



The Association for the Rights of Household Workers (ARHW)
L'Association pour la Défense des Droits du Personnel Domestique (ADDPD)

Migrant Caregivers, Canadian Immigration Policies and Human Trafficking

WRITTEN SUBMISSION TO THE STANDING COMMITTEE ON JUSTICE AND
HUMAN RIGHTS (JUST) - STUDY ON HUMAN TRAFFICKING IN CANADA

June 15, 2018



INTRODUCTION

Human trafficking, as it is defined in the *Criminal Code*, is of limited value when it comes to identifying and understanding how the trafficking of migrant caregivers occurs in practice.

The *Criminal Code* defines exploitation as occurring when the accused engages “in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened.”¹ As many others have noted, this is a stricter standard for trafficking than the one established in the *Palermo Protocol*, which sets out the internationally accepted definition for human trafficking.²

The *Palermo Protocol* does not define ‘exploitation’, but instead provides an open-ended list of examples that includes, at a minimum, “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”³ Forced labor is defined in international law as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”⁴ In the United States, courts have ruled that the term ‘involuntary servitude’ includes a condition of servitude in which the victim is forced to work for the defendant by the use or threatened use of legal coercion.⁵

The requirement of “fear for safety” on the part of the survivor is determinative for establishing the presence of exploitation in Canadian law - exploitation being a necessary component of the *Criminal Code*’s human trafficking offense. As noted by others, this framing of exploitation has been characterized “as an impediment to laying charges and securing convictions for human trafficking under the *Criminal Code*.”⁶ In the context of the labor trafficking of migrant workers, it ignores the reality that those who coercively exploit migrant workers have little need to resort to threats of violence but can rely on threats of deportation or debt bondage as equally effective means of compulsion.⁷

¹ Criminal Code, RSC 1985, c C-46, s 279.04(1).

² Jesse Beatson et al, “The Intersection of Exploitation and Coercion in Cases of Canadian Labour Trafficking” (2017) 26:1 Journal of Law and Social Policy at 142.

³ UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.

⁴ *Convention concerning Forced or Compulsory Labour*, 28 June 1930, 39 UNTS 55 at 58 (entered into force 1 May 1932).

⁵ *United States v. Kozminski*, 487 U.S. 931 (1988).

⁶ Lindsay E. Burgess, “Prosecuting Human Trafficking Offences in Canada: An Analysis of the Provisions of the Immigration and Refugee Protection Act and the Criminal Code, 2014, at 19.

⁷ Beatson et al, *supra* note 2 at 142-143.



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As such, the following comments regarding the trafficking of migrant caregivers see the labour trafficking of these individuals through the analytical framework developed by researchers Jesse Beatson, Jill Hanley and Alexandra Ricard-Guay, who studied 36 cases of labour trafficking, involving an estimated 243 victims, over the past fifteen years in Canada.⁸ This framework posits labour trafficking as existing “within a matrix of exploitation and coercion.”⁹ Our analysis will include only reference to measures of coercion that have been established in judicial decisions on forced labor and involuntary servitude.

‘EMPLOYER -TYING’ POLICIES AND MIGRANT CAREGIVERS

Canada has a long history of relying on migrant caregivers to address perpetual labour shortages in the domestic work sector. Despite chronic supply-side shortages, wages and working conditions of domestic work have stubbornly resisted the laws of supply and demand, never rising to levels that could attract and retain a sufficient number of workers to meet the demand for their services.¹⁰ State efforts to improve the wages and working conditions association with domestic work have been limited. Instead, immigration policies have been used to secure a steady supply of ‘unfree labor’ for Canada’s national domestic work sector.¹¹

Historically, Canada relied on contractual indentureship to prevent migrant caregivers from leaving the occupation:

Between 1888 and the 1920s, when the government did not directly provide assisted passage, private agents arranged for advanced loans from employers, which would tie domestics to them for a specific length of time. The Department of Immigration sometimes ignored protection legislation in order to fulfill its policing function. Around the turn of the century, for example, master and servant legislation was passed in most of the provinces, to protect domestics from exploitative contracts that they might have signed in order to immigrate to Canada. According to this legislation, contracts signed outside the province were not legally binding. The Immigration Department, however,

⁸ *Ibid* at 137.

⁹ *Ibid* at 145.

¹⁰ Audrey Macklin, “On the Inside Looking in: Foreign Domestic Workers in Canada” in Wenona Giles & Sedef Arat-Koç, *Maid in the Market* (Halifax: Fernwood Publishing, 1994) at 15.

¹¹ Sedef Arat-Koç, “From ‘Mothers of the Nation’ to Migrant Workers” in Abigail B. Bakan & Daiva Stasiulis, eds, *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) at 57.



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circumvented this legislation by having domestics resign their contract upon arrival, thus enforcing their indentured status.¹²

Eventually, Canada began to rely on more direct measures, mainly the issuance of temporary restricted work permits (or other similar administrative tools). Notably, the government's move towards the more coercive measures of the employer-specific work permits and employment-based access to permanent residency coincided with a shift in the racial characteristics of domestic workers from predominantly British and white to include women of colour.¹³ These types of policies can be considered 'employer-tying' policies since their effect in practice is to prevent the worker from leaving their employer.

Currently, most migrant caregivers arrive in Canada through the federal Caregiver Program, a branch of the Temporary Foreign Worker Program. Numerous news reports and studies have increasingly revealed that trafficking is frequently occurring in legal employment sectors, under the legitimizing guise of this program.¹⁴ This is no less true in the case of migrant caregivers. In fact, in a study on labour trafficking in Canada by Jesse Beaton, Jill Hanley and Alexandra Ricard-Guay, the largest number of cases was in domestic work sector (14 out of 36).¹⁵

Employer-specific work permits

Migrant caregivers are incorporated in the Canadian labour market through temporary restricted work authorizations, in the form of employer-specific work permits.

Pursuant to subparagraphs 185 (b) of the Immigration and Refugee Protection Regulations (IRPR), specific conditions can be attached to the work permit, such as the type of work, location of work, or employer. It is mandatory for officers issuing work permits to individuals coming to work in Canada through the Temporary Foreign Worker Program to impose the type of work, location of work and employer.¹⁶ These conditions must match the Labour Market Impact Assessment accompanying the work permit application.

Two consequences stem from the operation of this procedure: workers must formalize an employment arrangement with a government-approved employer to secure a work permit (sponsorship) and any termination of the employment causes the worker to be unable to benefit from the authorization to work granted by the work permit.

¹² Genevieve Leslie, "Domestic services in Canada, 1880-1920" in Janice Acton, ed, *Women at Work, 1850-1930* (Toronto: Canadian Women's Educational Press, 1974) at 122.

¹³ Arat-Koç, *supra* note 11 at 54; Patricia M. Daenzer, *Regulating Class Privilege: Immigrant Servants in Canada, 1940s-1990s* (Toronto: Canadian Scholars' Press, 1993).

¹⁴ Beaton et al, *supra* note 2 at 143.

¹⁵ *Ibid* at 150.

¹⁶ Operational instructions and guidelines for Immigration, Refugees and Citizenship Canada, "Conditions and Validity Period on Work Permits (Temporary Workers)." *Government of Canada*, 23 Feb. 2018.



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Employment-based access to permanent residency

Caregivers must accumulate 24 months of authorized work before they are eligible to apply for permanent residence status. Leaving their employment means delaying, or potentially jeopardizing, their eligibility for permanent residency.

Employment-based access is also indirectly a form of employer-based access to permanent residency. While the federal government has abandoned the practice of including an employer's report on the worker's performance in the assessment for granting landed status,¹⁷ access to permanent residence still requires that employers submit records of employment. If employers do not submit these records to confirm the sufficient period of employment, the worker will not be granted permanent status. Caregivers will refrain from leaving their employment or taking any action - such as filing complaints or launching legal proceedings - that might antagonize their employer in order to avoid reprisals.

'EMPLOYER-TYING' POLICIES AND LABOUR TRAFFICKING

Sponsorship and Debt

The Temporary Foreign Worker Program requires that a worker formalize an employment relationship with a Canadian employer in order to enter the country to work. This sponsorship requirement means that workers end up paying, to a third-party, a fee in order to secure a job offer with a Canadian employer, despite provincial legislation prohibiting recruitment fees.¹⁸

As stated by Fay Faraday in her 2012 report "Made in Canada", these fees mean that migrant workers often arrive in Canada burdened with thousands of dollars of debt, often owed to the recruiter or employer:

This is a very real burden that ties the worker to both the recruiter and the employer as a worker earning at or near the minimum wage (or even below it) must labour for many months or years to simply repay the debt of the recruitment fees.¹⁹

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

¹⁷ Patricia M. Daenzer, *Regulating Class Privilege: Immigrant Servants in Canada, 1940s-1990s* (Toronto: Canadian Scholars' Press, 1993) at 123.

¹⁸ For example, despite an Ontario law that prohibits recruitment fees for live-in caregivers, the Caregivers' Action Centre reports that two-thirds of its members have been charged fees after the law was introduced: Fay Faraday, "Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers" (Toronto: George Cedric Metcalf Charitable Foundation, 2014) at 32.

¹⁹ Fay Faraday, "Made in Canada: How the Law Constructs Migrant Workers Insecurity" (Toronto: George Cedric Metcalf Charitable Foundation, 2012) at 63.



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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 problem of debt is pervasive for migrant caregivers. A 2015 study of migrant caregivers in Quebec found that two-thirds of the respondents had paid between 3500\$ and 5000\$ to recruiters in order to secure an employer in Canada (that does not include travel costs),²⁰ money that was in a large part secured through loans taken with recruiters,²¹ and often at oppressive interest rates.²² Other studies across Canada have reported similar levels of recruitment debt.²³

Employer-specific work permits and irregular work

The employer-specific work permit only authorizes the migrant caregiver to work for the employer indicated on the work permit. Changing employers requires a new work permit, which can take months to secure.²⁴ In the interim, caregivers are prohibited from working in Canada.

It is well documented that workers arrive in Canada and discover that the job they were promised no longer exists,²⁵ either because the employer's need for the worker legitimately expired during the delay between the job offer and the arrival of the worker or because the job offer was fraudulent (known as 'release upon arrival'). Regardless of how it comes to be, the result is that worker arrives in Canada, saddled with thousands of dollars of debt and legally prohibited from working. Needing to satisfy their debt, sustain themselves, and send remittances home to their families, workers will inevitably engage in irregular employment, either for the recruiter or arranged by them, sometimes even for original employer that released them.²⁶

At this point, the conditions for labour trafficking are optimal.

Securing a new work permit requires securing a new Canadian employer, which recruiters are happy to arrange, for a fee of course. This increases the debt owed by the worker, which increases the need to continue working, which diminishes their capacity to resist the demands of either the recruiter or the employer.

²⁰ Elsa Galerand, Martin Gallié and Jeanne Ollivier Gobeil, "Domestic Labour and Exploitation: The Case of the Live-In Caregiver Program (LCP) in Canada", SAC - PINAY Research Report, January 2015, at 7.

²¹ *Ibid* at 7.

²² Fay Faraday, "Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers" (Toronto: George Cedric Metcalf Charitable Foundation, 2014) at 36.

²³ Sara Dorow et al, "Live-in Caregivers in Fort McMurray: a Socioeconomic Footprint", 2015, at 25.

²⁴ Natalie Drolet, "An Overview of Canada's new Caregiver Program: a Shift from Permanence to Precariousness" (Toronto: Thomson Reuters Canada, 2016) at 2.

²⁵ Galerand, Gallié and Ollivier-Gobeil, *supra* note 20 at 9.

²⁶ Faraday, *supra* note 22 at 39.



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The caregiver's engagement in irregular work makes them vulnerable to threats of arrest and deportation. These types of threats have been recognized as constituting a 'menace of penalty'²⁷ or a threatened use of legal coercion.²⁸ Deportation is an especially frightening prospect for caregivers who paid recruitment fees because currency conversion and the lower salaries available back home mean it would take the *entire wages* earned over two to three years to pay off the debt.²⁹

At this point, migrant caregivers may see their documents confiscated, movements restricted and monitored, have their earnings controlled or completely withheld to satisfy their debt, and be coerced into signing abusive contracts with either the recruiter or employer for housing, loans, processing of immigration papers, job placement services. Violence, or threats of violence, might, and often do accompany these other coercive methods.³⁰ Threats of punitive actions from immigration officials and police are used not only to extract labor from them, but also serve to keep them from seeking assistance. Fraud and deception about steps taken to regularize the immigration status may be used to keep the caregiver in a position of "illegality". Financial dependency, indebtedness, physical and social isolation, fear of arrest and deportation are tools used by traffickers to close off avenues of exit for the victim.³¹

'Employer-tying' policies and involuntary servitude

Even if the caregiver does not find themselves 'released upon arrival' and begins working immediately - or if the recruiter is in good faith and actually secures an authorized employer and new work permit for the caregiver- this does not end the worker's vulnerability to labour trafficking.

The employer-specific work permit puts workers in what can only be described as a "work or starve" position. In the United States, restrictions on the right to change employers have been held to violate the right not to be held in involuntary servitude, as guaranteed by the 13th amendment of the US constitution.³²

In *Shaw*, a sharecropper named Carver broke his contract with Shaw, and subsequently found employment with Fisher. Shaw sued Fisher for the common law tort of harboring a worker who had quit another employer in breach of contract. The South Carolina Supreme Court held that the Thirteenth Amendment had "annulled" the tort, even

²⁷ *Siliadin v France* [2006] 43 EHRR 16, 73316/01, [2005] ECHR 545, [2005] 20 BHRC 654 at para 183.

²⁸ *United States v. Calimlim*, 538 F.3d 706 (7th Cir. 2008).

²⁹ Faraday, *supra* note 22 at 34.

³⁰ Beatson et al, *supra* note 2 at 155.

³¹ For example, see *PN v. FR and another* (No. 2), 2015 BCHRT 60 [PN].

³² "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.", "The Constitution of the United States," Amendment 13.



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though Carver was free to quit and there was nothing in the opinion to indicate that he lacked alternative means of supporting himself, for example by working with family members, going into business for himself, or migrating outside the state.³³

At the time that *Shaw v. Fisher*³⁴ was decided, the right to freely quit one's employer was already firmly established as central to the right not to be held in involuntary servitude. This case established that a worker is not legally free to quit their employer if the only alternatives available to the worker were "to work for *his current employer* or to quit and starve."³⁵

(...) If no one else could have employed Carver during the term of his contract with plaintiff, after he had elected to break that contract, without incurring liability to plaintiff for damages, the result would have been to coerce him to perform the labor required by the contract; for he had to work or starve. The compulsion would have been scarcely less effectual than if it had been induced by the fear of punishment under a criminal statute for breach of his contract, which was condemned, as violative of the thirteenth amendment, in *Ex parte Hollman*, 79 S.C. 9, 60 S.E. 19, 21 L.R.A. (N.S.) 242, 14 Ann. Cas. 1105. The prohibition is as effective against indirect as it is against direct actions and laws — statutes or decisions — which, in operation and effect, produce the condition prohibited. The validity of the law is determined by its operation and effect.³⁶

The parallels between the effects of the common law tort at issue in *Shaw v. Fisher* and the operation of the employer-specific work permit issued to migrant caregivers are inescapable. The condition that caregivers work for no other employer than the one specified on their work permit places them in the same position as the worker in *Shaw v. Fisher*. Restrictions on caregivers' ability to change employers constitute state coercion to remain in the employment relationship. Employment-based access to permanent residency reinforces the effects of the employer-specific work permit by increasing the cost of job loss to the caregiver (namely delayed access to permanent residency and consequently prolonged separation from children and their spouse or partner).

The power-imbalance occasioned by the employer-specific work permit contributes to an environment in which coercion and exploitation easily flourish. Workers have little bargaining power to refuse employers who demand to keep their passports and documents for "safekeeping", impose rules that restrict their movements - such as curfews or prohibitions against socializing. Migrant caregivers who acquiesce to these demands find

³³ James Gray Pope, "Contract, Race, and Freedom of Labor in the Constitutional Law of 'Involuntary Servitude'" (2010) 119:7 *The Yale Law Journal* 1474 at 1518.

³⁴ *Shaw v Fisher* 113 S.C. 287 (S.C. 1920).

³⁵ Pope, *supra* note 33 at 1531.

³⁶ *Shaw v Fisher*, *supra* note 34.



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their ability to exit the situation severely reduced. When these means of coercion are accompanied by the withholding of wages and illegal deductions, caregivers find themselves deprived of the resources needed to sustain themselves if the employment is terminated, further constraining their ability to leave abusive and exploitative situations. Employers who exploit migrant caregivers may also fail to ensure consistent immigration status by misleading the worker about steps taken to renew their work permit or require the caregiver to work for family members or friends, thereby causing them to violate the conditions attached to the work permit.

The power imbalances created by the employer-specific work permit are amplified when the caregiver resides with their employer. The live-in requirement was formally removed in 2014. However, many factors, such as low-wages, lack of affordable housing, and the fact that the employer-specific work permit means that employers' preference inevitably dictate whether the arrangement is live-in or live-out, mean that many migrant caregivers still do reside in the house of their employer. This particular aspect of caregiving work, in which the divide between private life and work life is easily ignored, and the employer is able to exercise almost complete supervision over the worker, would logically seem to necessitate that governments strengthen the bargaining power of these workers vis-à-vis their employer. However, in the case of migrant caregivers, the government has done the opposite.

CONCLUSION: IMPLICATIONS AND RECOMMENDATIONS

The manner in which the labour trafficking of migrant caregivers operates raises two concerns.

The first is that the definition of exploitation in the *Criminal Code* does not capture the way labour trafficking occurs in practice, diverges from the way forced labour and servitude has been traditionally defined, and therefore does not criminalize all the conduct set forth in article 3 of *Trafficking in Persons Protocol*.

Secondly, as Member of Parliament Paul Harold Macklin stated back in 2005, during the debate on Bill C-49, human trafficking denies individual's their right to life, liberty and security of the person.³⁷ Given the considerable role played by immigration policies in increasing the vulnerability of migrant caregivers to trafficking, as well as impeding the ability of victims to exit or escape, it is very possible that Canada's Temporary Foreign Worker Program is incompatible with section 7 of the *Canadian Charter of Rights and Freedoms*.

The first question in the section 7 analysis is whether the law "limits", or "negatively impacts" life, liberty or security of the person.³⁸ Security of the person has been defined

³⁷ *House of Commons Debates*, 38th Parl, 1st Sess, No 125 (26 September 2005) at 7988 (Peter Milliken).

³⁸ *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602 at para 16; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para 58.



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over time to include the physical and psychological integrity of the person - possible negative effects on the preservation of a person's physical safety and wellbeing are clearly contemplated by security of the person.³⁹ There must be a "sufficient causal connection between the state-caused effect and the prejudice suffered by the claimant."⁴⁰

As the Supreme Court of Canada stated in the case of *Canada v. Bedford*, the sufficient causal connection standard does not require that the government action or law be the only or the dominant cause of the prejudice suffered.⁴¹ Nor does it require that the prejudice would not have been suffered but for government action or law.⁴²

As Jesse Beatson, Jill Hanley and Alexandra Ricard-Guay noted in their study on labour trafficking, not one of the cases involved Canadians or permanent residents, and that was not because they limited their search to migrant workers, which they conclude "provides a clear indication of the degree to which precarious status makes people vulnerable."⁴³ As such, Canada's immigration policies for migrant caregivers could be considered a contributing factor to their vulnerability to labour trafficking to an extent that satisfies the 'sufficient causal connection' threshold.

RECOMMENDATIONS

- 1) Issue work permits valid for all employers authorized to hire foreign workers in a specific occupation, economic sector or province.

The precariousness of the employer-specific work permit leaves migrant caregivers too dependent on their employer and vulnerable to falling 'out-of-status' through no fault of their own and therefore faced with little choice but to engage in irregular employment. The loss of the authorization to work occasioned by job loss means caregivers are extremely desperate to secure a new employer, increasing the ability of recruiters to extort large sums of money. These two effects increase the likelihood that migrant caregivers will be subject to human trafficking. Work permits that allow effective job mobility should be issued instead.

- 2) Coordinate with provinces and sending countries for the effective regulation of recruiters.

Indebtedness associated with recruitment costs is consistently identified as factor that facilitates the coercion of migrant caregivers for the purpose of exploitation. Internationally, there is growing consensus that abuse in labor recruitment must be addressed, however Canada's efforts to combat abusive recruitment practices (such as the

³⁹ *R. v. Michaud*, 2015 ONCA 585 at para 64.

⁴⁰ *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

⁴¹ *Ibid* at para 76.

⁴² *Ibid* at para 77.

⁴³ Beatson et al, *supra* note 2 at 154.



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payment of fees by the worker) has consisted mainly of a patchwork of inconsistent legislation at the provincial level, which has limited impact given the transnational and intra-provincial nature of recruitment. Effective regulation requires “leveraging the federal and provincial governments’ capacity to pursue proactive regulation and supervision of recruiters and employers.”⁴⁴

3) Independent access to permanent residence status upon arrival.

Relying on employment (or rather employers) for access to permanent residence further shifts the balance of power in favor of the employer and reduces migrant caregivers’ capacity to resist exploitation. Caregiver may ‘choose’ to stay with abusive employers (even in situations where they experience psychological, sexual and physical harassment and/or abuse) in order to accumulate the necessary work experience. Delayed access to permanent residence also means caregivers cannot be accompanied by their family, which increases their vulnerability to trafficking since they are isolated from the most fundamental form of social support. It has been consistently documented that caregivers, or migrant workers in general, will only assert their rights (either formally⁴⁵ or informally⁴⁶) once they have obtained permanent status. Loss of employment means further delays in accessing permanent residency, a situation that unscrupulous recruiters often leverage to their advantage.

ABOUT THE ARHW/ADDPD

The Association for the Rights of Household Workers (ADDPD/ARHW) is a non-profit community organization founded in 1975 and incorporated in 1977. Our mission is to ensure that the work done in private households is recognized, respected and valued. Through research, advocacy and policy interventions, the ARHW supports the rights of household workers in Quebec and across Canada.

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⁴⁴ Faraday, *supra* note 22 at 67.

⁴⁵ Myriam Dumont-Robillard, *L'accès À La Justice Des Travailleuses Domestiques Migrantes: Une Illusion?* (Montréal: Editions Thémis, 2015) at 55-56.

⁴⁶ See for example Mandana Vahabi and Josephine Pui-Hing Wong, “Caught between a rock and a hard place: mental health of migrant live-in caregivers in Canada” (2017) 17:498 BMC Public Health.