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A Submission by the Migrant Workers Centre to Minister of Labour Harry Bains 6 July 2021

Thank you for the opportunity to provide a written submission on the subject of the Ministry of Labour's proposed amended exclusion for a "sitter" in the *Employment Standards Regulation* (Regulation).

Please note that this submission is endorsed by the BC Federation of Labour.

Summary of Submission

The Migrant Workers Centre proposes that the existing definition of a "sitter" in the Regulation is subsumed within the new definition of a "domestic worker." As such, there is no need for the Government of British Columbia to create a new exclusion for an already vulnerable workforce, and the existing exclusion should simply be eliminated. In the alternative, if a new exclusion is deemed to be absolutely necessary, then it must be as minimal as possible and apply only to labour that is genuinely casual and not performed by workers who perform care work as their vocation. We argue that British Columbia must also eliminate the other exclusions for care workers (residential care workers, live-in home support workers, and night attendants) that currently exist in the Regulation, as these are also subsumed within the new "domestic worker" definition. Care work has historically been and continues to be performed by mainly women and girls, many of whom are racialized. Exclusions for care workers in the Regulation, including the proposed "sitter" amendment, are discriminatory on the basis of personal characteristics such as sex and race and are woefully outdated. Care workers do the essential task of taking care of British Columbians and their work deserves minimum employment standards.

About the Migrant Workers Centre

The Migrant Workers Centre (MWC), formerly the West Coast Domestic Workers Association, is a non-profit organization dedicated to legal advocacy for care workers and other migrant workers in British Columbia. Established in 1986, MWC facilitates access to justice for migrant workers through the provision of legal education, advice and representation. MWC also works to advance fair immigration policy and improved labour standards for migrant workers through law and policy reform and test case litigation.

Profile of Care Workers in British Columbia

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In June 2019, the Government of Canada introduced two new pilot programs for migrant in-home care workers, replacing the previous pilot programs under Canada's Temporary Foreign Worker Program (TFWP).[1]

Under the new pilot programs, the Home Child Care Provider Pilot and the Home Support Worker Pilot, migrant care workers now receive an occupation-restricted open work permit rather than an employer-specific work permit. The occupation-restricted open work permit is valid for three years and allows care workers to work for any employer and for any number of employers.[2]

These new pilot programs are now part of the International Mobility Program (IMP) rather than the Temporary Foreign Worker Program. The pilot programs allow employers to hire foreign nationals to perform in-home care work in Canada without the need for a Labour Market Impact Assessment (LMIA).

While workers under the pilot programs submit a job offer from an employer in Canada as part of their initial application to Canada, employers and care workers are no longer required to have written employment contracts. This results in decreased protections for these workers.

The Home Child Care Provider Pilot and the Home Support Pilot each provide a pathway to permanent residency following the completion of 24 months of work in Canada. Each pilot is capped at 2,750 applications that will be accepted by Immigration, Refugees, and Citizenship Canada per year.

Care workers who were already working in Canada at the time when the new pilot programs were introduced in June 2019 are still under the TFWP. In the first quarter of 2021, Employment and Social Development Canada approved 307 new positions for Home Child Care Providers and 87 new positions for Home Support Workers in British Columbia under the TFWP.[3]

In-home care workers are among the most vulnerable workers in British Columbia. They are often abused and mistreated and frequently work under harsh conditions. They are routinely forced by employers to work long hours without payment. They are often charged high

[1] See: Canada Gazette, Part 1, Volume 153, Number 26: GOVERNMENT NOTICES
[2] See: Occupation-restricted open work permit for caregivers - Canada.ca
[3] See Table 8 at: Temporary Foreign Worker Program 2020Q1-2021Q1 - Open Government Portal (canada.ca)

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recruitment fees for jobs. Many are financially, psychologically, physically and sexually assaulted and abused.

The majority of care workers are migrant workers and recent immigrants. They face marginalization and vulnerability due to multiple and intersecting employment and social insecurities: the temporary nature of their immigration status, work permits that are tied to a single employer, reliance on employers for access to permanent residency, language barriers, isolation, family separation, lack of access to services and a lack of familiarity with their rights and obligations under Canadian law.

The Importance of Employment Standards for In-Home Care Workers

The *Employment Standards Act* (Act) states that its purpose, among others, is to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment."[4] The Act sets the floor for the most basic workers' rights. By default, all workers in BC are covered by the Act and Regulation unless they are explicitly excluded.

Care work in BC is a highly gendered and racialized sector of work that continues to be linked with persistent gender inequalities in households and the labour market. Care workers are often isolated and invisible, as private homes continue to be perceived as being off limits to labour regulation and inspection. In 2011, the International Labour Organization adopted Convention 189 concerning decent work for domestic workers (C189), the first international instrument to comprehensively apply minimum standards of work to domestic work.

The Preamble to C189 considers "that domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights."[5]

Article 10(1) of C189 expressly makes it an obligation of signatories to ensure "equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work."[6]

[4] ESA, S. 2(a)
[5] *Domestic Workers Convention*, June 16, 2011, C189 (entered into force September 5, 2013)
[6] *Supra* note 5.

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Although Canada has not ratified C189, a number of top source countries for migrant care workers to Canada, such as the Philippines, are signatories.

As recognized by C189, domestic work is work like other work and the fact that it takes place in private residences should not preclude care workers from enjoying the same minimum employment standards as other workers. Moreover, the vulnerable position of in-home care workers is a factor that necessitates adequate minimum labour standards and protections for workers in this sector.

Proposed Amended Exclusion for "Sitters"

Migrant Workers Centre welcomed the change to the definition of a "domestic worker" in the *Employment Standards Act* (Act) in Bill 8 in 2019. Bill 8 changed the definition of a "domestic" to "domestic worker" as follows: "'domestic worker' means a person who is employed at an employer's private residence to provide cooking, cleaning, child care or other prescribed services." This definition now includes domestic workers who live in and out, whereas previously, "domestics" lived in and "sitters" lived out. Once in force, "domestic workers" will be subject to employment standards protections.

In our view, the existing definition of a "sitter" – "a person employed in a private residence solely to provide the service of attending to a child, or to a disabled, infirm or other person, but does not include a nurse, domestic, therapist, live-in home support worker or an employee of (a) a business that is engaged in providing that service, or (b) a day care facility" - is completely subsumed within the new definition of a domestic worker. A such, there is no need to create an amended exclusion for a "sitter."

According to the Ministry of Labour's new proposal, sitters providing care averaging more than 15 hours per week in any period of four weeks will have employment standards protections. The proposal would also remove the outdated references to disabled and infirm persons and maintain the existing exemption for all sitters from the child permit requirement.

Carving out a new exemption for "sitters" who work 15 hours or less per week would have the practical result of conferring different minimum employment standards and protections for workers who do exactly the same work as "domestic workers."

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The new exemption would apply to adults who provide care as their vocation. Due to the nature of in-home care work, it is common for a worker to work a number of different shifts for a number of different employers in any given week, but work full time in the aggregate.

We submit that the proposed amendments fail to adequately protect care workers who provide less than 15 hours per week per employer but work more than this per week in the aggregate across multiple distinct employers.

We further submit that the proposed amendments do not provide terms specific enough to clarify who is considered to be a "babysitter" in a casual sense as opposed to an individual worker who provides care as a means of subsistence.

If the Government of British Columbia deems it necessary to carve out an exclusion for "babysitters," typically teenagers who perform work on a casual basis, then strong regulatory language is required to define "casual" work to avoid the potential for misclassification of workers.

We strongly urge you, however, to apply a gender lens to any exclusions for babysitters even where the definition of casual work is clear and unambiguous. We note that no exclusions exist for "domestic" work that is historically performed by teenage boys, such as yard work or shoveling snow. This double standard is discriminatory towards a group that is vulnerable, namely female children. Any exclusions should be as minimal as possible and should not include an exemption to minimum wage.

Other Jurisdictions

You have stated that the language currently proposed for the sitter definition is based on a BC Law Institute report, which itself is based on the 1994 Thompson Commission report. Unfortunately, the language proposed does not seem to be based on any recent research or consultation. In fact, the language proposed lags far behind that in other provinces and jurisdictions. We encourage BC to be a leader in this field, instead of lagging behind.

i. Other Provincial Legislation

In Ontario, sitters are excluded from the definition of "domestic worker" under the Employment Standards legislation. However, the work covered by sitters is far more limited, and is more consistent with the idea that these workers are akin to a "babysitter" as the name would imply. Sitter work is considered to be "on an occasional, short term basis while the

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parents are away from the home", and it only applies to the care of children. Although not perfect, using the description "occasional, short term" ensures that "sitter" does not capture individuals who are regularly employed by the same family, even on a part-time basis. There is no time threshold ascribed to this definition. Therefore, a care worker working 14 hours every week for the same employer would still be covered since they are not occasional and not short-term.

The characterization that sitters work on an occasional and short-term basis is common in the legislation of other jurisdictions, such as in Saskatchewan. Alberta employs similar language to capture workers falling outside the full status of a domestic worker, excluding "casual babysitting" from provincial employment standards. By adopting similar language in its own legislation, British Columbia can ensure that care workers whose work is more than just occasional or casual can be better protected from potential employer exploitation by availing of easier access to employment standards.

Eliminating any exclusions from employment standards based on number of hours worked would provide even stronger protection for individuals employed as care workers in any capacity. Newfoundland and Labrador's *Labour Standards Act* does not differentiate between full-time and part-time employees. The *Act* also does not provide any exemptions for an employer to pay an employee less than minimum wage. The only exemption it provides relating expressly to babysitters is in the payment of overtime whereby time off arrangements can exempt an employer from paying overtime wages to a babysitter working more than 40 hours per week. As such, sitters are protected by minimum wage and other employment standards under the *Labour Standards Act*. While there are some positive elements of Newfoundland and Labrador's legislation, we submit an individual working more than 40 hours per week would not be "casual" and should, therefore, not be considered a sitter at all.

ii. American Legislation

Since 2010, ten states (California, Hawaii, Illinois, Massachusetts, Nevada, New Mexico, New York, Oregon, and Virginia) and two major cities (Seattle and Philadelphia) in the United States have passed domestic workers' bills of rights into law. Exemptions for domestic workers who work on a purely casual basis are present in nine of these jurisdictions.

In these laws, working on a casual basis is commonly characterized as being "intermittent", "irregular," "uncertain," and "incidental." The City of Seattle, for example, defines working on a casual basis in the context of domestic work as the following:

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> "Casual work refers to work that is 1) irregular, uncertain, or incidental in nature and duration, and 2) different in nature from the type of paid work in which the worker is customarily engaged in."[7]

Three other jurisdictions (California, Hawaii, and Massachusetts) similarly include work that is *not* performed by an individual whose vocation is care work in their definitions of casual work.

By adopting similar clear language with respect to the nature of casual work in the definition of a sitter, British Columbia can reduce the potential for misclassification of workers who perform care work as their vocation and on more than a casual basis.

Additional Exclusions to Consider

During our conversation with Assistant Deputy Minister Danine Leduc on 22 June 2021, it was indicated that no other sections of the Act or Regulation pertaining to the work of care workers were being examined or revised. Sadly, this is a real missed opportunity to provide clarity to a set of exclusions and definitions that we know, from firsthand experience, have caused confusion and inconsistency with respect to Employment Standards Branch decisions.

In our view, the Act and Regulation should allow for a minimal number of exclusions. More specifically, it is our position that the existing exclusions for in-home care workers, including "sitters," "live-in home support workers," "residential care workers," and "night attendants" are subsumed within the definition of a "domestic worker." Consequently, they should be eliminated.

Highlighting the need to eliminate all these exclusions is the confusion created by both the new and revised definitions for domestic/domestic worker. You have indicated that the proposed amendments are being made to ensure that the amended domestic worker definition matches the Federal care worker programs. However, the confusion caused by the current legislation, and the confusion that will continue to exist even with the proposed amendments to the "sitter" definition, will continue to harm care workers who take care of adults. Both the domestic and domestic worker definitions mention that the work involved is "cooking, cleaning, child care or other prescribed services". While "other prescribed services" is an incredibly broad term that can and should be read to include caring for elderly individuals and those with disabilities, some

[7] See: http://seattle.legistar.com/View.ashx?M=F&ID=6451347&GUID=107050D2-BEFC-4B43-BC0D-B7AD73ADABF1

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decisions makers have failed to apply the phrase accordingly. Instead, some decisions makers have used the broad and ambiguous language found in other exclusions in the Regulation to capture care workers providing adult care and deny them the "domestic" or general employee definitions and exclude them from their protections under the Act.

If there *are* going to be exclusions they must be clear and consistently applied. Care workers should not need to wait until another round of revisions to know what level of protections they are owed. Similarly, employers should have clarity with respect to their obligations. In particular, we are seeking that you, at the very least, take this opportunity to clarify the definitions of "residential care worker", "live-in home support worker", and "night attendant". These definitions are covered by most provisions of the Act, but are excluded from the very important hours of work and overtime provisions under Part 4. We will discuss each of these definitions in turn.

i. Residential Care Workers

Section 1 of the Regulation defines a "residential care worker" as a person who:

a) is employed to supervise or care for anyone in a group home or family type residential dwelling, and

b) is required by the employer to reside on the premises during periods of employment,

but does not include a foster parent, live-in home support worker, domestic or night attendant;

Within this term we are particularly concerned about the phrase "family type residential dwelling", which has caused significant confusion for Branch decisions. It could easily be clarified by a definition that specifically and narrowly characterizes what is a "family type residential dwelling" so as to avoid the possibility that it is conflated with a private residence. Without such clarification, decision makers will continue to issue inconsistent findings regarding this issue.

We submit that statutory interpretation principles support that the term "family type residential dwelling" should be clarified in favour of stipulating that it does not include private residences. Reading the terms and definitions in the Act and Regulation in their entire context with grammatical and ordinary sense supports the position that "family type residential dwellings" are not private residences. The Act and Regulation definitions for "sitter", "domestic", and "night attendant", all include the specific phrase "private residence". The term "family type residential

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dwelling" only exists in the definition of "residential care worker". Because "family type residential dwelling" is unique and separate language, statutory interpretation principles that require reading provisions within the full context of legislation necessitate that the term refers to unique and separate circumstances. If the definition of "residential care worker" was intended to include work at a private residence, the definition would have stated as much. Further, a "plain reading" of the term "family type residential dwelling" on its own also does not support the finding of it being a private residence. The phrase "family type" within the definition points to something similar to a "residential dwelling", but distinguished. Treating the term "family type residential dwelling" the same as "residential dwelling" renders the phrase "family type" meaningless, contrary to statutory interpretation principles.

If "family type residential dwelling" is not clarified to exclude private residences then, should that term be interpreted broadly, there is significant overlap between the definitions of "domestic worker" and "residential care worker". According to the current definition, a "domestic" is someone who works and resides at a private residence and whose duties can involve care work. If a "family type residential dwelling" is a private residence, then a residential care worker can also be someone who works and resides at a private residence and whose duties involve care work. Even the new "domestic worker" language would lead to the same overlap issue for live-in domestic workers.

While it defies logic that the legislation would have two definitions that are effectively the same, with one receiving overtime protections and one not, there have been Employment Standards decisions that have failed to make the distinction and have broadly interpreted "family type residential dwelling", effectively precluding many workers from overtime pay. One such example is ***Fazal*** (2001 BCEST 63) which states that private residences are "clearly" family type residential dwellings. This case has been relied on in at least one Branch decision to make the same finding. Other Branch decisions have stated that family type residential dwellings are clearly *not* private residences and MWC has cited many of the arguments noted above in support of this position. However, having to make these arguments with various Branch and Tribunal members should not be necessary and it wastes countless resources. It undermines the Act's stated purpose of providing "fair and efficient procedures for resolving disputes over the application and interpretation of this Act" when Branch and Tribunal decisions are woefully inconsistent and employees and employers have no reliable expectation on how to interpret this language.

Manitoba's *Employment Standards Regulation* is one such example where the necessary clarification is provided. It defines a "residential caregiver" as a person working in a residence that is *not* the employer's private residence. Because domestic workers may also work in the

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private residence of the employer's parent or adult child, we suggest that BC's amended language use the phrase "not a private residence" rather than "not the employer's private residence".

ii. Live-in Home Support Workers

Section 1 of the Regulation defines a "live-in home support worker" as a person who:

> (a)is employed by an agency, business or other employer providing, through a government funded program, home support services for anyone with an acute or chronic illness or disability not requiring admission to a hospital, and
> (b)provides those services on a 24 hour per day live-in basis without being charged for room and board;

Our primary submission is that this definition is completely subsumed by the definition of "domestic workers". Domestic workers' duties can include home support services for anyone with an acute or chronic illness or disability and many of these workers are live-in.

Where work can be classified under two different definitions – one that receives all protections and one that is partially excluded – the worker will be categorized under the definition that receives all protections. This principle was recently confirmed by the Employment Standards Tribunal in ***LMSCL Lower Mainland Society for Community Living (Re)*** 2020 BCEST 118 ("***LMSCL***"), which states:

> When drawing this conclusion, I take guidance from the comments of the Supreme Court of Canada in Rizzo & Rizzo Shoes Ltd. [1998] 1 SCR 27 to the effect that employment standards statutes like the ESA are intended to act as a mechanism for providing minimum benefits and standards to protect the interests of employees. As benefits-conferring legislation, the elements of the ESA that provide those benefits should be interpreted in a broad and generous manner. It follows that provisions in the legislation that restrict or eliminate access to those minimum benefits should be interpreted narrowly. Most importantly, the court stated that any doubt arising from "difficulties of language" should be resolved in favour of employees. (emphasis added)

If this exclusion is not completely eliminated, then its ambiguous terms should be clarified. In particular, the term "government funded program" is unclear. We submit that it should be

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clarified that this term specifically refers to a particular government funded program that provides money for the specific purpose of caring for an individual.

iii. Night Attendants

Section 1 of the Regulation defines a "night attendant" as a person who:

> (a)is provided with sleeping accommodation in a private residence owned or leased or otherwise occupied by a disabled person or by a member of the disabled person's family, and
>
> (b)is employed in the private residence, for periods of 12 hours or less in any 24 hour period, primarily to provide the disabled person with care and attention during the night,
>
> but does not include a person employed in a hospital or nursing home or in a facility designated as a community care facility under the *Community Care Facility Act* or as a Provincial mental health facility under the *Mental Health Act* or in a facility operated under the *Continuing Care Act*;

Just like the definition for "live-in support home support worker", the definition of "night attendant" is completely subsumed by the definition of "domestic worker". As stated above, if both definitions could apply to an employee, the "domestic worker" definition would prevail. Therefore, the inclusion of "night attendant" under the Regulation is completely unnecessary and redundant. It only serves to create ambiguity and confusion in the Act and to risk inconsistent decision-making.

The five classifications for care work in the Act and Regulation confer different minimum employment standards for workers who essentially do the same work. All care workers should receive equal treatment under the Act regardless of whom they provide care for, in what type of household they provide care, whether they work during the day or night, how many hours a day they work, and whether the government or a private individual pays their wages.

The classification system constitutes a significant barrier for care workers to assert their rights under the Act. Even for those care workers whose jobs are partly covered by the Act, the classification system is so complex that care workers commonly misunderstand the classification their job falls under and their corresponding benefits and protections.

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Employers may also misunderstand their obligations, or improperly classify an employee's job in order to take away benefits and protections conferred by the Act.

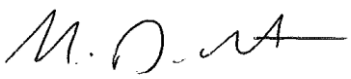
Conclusion

This submission has proposed that the exclusion for "sitters" in the Regulation should be eliminated. This is a necessary step to make decent work a reality for care workers in British Columbia. In the alternative, if a new exclusion is deemed to be absolutely necessary, then it must be as minimal as possible and apply only to labour that is genuinely casual and not performed by workers who perform care work as their vocation.

In addition, the other care worker exclusions in the Regulation should be eliminated. At the very least, these definitions must be clarified to ensure that their application is extremely limited, and that these limitations are clear to all parties and consistently applied.

Sincerely,

Migrant Workers Centre BC Society
Per:



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