf Foundation, 2014); and Fay Faraday, *Canada's Choice: Entrenched exploitation or decent work for Canada's migrant workers* (Metcalf Foundation, 2016).

⁴ Figures from IRCC demonstrate that consistently 48-49% of migrant caregivers each year work in Ontario.

wage. Most migrant caregivers work in isolated and private homes, without inspections on their living and working conditions.

The persistent failure of federal and provincial governments to adopt policies that support accessible and affordable public childcare, elder care and care for persons with disabilities has created and sustained a need for caregiving labour to be performed in private homes. For decades, this work has been performed by an overwhelmingly female, racialized workforce that is poorly paid, highly precarious, and often faces exploitative working conditions that fail to accord with minimum employment standards. Austerity measures over the past two decades have shifted significant caregiving labour from public healthcare facilities into the private home. As a result, the number of workers in this precarious sector has grown significantly. At the same time, these caregivers are increasingly serving a “patient population with more chronic and complex health issues.”

Expanded transnational labour migration policies bring thousands of migrant caregivers into Ontario each year with temporary immigration status. The structure of these immigration programs means that migrant caregivers face restrictions on labour mobility, profound difficulty enforcing contractual and workplace rights, and experience compromised health status (including coming in and out of provincial health coverage), the psychological and physical impact of family separation, linguistic and cultural barriers, a lack of access to settlement services, a heightened risk of abuse due to legal/economic vulnerability, and barriers to freedom of association and meaningful voice. Even though it violates the Employment Protection for Foreign Nationals Act, recruitment agencies continue to charge migrant caregivers thousands of dollars in illegal fees to secure jobs in Ontario. Workers in the federal Caregiver Program are given permits that tie them to one employer for two years. They must complete two years of caregiving labour on tied work permits before they can apply for permanent residence and receive an open work permit.

These practices foster extremely exploitative work conditions. Often working and living in the same private family home, caregivers are isolated and vulnerable to abuses ranging from unpaid overtime to physical and sexual abuse and racial harassment. The live-in employment arrangement gives employers substantial control over every aspect of caregivers' lives, often with no clear boundary between being “on-duty” and “off-duty,” and with a great deal of room for manipulation of the worker as a “member of the family.”

Unpaid overtime is common. Although the live-in component was made optional Federally in 2014, over 90% of caregivers we meet through CAC are living in with their employers⁵ due to demand for live-in care. To complain or leave abusive employment will delay or even eliminate the opportunity to complete the two years of work that is required to apply for permanent residence and to be reunited with their families.

The migrant caregiver workforce must have robust employment and labour law rights, including effective enforcement, in order to prevent exploitation. In order to break away from the legacies of slavery and indentured labour in Canada, we must give Domestic workers access to the same rights as any other worker in Ontario, including full access to unionization and full protections under ESA Minimum standards.

Review of Exemptions

ESA Exemptions for Domestic Workers, Homemakers, and Residential Care Workers

Domestic Workers are subject to a special minimum wage rule that allows employers to deduct room and board from wages for the purposes of determining whether minimum wage has been paid. This special minimum wage rule is inconsistent with the federal Caregiver Program policies that prohibit employers from charging room and board to live-in caregivers⁶. Revoking the special rule for domestic workers would ensure that the Employment Standards Act is consistent with federal government policy and practice.

In general, employers of domestic workers are enabled, through this exemption, to pay workers wages “in-kind” through room and board. No other employer is allowed to pay its employees with “things” rather than wages. This practice reifies that caregiver work is lesser work not requiring wages paid for all hours of work.

Further, live-in caregivers report conditions of room and board that do not meet the requirements of the exemptions (e.g., no privacy including no lock on the room; inadequate

⁵ Statistics gathered by CAC through surveys, hotline calls, focus groups, and in-person support.

⁶ When the Federal government scrapped the Live-In Caregiver Program in 2014 and replaced it with the two-streamed Federal Caregiver Program, the live-in component became optional. See *Hire a temporary worker as an in-home caregiver - Program Requirements*, ESDC, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/caregiver/requirements.html?wbdisable=true>

food for meals). Caregivers report that their wages are reduced under this exemption below minimum wage with no real way to enforce minimum wages due to the issues discussed above.

Finally, caregivers report that employers may pay wages as a monthly salary with monthly room and board deductions that do not reflect the actual meals eaten. Again, caregivers have no real way to negotiate with employers to adjust monthly room and board payments to reflect actual meals consumed.

Recommendation 1: Repeal the Domestic Worker, Homemaker and Residential Care exemptions and special rules as set out in O. Reg. 285/01. Specifically, remove the exemption on minimum wage protections for Domestic workers.

Review of the LRA Exemptions for Domestic Workers

Eva⁷ came to Canada through the Live-In Caregiver Program. She began working as a live-in caregiver for her employer's two elderly parents on a closed or restrictive work permit in 2014. Due to her closed work permit, Eva was forbidden from working elsewhere or attending school and was dependent on her employer for her income, housing, and her ability to obtain permanent residency in Canada. Unfortunately, Eva's employer exploited her precarious status.

Eva worked long days and overnights, taking care of two elderly individuals. Despite working approximately 150 hours per week, Eva's employer only compensated her for 44 hours of work per week at a rate of \$12.56 per hour. While Eva was aware of the poor working conditions, she felt obligated to continue working for her employer due to her closed work permit.

"I felt as though I had to accept the long hours and no overtime because I wanted to provide a better future for my family. I knew that my employer should be paying me for every hour I worked, but I could not quit if I wanted to gain my permanent residency," explained Eva.

⁷ Name and identifying details have been changed to protect caregiver's privacy and anonymity

Eva is like many of the migrant caregivers who come to us at CAC. Tied work permits restrict migrant caregivers to working for a single employer. Under predatory recruitment practices, migrant caregivers are regularly charged thousands of dollars in illegal fees (typically up to two years' wages or more in their home currency) to secure the minimum wage jobs they do in Ontario. These practices create extremely exploitative work conditions in which migrant caregivers are often "released on arrival" and forced into undocumented status; work under conditions of debt bondage; are forced to work excess unpaid hours with little time off; are forced to perform duties outside their contracts; and/or are subject to sexual and racial harassment.⁸ Demanding fair treatment and contract compliance typically results in termination. Largely because of the ways in which current law structures their work as highly precarious and exploitable, these migrant caregivers who are most in need of collective representation are denied the right to unionize.

Most caregivers working in private homes are not unionized because the work structure differs from the standard employment relationship for which our current labour relations laws were designed. While caregivers typically work one-on-one in private homes, bargaining units are workplace-specific and s. 9(1) of the LRA prohibits single-member bargaining units. More fundamentally, s. 3(a) of the LRA expressly states that "This Act does not apply to [...] a domestic employed in a private home."

The lack of unionization in the sector, therefore, does not reflect workers' active choice to remain non-union; it reflects exclusionary laws that fail to account for the structures of female-dominated and primarily racialized care work. In fact, for decades migrant caregivers have organized through social/community networks and have been demanding the right to unionize. In particular, since at least 1993, migrant caregivers in Ontario have been demanding law reform to grant them access to the right to unionize through broader based bargaining structures.⁹ Their continued exclusion raises serious concerns in light of the *Charter's* guarantees for freedom of association and equality.

It must also be emphasized that the ILO's Convention No. 189 and Recommendation 201 on the rights of Domestic workers expressly state that governments must take positive

⁸ See Faraday, *Profiting from the Precarious*.

⁹ Ontario District Council of the ILGWU and Intercede, *Meeting the Needs of Vulnerable Workers: Proposals for Improved Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* (ILGWU/INTERCEDE, February 1993).

steps to enact legislation and adopt policies to enable and facilitate caregivers' organizing and right to bargain collectively.¹⁰

The practical reality is that the possibility of unionization is very small under current labour relations regimes because many caregivers are the only persons employed in a private home. Such isolation in small workplaces makes collective action extremely difficult. As a result, not only must explicit exclusions from legal protections be rectified, but there must also be other statutory reforms that will ensure that Domestic Workers' right to unionize is accessible in practice.

The Special Advisors recognized this structural problem and noted that "sector specific regulation under the [Employment Standards Act] is likely to become more necessary and important to ensure that working conditions meet the test of decency, and that certain issues contributing to vulnerability and precariousness are addressed." However, sector specific standards under the Employment Standards Act are not enough.

First, sectoral standards would not provide a right to unionize, to collective representation, to collective bargaining and to dispute resolution mechanisms. The right to unionize, to collectively bargain, and to engage in other forms of collective action are critical to giving caregivers an effective voice in the workplace, to allowing them to enforce their rights, and to participate in the political forum to shape the terms and conditions of their work.

Second, migrant caregivers' terms and conditions of work are already effectively subject to a sectoral standard that has depressed their terms and conditions of work, not augmented them. Migrant caregivers do not "negotiate" their contracts. They are typically presented with standard contracts to sign before they arrive in Canada with wages that are typically set at the "prevailing wage rate" (generally minimum wage). A strong floor of substantive rights is a necessary platform from which bargaining in the care sector must operate, but reforms cannot be restricted to minimum standards.

What is ultimately needed is a broader based bargaining framework that is actually responsive to migrant caregivers' reality and that will allow full access to effective freedom

¹⁰ ILO Convention 189: *Convention concerning decent work for domestic workers, 2011*, Article 3; ILO Recommendation 201: *Recommendation concerning decent work for domestic workers, 2011*, Article 2.

of association. Unlike many workers, migrant caregivers face two points of power imbalance: they face a power imbalance relative to their immediate employer, and they also face a power imbalance relative to the recruiters who place them with their immediate employer and who may continue to exert ongoing pressure through the extraction of unlawful fees and other coercive behaviour. An effective broader based bargaining framework must give migrant caregivers a strong collective voice to counter both of those sources of workplace exploitation.

Migrant caregiving already operates under a labour migration framework that is effectively sectoral. But while employers and recruiters have power in that sectoral system, workers do not. Establishing a broader based bargaining framework in this context is entirely feasible and is in fact necessary to rectify the profound power imbalance that exists.

The structural capacity is in place to organize on a broader basis for bargaining. Currently, employers who wish to hire a migrant caregiver must apply for a Labour Market Impact Assessment authorizing them to hire a migrant worker. In order to receive this Assessment, an employer must prove that they are unable to hire or train a local worker (i.e. that there is a sectoral shortage of labour). Again, as identified above, employers present workers with standard contracts which are common throughout the sector and which provide the “prevailing wage rate” in the province.

In provinces such as Manitoba, Saskatchewan and Nova Scotia, employers must register with and be approved by the provincial employment standards branch before they can apply for an Assessment and hire a migrant worker. Those provinces also have a statutory requirement for recruiters to be licensed and registered. Ontario should implement similar systems, which are consistent with a sectoral bargaining framework.

In a system where employers must already apply for the authorization to hire migrant workers based on a sectoral labour shortage, and in which the global leading best practices require employers to be registered with the Ministry of Labour, requiring those employers to be part of a designated employer bargaining agency is not a difficult step. Broader based bargaining would redress the sharp power imbalance in the sector and bring accountability to employer and recruiter practices.

Migrant caregivers must play an active role in developing the broader based bargaining model that applies to their sector. Meaningful models of collective bargaining require the participation of domestic workers in their development. Without such participation, any broader-based bargaining models would lack both legitimacy and effectiveness.

Caregivers need access to a sectoral platform for collective bargaining with the goal of enabling workers to organize and bargain collectively from multiple locations with the same employer/franchisor. For sectoral bargaining, there must be a process for designating an employer entity that is the counterpart in bargaining and to recognize the triangular relationship involved in some employment relationships involving recruitment agencies and employment agencies.

Domestic workers in Ontario are denied the most fundamental labour rights – the constitutionally protected right to unionize, to bargain collectively and to exercise the right to strike (or have access to an effective dispute resolution process that is a substitute for the right to strike). We recommend removing the exclusions of domestic workers from the LRA and introducing reforms that will ensure that domestic workers' right to unionize is accessible in practice.

Recommendation 2: Ensure substantive fairness in the review process for exemptions and special rules. This must include addressing the power imbalances between employers and employees and soliciting employee feedback.

Recommendation 3: Repeal s. 3(a) of the Labour Relations Act, 1995 so that domestic workers are not formally excluded from the right to unionize.

Recommendation 4: Remove the requirement in s. 9(1) of the Labour Relations Act, 1995 that a bargaining unit be more than one employee.

Recommendation 5: Following active consultation with caregivers, other domestic workers, and advocates, enact a model of broader based bargaining for domestic workers.

Summary of Recommendations

While caregivers perform the work that makes all other work possible, they are among the most undervalued workers in this society. It is time for the laws in Ontario to reflect a respect and recognition for care work as real work. While the decision to issue migrant caregivers temporary work authorizations rather than permanent status lies with the Federal government, the right to unionize and bargain collectively is governed at the provincial level, as is access to minimum employment standards. The Ministry of Labour of Ontario has the power to ensure that migrant caregivers can access their constitutionally protected freedom of association in the province and live with basic dignity and labour rights.

Recommendation 1: Repeal the Domestic Worker, Homemaker and Residential Care exemptions and special rules as set out in O. Reg. 285/01. Specifically, remove the exemption on minimum wage protections for Domestic workers.

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Recommendation 4: Remove the requirement in s. 9(1) of the Labour Relations Act, 1995 that a bargaining unit be more than one employee.

Recommendation 5: Following active consultation with caregivers, other domestic workers, and advocates, enact a model of broader based bargaining for domestic workers that includes:

- a) Designation of region(s) for bargaining;
- b) Designation of an employer bargaining agent for the region(s); and
- c) Recognition of workers' bargaining agents for the region(s), including the ability of domestic worker unions to operate union hiring halls.