# Temporary Foreign Workers in Canadian Labour and Human Rights Tribunals: A Comparative Analysis

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# Abstract

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Due to their status, it is difficult for temporary foreign workers to report grievances related to instances of discrimination, exploitation, harassment, abuse, and health and safety violations. While the subject of temporary migrant work and legal action has been studied before, available research focuses on the impacts of high-profile cases at the Supreme Court. As such, there is limited research about the tribunals that handle the grievances of TFWs most often. This thesis fills that gap by presenting a comparative analysis of the fortunes of temporary foreign workers in human rights tribunals and labour tribunals in Ontario and Alberta. This analysis shows the nature and outcome of these hearings have important differences that depend on the tribunal type. More specifically, human rights tribunals seem to be better equipped to assess the grievances of TFWs despite there being a higher volume of TFWs using labour tribunals.

# Dedication

This thesis is dedicated to my family, friends, and mentor. Thank you for all your love and support.

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# Introduction

Temporary migration has received much attention in recent scholarship. This is unsurprising considering the increasing dependence of states on this kind of migration for economic growth (de Haas, 2012; Omidvar & Cordy, 2024; Stark et al., 1997). In Canada, this dependence is especially evident in the case of the Temporary Foreign Worker Program (TFWP). Internationally, Canada's TFWP (specifically the seasonal agricultural workers program) is recognized for its standards surrounding migrant labour (Hennebry & Preibisch, 2012). As such, it is often seen as an ideal way for economies to construct how migrant workers are received and managed in host countries. However, the TFWP is not without its flaws, especially concerning the rights and treatment of temporary foreign workers (TFW) in Canada.

Due to their status in Canada, TFWs are vulnerable to discrimination, exploitation, harassment, abuse, and health and safety violations. This has been caused by factors such as economic precarity, language barriers, and their status in Canada. Furthermore, their lack of mobility within Canada and personal circumstances makes it difficult for workers to report their grievances or defend themselves (James, 2021). In this setting, TFWs usually have two options to uphold their rights: they could file a complaint with the appropriate government body (either federal or provincial) or pursue legal action. So far, the extent to which TFWs pursue these avenues and the success rate for each path is an understudied area in the social sciences. Existing scholarship has mostly focused on the rights, perspectives, and methods of self-advocacy of temporary foreign workers. More specifically, while there is some literature about the impacts of legal recourse of TFWs, there is yet to be a systematic analysis of legal decisions addressing the

grievances of this group (Basok & Carasco, 2010; Choudry & Thomas, 2013; Hastie, 2018, 2021; O'Sullivan & MacMahon, 2022).

This thesis aims to move this literature forward by presenting a comparative analysis of the decisions made in human rights tribunals and labour tribunals in Ontario and Alberta that concern the grievances of TFWs. This is done by examining 117 tribunal decisions concerning TFWs between 1988 and 2023, specifically regarding the length of time it takes for tribunals to reach a final decision, the common barriers that TFWs face in the legal process, the grievances presented in these tribunals, and the outcomes of these decisions. I argue that even though labour tribunals are easier to access for TFWs, human rights tribunals present more thorough decisions on a wider variety of issues, thus making them a better legal option for foreign workers navigating provincial tribunal systems. This reality creates clear legal gaps for TFWs alongside the presence of several barriers which hinder their access to justice in Canadian administrative tribunals and adequate solutions to their grievances. I find that, among the recurring issues presented by TFWs and the functional differences between tribunal types, there are meaningful comparisons that ought to be accounted for in terms of their implications for this group.

This thesis is structured as follows: the following section provides an overview of Canada's TFWP by explaining its purpose as well as the rights and regulations pertaining to the TFWP and TFWs. It also explains the role of governments and employers in the experiences of TFWs and the options these migrants have in making their grievances known. The third section compares the purpose of human rights tribunals and labour tribunals and how these tribunal types differ in Alberta and Ontario. This chapter also outlines the guiding theories and expectations for this project. Section four discusses the methods of data collection and operationalization used in this project and outlines the boards and tribunals that are included in the analysis. The fifth section of

this project presents my key findings. A concluding section summarizes the key findings and discusses their implications.

# 2.0 The Temporary Foreign Worker Program

The federal government created the TFWP as a way for Canadian employers to fill labour gaps they were not able to address with the available working population of Canadian citizens and permanent residents. As such, this program was designed to be a last resort for struggling employers; however, despite the purpose of the TFWP, it is instead sometimes used as a means of cheap labour for employers (Omidvar & Cordy, 2024; Shantz, 2015). The practice of recruiting temporary migrant workers to Canada has its origins in the creation of the Seasonal Agricultural Workers Program (SAWP) in 1966, which targets labour demands in the agricultural sector specifically (Asomah, 2014; J. Hennebry & McLaughlin, 2012). The federal government later created the TFWP in 1973 as a means of bringing in foreign workers to fill high-skilled position, and added low-skilled positions through the implementation of *the Pilot Project for hiring Foreign Workers in Occupations that Require Lower Levels of Formal Training* in 2002 (Nakache & Kinoshita, 2010). This project established the TFWP as it exists today.

The TFWP is one of two temporary labour migration programs in Canada, the other being the International Mobility Program (IMP). These programs differ in terms of their purpose as the IMP brings workers specializing in natural and applied sciences, or social service positions, while the TFWP primarily brings agricultural workers and workers in lower-paying positions (Immigration Refugees and Citizenship Canada, 2024). Moreover, workers in the IMP are more likely to come to Canada with an open work permit, allowing them to change employers and locations, while TFWs are often given closed work permits, which tie them to their initial

employer. Between the two programs, the TFWP has gained most academic and media focus over the last decade, usually pertaining to the rights and working conditions of TFWs (Barnes, 2013; Basok & Bélanger, 2016; Bogdan, 2023; Cohen & Caxaj, 2021; Faraday, 2012; Jones, 2023; K. Preibisch, 2010; K. L. Preibisch, 2007; Salami et al., 2019; Shantz, 2015; Stasiulis, 2020; Stevenson, 2022; Vosko, 2022). The program is often regarded as exploitative because the precarious status of TFWs can be easily manipulated by unscrupulous public or private figures. We see this occur in the form of harassment, abuse, and discrimination in the workplace, as well as clear policy gaps regarding employer conduct and the rights of TFWs.

## 2.1 Rights concerns

Generally, the vulnerability of migrant workers is shaped by the institutions that govern them as well as the social, political, and economic structures that frame ideas about them. More specifically, Canada's policies and regulations on labour and immigration both overlook and restrict TFWs in a way that allows for their mistreatment and makes it difficult for them to advocate for themselves. The temporary aspect of migrant work paired with closed work permits makes TFWs dependent on their employers in terms of income, housing, and future employment in the TFWP, thus creating a space where workers are vulnerable to instances of abuse, discrimination, and harassment. Under these policies, employers essentially have control over the mobility, wellbeing, livelihood, and future employment of the TFWs they hire. Between abusive employers and obvious government oversight, several barriers prevent TFWs from adequately exercising their rights while in Canada. On the government side, these barriers are legislative and administrative; that is, the rules and regulations instilled by federal and provincial actors (Foster & Barnetson, 2015; J. Hennebry & McLaughlin, 2012; Nakache, 2013; K. Preibisch, 2010; Salami et al., 2019; Shantz, 2015).

Technically, as legal workers in Canada, TFWs have access to extensive labour rights and should enjoy the same labour protections as Canadian workers (James, 2021). At the federal level, employers must compensate the worker for the work stated in the employment agreement, pay for health insurance for the worker, and ensure that the worker has access to healthcare services. Employers cannot force them to perform unsafe work, punish the worker for complaining, or force the worker to work if they are sick or injured. TFWs also have several formal protections instilled by the province of employment. For instance, in Ontario, TFWs are protected under the *Employment Standards Act, 2000* (ESA) and the *Employment Protection for Foreign Nationals Act, 2009* (EPFNA), wherein protective measures are geared towards the actions of the employer. These measures prohibit the use of force or intimidation as an act of reprisal (EPFNA, section 10, subsection 1) and emphasize the duty to provide the worker with the most recent documentation of their rights while working in Canada (EPFNA, section 11, subsection 1).

Despite these formal protections, academics have noted that these regulations are not always observed in practice (James, 2021; Nakache, 2013). There are numerous inefficiencies in the legislative protections of TFWs at the federal and provincial levels, which allow the vulnerabilities of TFWs to be used in a way that creates exceptions to rules that Canadian workers are not as easily subject to (Preibisch, 2012; Tucker, 2012). For instance, some workers are forced to work long workdays without time off; physical and emotional abuses by their employer; or receive wages that are below the median rate for a given position in Canada. Because employers also have some control over whether these workers know the full extent of their rights and protections, they may fail to provide access to appropriate health care and benefits to TFWs; or assume more lax health and safety practices when they have TFWs as their primary staff (Salami et al., 2019; Shantz, 2015). TFWs are also subject to the disciplinary will of their employer, which

can manifest itself in the form of harassment and workplace discrimination. Moreover, should a worker choose to complain about these abuses, they risk reprisal by the employer, for example in the form of termination of employment and repatriation (Basok & Bélanger, 2016; Vosko, 2015). TFWs under a closed work permit are particularly vulnerable in this regard because they rely on their employers for their income, employment, housing, and ability to stay in Canada. As such, if a TFW falls out of favour with their employer, they risk repatriation, and possibly being barred from working as a TFW in the future. Vosko (2015) highlights the practice of employers blacklisting TFWs to justify the repatriation of workers considered to be "habitual complainers." Although these practices explicitly violate federal and provincial policies, it is relatively easy for employers to do so without consequence because workers hesitate to make complaints or are unaware of how to do so (Preibisch & Hennebry, 2012). As such, TFWs are not completely protected by the above policies and regulations, which overlook the barriers that this group faces (Molyneaux, 2019; Tucker, 2012). In this sense, existing policies fail to adequately protect this group and create space for employer malpractice.

While non-compliant employers do occasionally face penalties (i.e. fines, and sanctions), it is likely that many issues have gone, unaddressed since the creation of the SAWP in 1966 and the TFWP in 1973. It was only in December of 2015 that the federal government created a federal enforcement system for non-compliant employers (Marsden et al., 2021). Alongside this system, the federal government maintains a publicly accessible list of non-compliant employers of TFWs (Immigration Refugees and Citizenship Canada, 2015). The enforcement system allows the federal government to investigate employers at random or when they suspect non-compliance (e.g., after receiving a complaint). While the introduction of this system makes for a positive regulatory shift in the TFWP, it also has a few flaws. For instance, federal investigators do not have the power to

enforce employment laws upon non-compliant employers unless the specific law falls within federal jurisdiction (Marsden et al., 2021). As such, it is still useful for TFWs to explore other avenues of advocacy at the provincial level.

## 2.2 Making a complaint

When TFWs believe their rights have been violated, there are two options for them to advocate for themselves. First, a TFW (or their representative) could consider filing a complaint at the provincial or federal levels. To file a complaint, one would need to contact a federal or provincial office that deals with employment standards. At the federal level, TFWs, members of the public, consulates, or advisory groups may report abuse, threats to legal status in Canada, mobility, compensation, or working conditions at a Service Canada Centre. This can be done by phone, or online through the Government of Canada website. Alberta has a similar system in which complaints are reported to the Temporary Foreign Worker Advisory Office (the Advisory Office). The Advisory Office responds to complaints, reports allegations of mistreatment, and provides resources for foreign workers regarding their rights and entitlements. The primary focus of the Advisory Office is to help foreign workers in Alberta to find solutions surrounding mistreatment in the workplace (*Temporary Foreign Worker Advisory Office*, 2024). The Advisory Office can be contacted via phone, email, or by visiting one of the offices located in Edmonton or Calgary. In Ontario, TFWs can make complaints through the same government avenues as any other worker protected under the ESA or the EPFNA. Therefore, the process for filing a complaint regarding employment is similar to that of Canadian workers. If a complaint is filed through these venues, the complainant cannot take court action against the employer for the same issue or if the employee is represented by a union and covered by a collective agreement (*Filing a Claim: Your Guide to*

*the Employment Standards Act*, 2023). Claims can be submitted either through the Ontario Public Service website, or via email.

The second option is legal action, which can be difficult to navigate. This process begins with a decision regarding which legal jurisdiction has the capacity to address the issue and best serve the legal needs of the TFW. Canada has a complex legal system, thus, depending on the issue, TFWs will appear most often in provincial administrative tribunals[1] that handle issues of employment and labour. I discuss the differences between these specific types of tribunals in detail below (see section 4.1) Once an application or complaint is filed, the issue of resolution time comes into play. Depending on the tribunal and the nature of an issue or grievance, the timelines of a proceeding will vary. For example, human rights tribunals require complaints to be filed within one year of the incident. When the complaint is filed, a human rights officer or adjudicator will assess whether the grievance falls within its jurisdictional capacity; if not, the complainant will be notified with a Notice of Intent to Dismiss and will be given 30 days to respond. In Ontario, if the issue also appears in another court or tribunal, the Human Rights Tribunal of Ontario (HRTO) might defer the complaint, pending the decision of the other tribunal. If the complaint is accepted, the process will continue to mediation (conciliation between parties) or a formal hearing.

On the other hand, the time for complaints or claims to be filed in labour tribunals varies depending on the tribunal. For example, compensation boards, employment standards tribunals, or labour relations boards usually have a six-month time limit for complaints or claims to the filed. Direct complaints about an employer are dealt with by employment standards boards and labour relations boards, while claims are filed with compensation boards (Alberta Human Rights

[1] Administrative tribunals describe legal venues that handle smaller-level disputes between individuals or between individuals and the government. Tribunals differ from courts as they are a faster, less formal way to resolve disputes through adjudicators that specialize in a specific area of law (Cane, 2009; Creyke, 2008).

Commission, 2024a; Ontario Labour Relations Board, 2024). When filing a complaint, one must provide personal contact information, the employer's contact information, work history with the employer, and supporting documents (e.g., the employment contact, records of work hours, and proof of compensation). When these documents are received by the tribunal, an agent will contact the complainant. There are no specified timelines that indicate when a tribunal will resolve a complaint. If the worker does not agree with the final decision made by a labour tribunal or board, they have 21 to 30 days (depending on the tribunal and the province) for notices of intent to appeal to be filed.

This general process for complaints and claims filed in human rights or labour tribunals looks somewhat different for TFWs compared to regular workers; this is because TFWs may experience barriers when seeking legal aid. Many TFWs lack access to information about their legal options or are isolated from finding legal aid (Hastie, 2018; Salami et al., 2019). Moreover, the unpredictable timelines of tribunal proceedings are not ideal considering that closed work permits and the temporary status of these workers, creates time constraints. Representation is also important, especially for members of a group who are not familiar with Canadian legal procedures, are not fluent in the official languages, or are struggling financially. While some TFWs have access to union representation, many do not for one of two reasons: first, as is the case for many Canadian workers, not all occupations come with union representation and not all unions represent TFWs (Binford, 2019). A lack of representation is an important hurdle for TFWs because it leaves them either searching for affordable legal aid or navigating the legal system by themselves.

# 3.0 Temporary Foreign Workers and legal action

The presence of TFWs in the Canadian legal system is a particularly interesting area of focus. By pursuing legal recourse, TFWs can potentially impact the behaviours of their employers, government agencies, and policymakers in ways that are beneficial to both regular and foreign workers (Basok & Carasco, 2010; Choudry & Thomas, 2013; Gabriel & Macdonald, 2018; Hastie, 2021; O'Sullivan & MacMahon, 2022; Tucker, 2012). The available literature tends to conclude that legal challenges have a positive impact on migrant workers in Canada, in terms of health care, bargaining, livelihood, and security (Basok & Carasco, 2010; Choudry & Thomas, 2013; Hastie, 2017). In this literature, the focus tends to be on higher level court cases, such as those in the Supreme Court of Canada; however, most legal proceedings involving TFWs appear at the provincial level, in administrative tribunals, specifically, labour tribunals (LT) and human rights tribunals (HRT). As a result, the extent to which rights violations of TFWs have been contested in the Canadian legal system has been significantly understudied.

## 3.1 Comparing Human Rights Tribunals and Labour Tribunals

Generally, administrative tribunals are less formal than regular courts and can revise and adjust previously made decisions (Cane, 2009; Creyke, 2008). In terms of this study, there are important differences between LT and HRT hearings in both purpose and outcomes. For one, HRTs determine whether one's human rights have been violated according to the Canadian Charter of Rights and Freedoms and provincial human rights codes[2] (Brodsky et al., 2017; Doga, 2020; Ontario Human Rights Commission, 2023). These tribunals rely on a complaint of discrimination,

[2] The Canadian Charter of Rights and Freedoms applies solely to issues between the individual and the government. Provincial human rights codes applies in public and private sectors, and between individuals (Alberta Human Rights Commission, 2024b; Ontario Human Rights Commission, 2008).

such as dismissal or mistreatment based on status, race, gender, sex, or creed. If the tribunal decides there is sufficient evidence to conclude that discrimination has taken place, there are two common options for resolution. First, the inquiry board (also known as a the Commission investigator or adjudicator), appointed by whichever jurisdiction (i.e., federal or provincial) can make recommendations to the respondent "to prevent the same or similar [discriminatory] practice occurring in the future" (Brodsky et al., 2017; *CN v. Canada (Canadian Human Rights Commission)*, 1987; Hunter, 1976). Alternatively, or in tandem, compensation may be issued to the applicant from the respondent. These hearings are addressed by the specific legal body that upholds human rights standards at the federal level or within a particular province.

On the other hand, LTs have several bodies, that each have their own purpose; in this paper, I examine labour relations boards and workers compensation boards. Labour relations boards handle disputes between employers, trade unions, and employees represented by unions and act within the labour relations legislation of a particular province to mediate these disputes. Issues that are brought to labour relations boards usually concern union certification, employment rights, and collective bargaining (Shilton & Banks, 2014; Tucker, 2012). Because these boards function based on provincial legislation there are some differences in how they operate across Canada, which can cause variation in the outcomes depending on where the proceeding is held (Shilton & Banks, 2014). Worker compensation boards are independent public agencies that deal with occupational workers health and safety and compensation legislation, which also varies by province. Workers in each province are covered by benefits should they face a workplace injury or illness that prevents or restricts their work (Lippel et al., 2011).

## 3.2 Theory and general expectations

While the outcomes of TFWs in provincial tribunals has been understudied, the available literature and broader theoretical reasoning would lead us to expect at least five differences in the discussions and outcomes in HRTs and LTs. First, I expect there to be more LT decisions than HRT decisions over time; this is because LTs, especially labour relations boards and employment standards boards, are specifically designed to address issues surrounding labour standards, and collective bargaining. LTs "regulate both management and union activity and may restrain some forms of employer interference with union organizing and bargaining activity" (Farrell, 2012). As such, because the issues surrounding TFWs take place most often while at work, the most natural legal avenue would be LTs. Along these lines, LTs also seem to have a longer history in handling issues pertaining to TFWs. For example, the earliest LT decision on a TFW grievance took place in 1988 in Ontario. In this sense, this expectation may be indicative of the accessibility of LTs for TFWs in comparison to HRTs.

Second, I expect LT decisions to be made faster than HRT decisions. Andiappan et al. (1990) find, in the context of pregnant employees facing discrimination, that while HRT hearings were better equipped to serve employee interests, the LT route usually offered a faster decision time. HRTs require more investigation into a particular issue, prompting them to make interim decisions on the same issue, and therefore, taking more time to reach a conclusion. Furthermore, because human rights violations can be difficult to identify, bringing grievances of this nature to an HRT would be challenging, especially when representing the interests of a group of people (Doga, 2020). As such, while HRTs might handle the grievances of TFWs better, they are not necessarily a practical option for them in terms of receiving justice (Foster & Barnetson, 2015; Hastie, 2018; O'Sullivan & MacMahon, 2022).

The grievances brought to these tribunals are another relevant area of focus in this study because the ability and ways in which either tribunal type handles certain grievances is a major determinant of the decision outcome. In terms of grievances, we can expect two issues to be most prevalent. First, I anticipate issues about work and living conditions to appear frequently. This assumption is based on the known vulnerabilities of TFWs as well as several media sources that discuss the sub-par working and living conditions of TFWs in Canada (Basok & Bélanger, 2016; CBC News, 2021; Major, 2023; Salami et al., 2019; Shantz, 2015; Smith, 2014; Vosko, 2015, 2018; Wyton, 2023). I anticipate these grievances to be largely discussed in HRTs because issues about working and living conditions can branch out beyond the scope of labour and employment. Secondly, wage discrepancies are also mentioned frequently in popular media. Although TFWs are legally entitled to make the same wage as regular workers in the same positions and locations, there are instances where employers underpay foreign workers because of their status (Employment and Social Development Canada, 2023; Foley & Piper, 2021; Salami et al., 2019). I expect this grievance to be largely handled in LTs because it is more of an issue concerning labour and employment. Should there be grievances outside of what has been listed, I expect them to appear in HRTs more often than in LTs. This is because, HRTs have more reach in terms of the grievances they can address, while LTs are more concerned with issues strictly relating to labour.

Considering these grievances, it is also worth identifying any specific barriers that cause or worsen issues surrounding TFWs; if so, I expect these barriers and approaches to them to be different depending on the tribunal. Because HRTs have more breadth in terms of the issues they address, I anticipate there to be more acknowledgment of those barriers in these tribunals (Brodsky et al., 2017; Hunter, 1976). On the other hand, LTs tend to be exclusively orientated towards labour legislation and policy, and thus might overlook these barriers (Shilton & Banks, 2014). I predict

at least two barriers to appear in either tribunal. First, citizenship plays a significant role in how TFWs are treated both by employers and in legislation. Because they are not citizens, they have certain restrictions in Canada that may prevent adequate participation in the legal system (Barnes, 2013; Basok & Carasco, 2010; Piper, 2010). For example, closed work permits tie TFWs to a specific employer and determine how long they can work in Canada. As such, because of their precarious status, TFWs may not have enough time to file complaints and participate in hearings (Preibisch, 2010; Vosko, 2018; Vosko et al., 2022). The second barrier I expect TFWs to face regards their access to information about their legal rights in Canada. Although TFWs should be informed of their rights by their employer upon their arrival (according to the EPFNA), this does not always happen (Asomah, 2014). This is further hindered in situations where linguistic or educational limitations are present, making it difficult for TFWs to fully understand the extent of their protections and entitlements. With this in mind, I expect the decisions in this project to highlight TFWs' lack of knowledge or understanding of their rights and protections in Canada.

Lastly, the outcome of a decision is another line of focus, because it indicates the remedy (if any) assigned to the grievance. In this aspect of the study, a particular area of importance is how often these outcomes are beneficial to TFWs or their opponents in these tribunals. Outcomes that are in favour of TFWs acknowledge the grievances and barriers of this group in a legal setting, thus creating a setting of precedent[3] for future proceedings (Cottrill, 2020; Zariski, 2014). I expect that HRTs are more likely than LTs to result in favorable outcomes for TFWs. Labour law and human rights law often overlap with one another, especially in the case of employment-related abuses and discrimination. However, HRTs offer more in-depth assessments of a given case and

[3] The doctrine of precedent asserts the need for consistency in legal decisions to maintain equal treatment under the law. While decision-makers in Canadian administrative tribunals are not bound by precedent, it is still present in several tribunal decisions.

can handle a greater variety of issues (Doga, 2020). On the other hand, LTs are more surface-level and concerned with issues strictly related to employment (Shilton & Banks, 2014). Furthermore, adjudicators in HRTs may be more sympathetic to TFWs than LTs, which are likely to weigh in the interests of government actors and employers more explicitly.

# 4.0 Methods

To investigate the merit of the theoretical expectations discussed in the previous section, I pursued a qualitative and quantitative analysis of the hearing decisions of LT and HRT hearings in Alberta and Ontario in which at least one TFW was a primary party. I chose Alberta and Ontario for two reasons. First, these provinces are among the highest receiving provinces of TFWs in Canada[4]. As of December 2023, 10 percent (20,335) of TFWs who were permitted to work in Canada were in Alberta, while 27.3 percent (49,885) went to Ontario (Immigration Refugees and Citizenship Canada, 2024). Secondly, in comparing these provinces, I increase the validity of my findings, because Ontario and Alberta differ both legislatively and politically. According to Shilton and Banks (2014), Alberta's approach to labour law, specifically in Labour Relations Boards, is more rigid, and adheres almost exclusively to the *Alberta Labour Relations Act, 2000*. On the other hand, Ontario's approach adheres to the *Ontario Labour Relations Act, 1995* as well as several other statutes (see Stilton and Banks, 2014, p. 6), which gives it more breadth in terms of the capacities of labour boards and tribunals. Politically, Alberta tends to have a more conservative leaning, while Ontario more centrist; this likely indicates differing political approaches at the judicial and legislative levels (Collier & Malloy, 2017; Sayers & Stewart, 2019). Considering these factors, by analysing cases in either province, I am better equipped to make general claims about

[4] At the end of 2023, Quebec received 58, 630 TFWs, followed by 49,885 in Ontario, 38,435 in British Columbia, and 20,335 in Alberta (Immigration Refugees and Citizenship Canada, 2024).

the differences between HRTs and LTs in Canada and how either tribunal approaches the grievances of TFWs. In terms of the tribunals, I focus on HRTs and LTs because the bulk of provincial legal proceedings about TFWs occur in these specific tribunal types.

## 4.1 Data Collection

For data collection, I conducted a content analysis of relevant LT and HRT hearing decisions in Alberta and Ontario. I chose this method of data collection because these decisions are easily accessible to the public, which made this information relatively easy to retrieve. Decisions were chosen based on specific criteria, namely, the province, the tribunal type, and the relevance of the decision to TFWs. To collect decisions from these boards and tribunals, I conducted a search in the Canadian Legal Information Institute (CanLII) database. The CanLII database provides public access to legislation, legal commentary, and legal decisions from all courts and jurisdictions in Canada (i.e., federal courts, provincial and territorial courts and the Supreme Court of Canada). To find these decisions, I used Boolean operators that mentioned specific words pertaining to TFWs and the TFWP at least once (Dinet et al., 2004). The keywords "seasonal agricultural worker," "migrant work," "temporary foreign work," "foreign work", "TFW", and "SAWP" resulted in 152 HRT and LT decisions between Alberta and Ontario. These decisions were then manually examined for their relevance to my study. I removed all hearings where the respondents or applicants were neither TFWs themselves nor their representatives[5]. This resulted in a final total of 117 decisions. With regard to the timeframe, the earliest HRT hearing in Ontario occurred in 2010, while LT decisions were made as early as 1988. In Alberta, HRT

[5] The search terms used for this project were used to find decisions where TFWs or the TFWP was referenced. As such, decisions that used cases regarding TFWs or the program as precedent were also included in the search results. These were omitted from the study.

decisions became more frequent in 2021, and LT decisions in 2007. Therefore, this investigation analyses decisions made between December 14, 1988, and December 31, 2023.

To analyze the data, I used two methods. Firstly, I used Excel to collect data on the date of the decision; the tribunal or board in which the proceeding was held; the sector the TFW(s) worked in; the status of the proceeding (ongoing or resolved); the target of the grievance (i.e., the employer or a government body), and the outcome. Secondly, I used open coding to determine the grievance discussed in the hearing and the common barriers among TFWs (defined by explicit reference to the TFW's positionality in Canada in the decision). Open coding is a system that allowed me to determine thematic ideas about the contents and outcomes of each decision in a way that defined and categorized different components of the text (Gibbs, 2007). This was tracked, using Microsoft Word, through three rounds of analysis. In the coding process I initially applied seven general categories: the grievance; the context of the proceeding; the judge's discretion; personal demographics; the use of precedents; and the outcome. These were based on the overall goal of this investigation, which was to study the nature of the grievances brought to tribunals, and to gain a general sense of how these tribunals handle those decisions. In a second round of analysis, I read through the categorized text to categorize recurring grievances and barriers in the decisions, based on my expectations outlined in section 3.2. This informed my third round of analysis, as other grievances and barriers also appeared. This is discussed in more depth in section 5.3 and 5.4.

All in all, this analysis includes decisions from seven tribunals. Both provinces under study only have one human rights tribunal, namely the Human Rights Tribunal of Ontario (HRTO) and the Alberta Human Rights Commission (AHRC); however, there were many tribunals and boards relating to labour in both provinces. Five tribunals and boards directly addressed labour issues concerning temporary foreign workers: the Ontario Labour Relations Board (ONLRB); the

Workplace Safety and Insurance Board (ONWSIB); and the Workplace Safety and Insurance Appeals Tribunal (ONWSIAT) in Ontario; and the Alberta Labour Relations Board (ALRB); and the Appeals Commission for Alberta Workers' Compensation (ABWCAC) in Alberta.

### *ONLRB and ALRB*

The ONLRB and ALRB address disputes concerning the labour laws in their respective provinces. In Ontario, these laws include the *Ontario Labour Relations Act, 1995,* the *Occupational Health and Safety Act*, 1990, and the *Ontario Employment Standards Act, 2000*. In Alberta these include the *Labour Relations Code, 2000*, the *Public Service Employee Relations Act, 2000*, and the *Police Officers Bargaining Act, 2000*. Labour Relations boards in both provinces navigate their respective legislations to mediate and adjudicate disputes between an employer or industry and a union or employee (Alberta Labour Relations Board, 2024; Ontario Labour Relations Board, 2024).

### *ABWCAC, ONWSIB, and ONWSIAT*

These tribunals consider labour issues related to compensation, benefits, insurance, and employment. The ONWSIB provides wage-loss benefits, medical coverage and support to help people return to work after a work-related injury or illness. The ONSWIAT works separately from the ONSWIB and acts as the final level of appeal for disputes surrounding insurance and workplace safety. The ABWCAC operates similarly to the ONWSIAT and hears appeals from the Alberta Workers Compensation Board, a similar body to the ONWSIB. There are no relevant hearings available from the Alberta Workers Compensation Board.

## 4.2. Operationalization

For the analysis below, the following five indicators were considered:

**(1) Volume of tribunal decisions in Alberta and Ontario**

This indicator tracks the number of tribunal decisions that involve TFWs in the two provinces and through the period under study. By measuring this, I saw how often TFWs used legal avenues as a means of self-advocacy. I was also able to see important provincial differences surrounding which tribunals produced more decisions, and when. With this, I was able to make connections between policy changes and decision frequency in particular tribunals and determine if there were significant provincial differences.

**(2) Length of time to reach a final decision**

This indicator concerned how many months it took to reach a final decision. Because many of the hearings included in this study are still ongoing, this indicator looks specifically at hearings that have reached a final decision. To measure this, I counted the time between the initial decision and the final decision date. The purpose of this indicator was to determine a relationship between the type of tribunal and the timeline of the proceeding and through this, determine a possible relationship between the use of either tribunal and the precarious status of TFWs.

**(3) Grievances presented in a tribunal**

This indicator tallies the number of times a specific grievance was brought to an HRT or LT as it concerned a TFW. This was initially approached by using the expectations discussed in section 3.2; however, in the second analysis, more grievances were discovered beyond what was anticipated. In this sense, a third round of analysis was required. These were determined based on explicit issues discussed in each initial decision (not including subsequent hearings). This indicator was particularly important to compare the variance of TFWs' grievances by tribunal. I account for

the different capacities HRTs have compared to LTs in terms of handling certain issues. This also helps to summarize the grievances that lead TFWs to use tribunals in the first place.

**(4) Common barriers**

Similarly to (3), this indicator is central to the qualitative aspect of this study. Common barriers were initially determined based on the common barriers discussed in media and academia. In my second round of analysis, I searched for my anticipated barriers; citizenship and access to information. I found that these barriers did not cover the full scope of hurdles for TFWs seeking legal action. As a result, more barriers were found in the second analysis, which gave way to a third round, to quantify the occurrence of each of these barriers.

**(5) Outcome**

The hearing outcome measured whether the decision favoured TFWs or other participating parties (i.e., employers and government bodies). In some instances, outcomes were not clearly in favour of one party or the other (in which case I coded the outcome as 'unknown') or were in favour of more than one party (in which case I coded the outcome as 'partial'). This was determined based on the explicit outcome outlined in the decision. The outcome is the most obvious way to measure how issues surrounding TFWs are resolved depending on the tribunal and the province.

# 5.0 Results

## 5.1 The use of tribunals by Temporary Foreign Workers

In total, this project analyzes 117 decisions in Alberta and Ontario (72 LT decisions and 45 HRT decisions), including both interim and final decisions. LT decisions in Alberta account for 71 percent of the province's total hearings, while that percentage is much lower in Ontario, where

HRT decisions are more numerous (see Table 1). Together, LTs account for 61.5 percent (72) of the total hearings and dominate in both provinces.

***Table 1.*** *Total number of tribunal hearings involving TFWs, by province and tribunal type*

| | ***Province*** | *Ontario* | *Alberta* | *Total* |
|---|---|---|---|---|
| ***Tribunal Type*** | Human Rights | 43% (34) | 29% (11) | 38.5% (45) |
| | Labour | 57% (45) | 71% (27) | 61.5% (72) |
| | Total | 100% (79) | 100% (38) | 100% (117) |

Figures 1 and 2 below produce a timeline of these decisions and show that the patterns of successfully filed claims and complaints by TFWs have changed considerably in the period from 1988 to 2023. For instance, LT decisions about TFWs in Ontario were made infrequently between 1988 and 2008 but have since increased greatly. The same can be said for HRT decisions in Ontario, which were not made until 2008, and reached a peak between 2012 and 2015. A possible explanation for these increases could be a rise in the number of TFWs working in Ontario. After 2015, HRT decisions decreased which could be an effect of the federal enforcement system that was introduced in December 2015, which likely pre-empted the need for legal recourse. In the same year, 70,000 TFWs were deported back to their home countries due to federal reforms surrounding work permits in June 2014[6]. We can reason that these regulatory shifts were the primary reason for fewer tribunal appearances between 2016 and 2019. In Alberta, there seems to be a different pattern. LT decisions in Alberta accounted for 71 percent of the TFW-related

[6] In June 2014, the Canadian federal government initiated reforms to the TFWP, which limited work permits for foreign workers in Canada to four years. In April 2015, approximately 70,000 TFWs were deported when their contracts expired (Salami et al., 2019).

decisions in the province and were only made in the years after 2007. Alberta's LT decisions reached a peak between 2012 and 2015 and have declined in the following years. Regarding HRT decisions in Alberta, it was only as of 2021 that the AHRC began making decisions pertaining to TFWs; however, the number of decisions that were made in that period was significantly higher than LTs.

The similarities between Ontario and Alberta in this context are likely related to the legal and regulatory climate concerning TFWs in either province. For instance, the implementation of stricter regulations for employers utilizing the TFWP as well as mass deportation in 2015 can explain the decline in LT and HRT decisions in Ontario and LTs in Alberta between 2016 and 2019. Despite this, in both provinces, between 2020 and 2023, there is an increase in decisions in at least one tribunal type. This is likely due to the increase in TFWs in both provinces during these years.

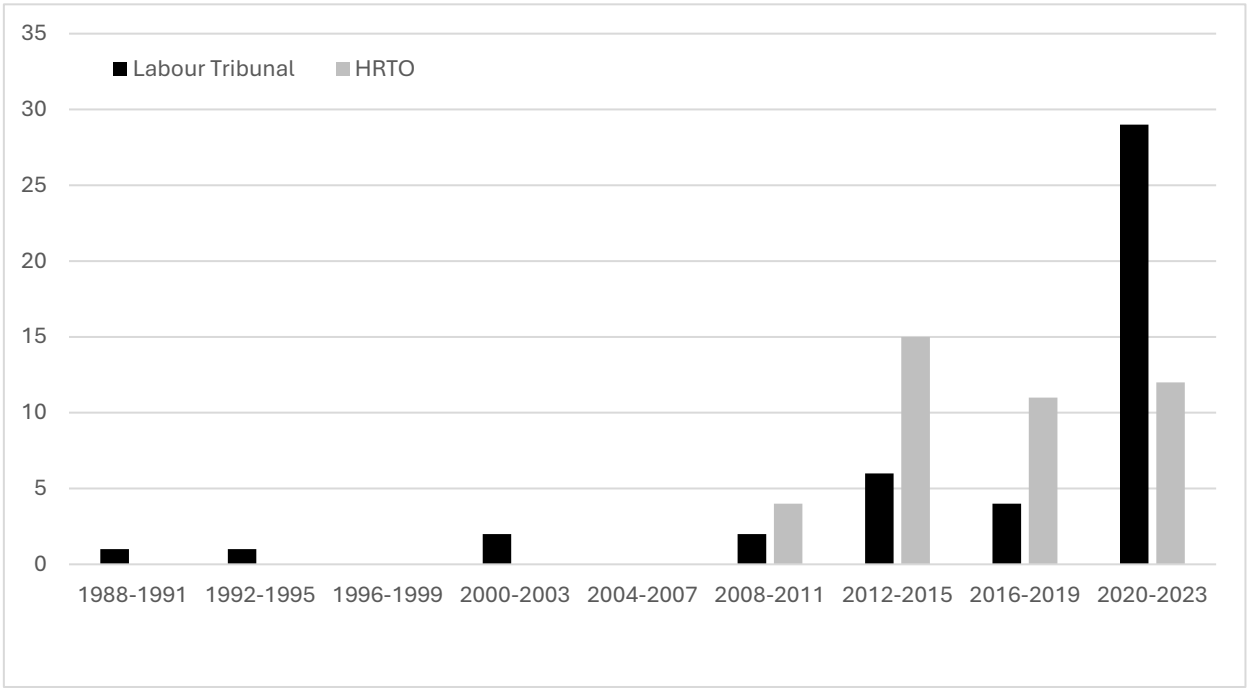


***Figure 1.*** *Number of Ontario Decisions, by tribunal type, 1988 – 2024.*

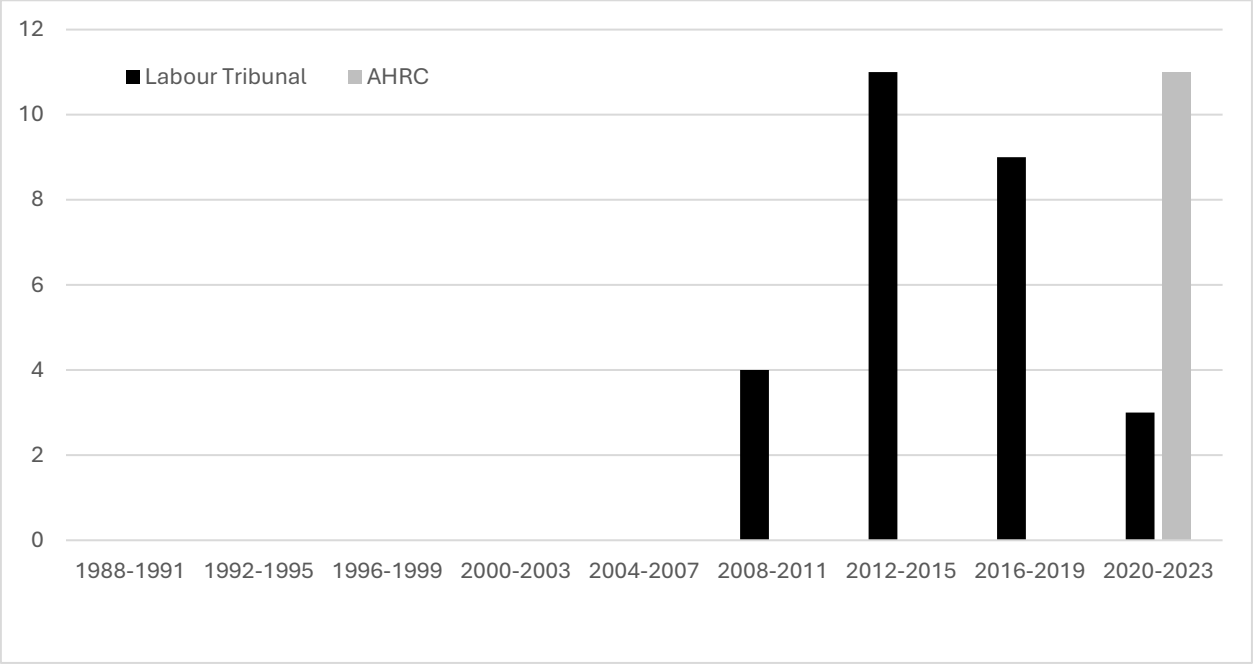


***Figure 2.*** *Number of Alberta Decisions, by tribunal type, 1988 – 2024.*

Given the rise in issues pertaining to TFWs, it is also worth investigating in which sectors, the complainants tend to work. Figure 3 displays the distribution of issues brought to labour and human rights tribunals in Alberta and Ontario based on the industry of the worker or employer, according to Employment and Social Development Canada's 'Broad Occupation Categories' (see Employment and Social Development Canada, 2023). Figure 3 only includes initial hearings and therefore totals 25 hearings in Alberta and 35 in Ontario. Five broad occupational categories (BOC) appear in this dataset: occupations in education, law and social community and government services (BOC 4, hereafter: public and social work); sales and service occupations (BOC 6); trades, transport and equipment operations and related occupations (BOC 7, hereafter: trades and transport); natural resources, agriculture and related production occupations (BOC 8, hereafter: agriculture); and occupations in manufacturing and utilities (BOC 9, hereafter: manufacturing). There were also hearings where the industry was unknown or not mentioned in the decision.

In Ontario, TFWs in agricultural work seem to dominate the hearings under investigation. 82.9 percent (29) of Ontario decisions had to do with TFWs working in the agricultural sector. This was followed by unknown sectors in Alberta, which accounted for 52 percent of all decisions in this province. The third highest percentage of decisions occurred in Alberta's trades and transport sector, at 36 percent. Public and social work, and sales and service occupations occurred infrequently.

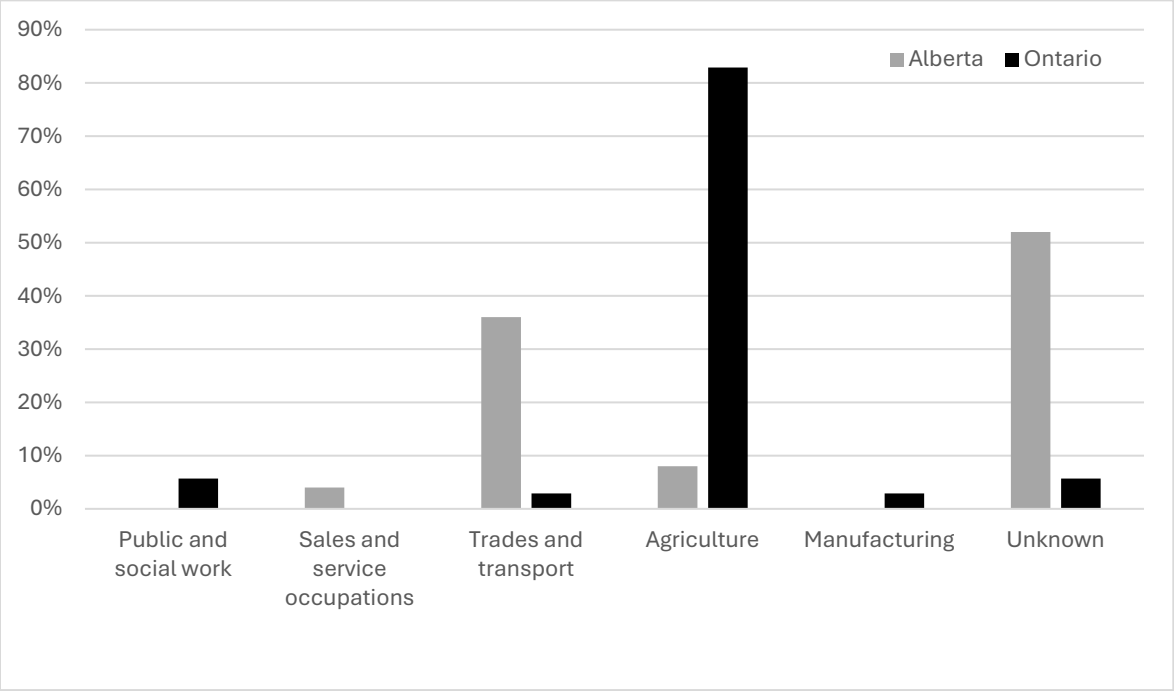


***Figure 3.*** *Percentage of tribunal hearings by broad occupational category.*

Most tribunal decisions in both LTs and HRTs between both provinces have to do with workers in the agricultural or trades and transport sectors. Again, the large differences between provinces and sectors are strongly related to the number of TFWs; however, these numbers also represent the number of successfully filed tribunal complaints and claims. There is also strong reason to conclude that Ontario's agricultural sector is particularly volatile for TFWs. The same can be said for the trades and transports sector in Alberta. In interpreting these numbers, it is

important to acknowledge that they understate the total number of TFWs who are involved in these decisions, considering that some decisions involve more than one TFW. For instance, *Hosein et al. v. Ontario* and *Logan v. Ontario* were related HRT proceedings in which 54 TFWs working on a farm in Northern Ontario, were racially profiled and forced to submit DNA samples to the Ontario Provincial Police (OPP) for an investigation. *CAW-Canada v. Presteve Foods Ltd.* and *O.P.T. v. Presteve Foods* were connected HRT proceedings dealing with issues of sexual harassment and discrimination having to do with 39 TFWs working for a seafood wholesaler in Southern Ontario.

All in all, the findings in this section can be summarized by three observations. First, as expected, there are significantly more LT decisions than there are HRTs. Second, regulatory shifts that have been made at the federal level as well as shifts in the intake of TFWs across Canada, can help to explain the trends of LT and HRT decisions at different periods between 1988 and 2023. Lastly, we know that the number of successful proceedings between both HRTs and LTs in either province is highest in Ontario's agriculture sector, which points to a unique level of volatility in this specific area of work, especially considering the number of TFWs involved in each individual decision.

## 5.2 Duration of Proceedings

The time it took for issues to reach a final decision varied according to the province and the tribunal. To determine this, I used the date of the initial decision and the date of the final decision. Ideally, the date of the initial filing of a complaint or claim would have been used; however, after contacting the relevant agencies I found that this information was not attainable. In total, eight HRT proceedings were ongoing at the time of writing; these are therefore not included in this analysis.

Figure 4 captures the average time between initial decisions and final decisions, which is produced by instances where multiple decisions occurred in the relevant proceedings. We can see that both LTs and HRTs in Ontario have instances in which multiple decisions were made leading up to the final decision. In Ontario, the HRTO took the longest to reach a final decision from its original decision date, with an average of about two years. This was followed by Ontario LTs, which average to about 1 year. On the other hand, although tribunals in Alberta took less time on both fronts compared to Ontario, we can see an inversed pattern. The AHRC took about nine months to reach a final decision, while LTs had an average of 11 months to reach a final decision.

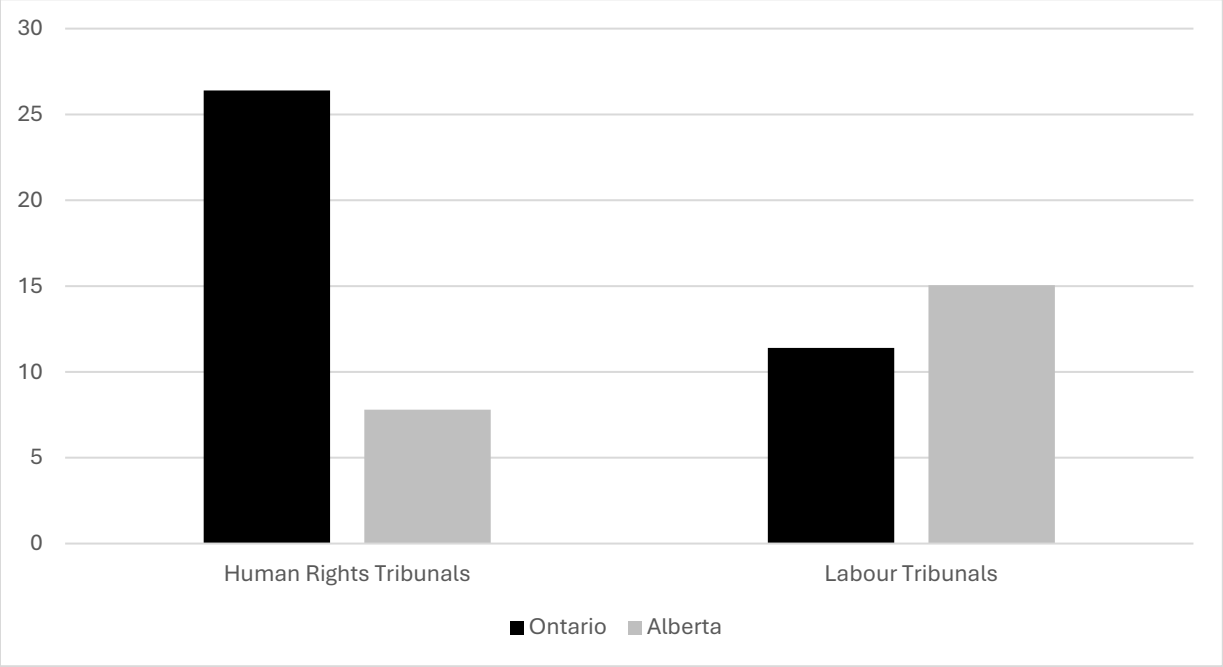


***Figure 4.*** *Average time to reach a final decision (in months), by tribunal type.*

The longest running proceeding in this dataset was *Francis v. Great Northern Hydroponics,* which had three decisions made between 2014 and 2017. The initial decision addressed whether the TFW's complaint should be deferred, pending a decision of the same issue with the WSIB. The second decision, in 2015, addressed whether the WSIB had appropriately

dealt with the issue and whether the complaint should be revised by the HRTO[7]. Finally, in 2017, the employer requested for the complaint to be dismissed; this request was denied by the adjudicator. Decisions for this matter that were made after 2017 have not been made yet. In LTs, there were four 'batched'[8] appeals in the ONWSIAT regarding the calculation of Loss of Earnings benefits for TFWs in the SAWP. Nine decisions were made for these appeals. The first eight were made between May 21, 2021, and November 8, 2022, and decided on potential intervenors, information sharing between parties, and considered whether the four appeals should be heard together. The final decision was made on December 23, 2022, in which the appeal was allowed in part.

One clear observation that can be made is that many interim decisions in both LTs and HRTs have an administrative purpose. It seems that in situations where multiple decisions must be made, the primary issues are usually in the realm of case management or determining the fine details of the matter before reaching a final decision. In this sense, depending on the issue at hand, and the organization of the proceeding, the length of a proceeding varies extensively. This is especially true in HRTs, where determining the presence of discrimination is the primary purpose. The differences in the purpose of either tribunal type likely play important roles in terms of how quickly final decisions are made. HRTs are meant to handle a range of intractable and controversial issues surrounding discrimination, harassment, employment, and accommodation, whereas the issues brought to LTs typically concern workplace injuries and employer-worker conflicts.

[7] In some cases, the same issue was brought to both an HRT and an LT. In these situations, the HRT may defer the decision, pending the LT decision. At which point, the HRT adjudicator will revise the LT decision to determine if human rights-related aspects were addressed. If those aspects were addressed by the LT, the HRT proceeding may be cancelled, otherwise, the proceeding will continue to a human rights-focused decision.
[8] Batched appeals refer to a group of hearings with the same or very similar issues that are being considered together, to reach one decision.

The differences in proceeding duration are more tied to a difference in location, rather than the tribunal type. The clearest difference in this aspect of the study is that while HRTs in Ontario take longer to reach final decision than LTs, the opposite can be said for Alberta. As such, my expectation is only supported in Ontario, and therefore, cannot yet be seen as a general condition of all LT and HRT comparisons in all Canadian provinces.

## 5.3 Grievances

Between each tribunal type, grievances that commonly concerned TFWs included issues of work conditions, termination of employment, wage discrepancies, harassment, access to benefits, and differential treatment by government authorities (see Figure 5). Of the six grievances outlined above, only two (work conditions and wage discrepancies) were among the original grievances expected to appear in this study. I found that the original two grievances did not fully cover the scope of issues that were relevant to TFWs, as such, more were added for a more thorough analysis. These grievances were tallied according to what grievances were explicitly addressed in the initial decision. In many decisions, more than one grievance was addressed, which is why the percentages in Figure 5 add up to more than 100 percent.

Figure 5 presents the occurrence of grievances in HRT and LT distributions comparatively. There are two important things to pay attention to. First, as expected, HRTs handle these grievances more than LTs. Along the same lines, except for work conditions and harassment (which occurred five times), LTs almost exclusively handle grievances surrounding access to benefits (82.2 percent). This is unsurprising considering that HRTs are better equipped and designed to address a myriad of issues fitting under the human rights umbrella, while LTs are more concerned with specifically employment-related problems. These results also point to an important

question concerning the use of these tribunals by TFWs. While HRTs handle more grievances, LTs are still more often used, despite their lower grievance capacity.

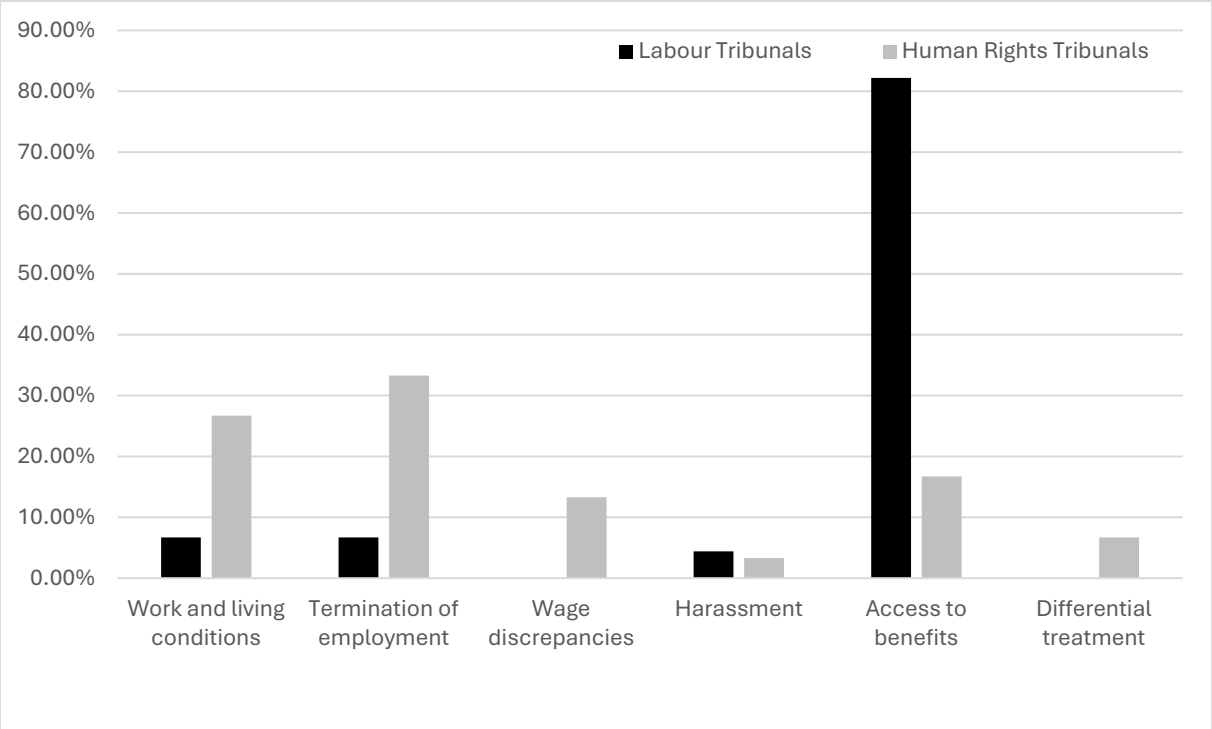


***Figure 5.*** *Grievances in tribunal hearings affecting TFWs*

### *Work and living conditions*

Work and living conditions were explicitly mentioned in 6.7 percent (3) LT decisions, and 26.7 percent of HRT decisions (8). In *Ben Saad v. 1544982 Ontario Inc.* (HRTO), *Francis v. Great Northern Hydroponics* (HRTO)*, Smith v. Schuyler Farms Limited* (HRTO), *Korkomaz v. Cora Breakfast and Lunch* (AHRC), *Shkreli v. Future Design Flooring Ltd.* (AHRC), and *Zabara v All Seasons Mushrooms Inc*. (AHRC) the TFWs' employment was terminated because of an injury that the employer refused to accommodate, thus causing fostering difficult work conditions. In *Luis Gabriel Flores v. Scotlynn Sweetpac Growers Inc.* (ONLRB), the worker was dismissed because they raised concerns about the living and working conditions of TFWs on the farm after

a coworker died from complications related to COVID-19. In *Jerome Angcog v. Amco Farms Inc.* (ONLRB), workers experienced issues regarding health and safety and working hours. In this proceeding, the TFWs expressed concerns about spraying pesticides within enclosed areas and being forced to work long hours without rest or sick days. One worker in this proceeding was dismissed for requesting work accommodations due to allergies. Issues of work conditions also appeared in *Kenny Bernard Florent v. 2492309 Ontario Limited, 2021* (ONLRB), which was about a worker who was dismissed shortly after reporting health issues due to exposure to hazardous chemicals. Similarly, in *Hazel v. 624091 Alberta Ltd.* (HRTO), the worker claimed to have been denied safety equipment and subsequently dismissed due to an injury. In the context of TFWs, work conditions and living were often tied to reprisal in which employers would punish or mistreat workers who complained about their working or living conditions.

***Termination of employment***

Termination of employment was found in 6.7 percent (3) of LT decisions and 33.3 percent (10) of HRT decisions. This grievance often occurred alongside wage discrepancies, and work and living conditions. When TFWs reported issues regarding their work conditions or pay, employers sometimes reacted by terminating the worker's employment. Examples of these include *Simpson v. Pihokker Farms Inc.* (HRTO) and *Pryde v. Align Fence Inc* (HRTO) in which a TFW's employment was terminated for raising concerns about being underpaid because he was a Jamaican migrant worker. In *Shkreli v. Future Design Flooring Ltd* (AHRC) the worker was unknowingly dismissed by the employer for reporting an injury to the ABWCB. Furthermore, *Jerome Angcog v. Amco Farms Inc.*, *Kenny Bernard Florent v. 2492309 Ontario Limited* and *Luis Gabriel Flores v. Scotlynn Sweetpac Growers Inc.* were cases appearing in LTs in which TFWs were dismissed for bringing up issues of health and safety to their employers. This grievance also appeared in

*Francis v. Great Northen Hydroponics*: the worker was fired and repatriated due to the employer's reluctance to accommodate their injury. Termination of employment was also addressed in *Ben Saad v. 1544982 Ontario Inc.* (HRTO), *Hazel v. 624091 Alberta Ltd, Smith v. Schuyler Farms Limited* (HRTO), and *Zabara v. All Seasons Mushrooms Inc*.

Termination of employment evidently came with significant implications for the TFWs that experienced it. For instance, in *Ben Saad v. 1544982 Ontario Inc.,* the worker could not find new employment because their initial employer would tell potential employers that "he was a problem" (para 33). This impacted his ability to stay in Canada, because his permit required him to "find work within 21 days of his termination" (para 35). Furthermore, in *Luis Gabriel Flores v. Scotlynn Sweetpac Growers Inc.,* the worker was "forced to find shelter and accommodation as well as live off the charity of others" after being dismissed (para 88). In this sense, termination of employment was often further exacerbated by factors related to the workers' status in Canada.

***Wage discrepancies***

Wage discrepancies appeared exclusively in HRTs and accounted for 13.3 percent (4) of those decisions. In *Caw-Canada v. Presteve Foods Ltd.* (HRTO), *Hazel v. 624091 Alberta Ltd.* (HRTO), *Simpson v. Pihokker Farms Inc.* (HRTO), and *Pryde v Align Fence Inc.* (AHRC), wage discrepancies occurred when TFWs received lower wages than Canadian workers in the same position, or when employers paid TFWs a wage that was below the national median for that position. Wage discrepancies were a secondary grievance in *CAW-Canada v. Presteve Foods Ltd.* as TFWs were not paid the same wages and received lower employment benefits compared to their Canadian counterparts. *Pryde v. Align Fence Inc*. also involved a matter in which the employer discriminated against the TFW by paying him below the median rate in Canada because of his status. Finally, in *Hazel v. 624091 Alberta Ltd.*, the worker claimed that he was discriminated

against based on place of origin, citizenship, and disability, among other things by being underpaid.

***Harassment***

Harassment appears in 4.4 percent (2) LT decisions and 3.3 percent (1) of HRT decisions. This includes sexual harassment, bullying, verbal harassment, and harassment as a form of reprisal. Issues of harassment were exclusively seen in proceedings between the employer and the worker. In these cases, employers used harassment to maintain control over the actions of the worker, usually to prevent them from reporting grievances. This usually came in the form of threats about future employment and repatriation.

*CAW-Canada v. Presteve Foods Ltd.* represents six HRTO decisions addressing the sexual harassment and differential treatment of 39 TFWs employed by Presteve Foods Ltd.[9] In this proceeding, TFWs "were subjected to: unwanted sexual solicitations and advances" by their employer "including sexual assaults and touching; a sexually poisoned work environment, discrimination in respect of employment because of sex; and reprisal (*O.P.T. v. Presteve Foods Ltd.*, 2015, para. 2)." Although the victims did not invite these interactions with their employer, they felt compelled to because they were threatened with repatriation. In *Jerome Angcog v. Amco Farms Inc.,* harassment was also connected with reprisal when a group of TFWs were threatened and harassed by their employer for raising concerns surrounding health and safety. Lastly, *Decision No.: 2021-0575, 2022* featured a TFW filing a claim for psychological disability benefits,

[9] Six HRTO decisions, under varied citations, addressed the same group of TFWs regarding sexual harassment and discrimination. For reference the relevant citations include *CAW-Canada v. Presteve Foods Ltd., 2011 HRTO 1581; CAW-Canada v. Presteve Foods Ltd., 2013 HRTO 20; Group of Employees v. Presteve Foods Ltd., 2012 HRTO 1047; Group of Employees v. Presteve Foods, 2012 HRTO 1365, Group of Employees v. Presteve Foods, 2012 HRTO 1448;* and *O.P.T. v. Presteve Foods Ltd., 2015 HRTO 675.*

due to the anxiety she developed from working with an employer who allegedly bullied and verbally abused her. Regardless of the kind of harassment that was used, it always took advantage of the precarious status of TFWs for the benefit of the employer.

***Access to benefits***

Access to benefits was handled in 82.2 percent (37) of LT decisions and 16.7 percent (5) of HRT decisions. Grievances about workers' entitlement to benefits are specifically related to injury-related benefits such as economic loss payments, disability payments, employee re-integration programs, relocation, or reimbursements for the costs of immigration. These grievances were by far the most common in all the proceedings under study. Issues of entitlement to benefits were found most often in LTs, namely workers compensation boards such as the ABWCAC, ONWSIB, and the ONWSIAT, and were usually about workers or employers appealing a decision regarding a worker's entitlement to benefits. The main problem identified in some appeals relating to entitlement to benefits usually laid within the gaps present in labour policies in both Alberta and Ontario when applied to TFWs. For instance, in situations where the employment aid was offered to the TFW, the worker had already returned to their home country, where Canadian employment aid strategies likely would not apply. This is seen in *20150043 (Re), 2015 CanLII 30418* (ON WSIB) wherein,

> "It was not 'possible and practical' to provide the worker with [work re-integration] services in Jamaica. A Work Transition Specialist (WTS) conducted an assessment without the worker present based on claim file documentation to provide recommendations on what likely would have been the [work transition] plan if the worker remained in Ontario and was available to participate."

In this context, these grievances could not be fully resolved, especially in cases where the worker was no longer in the country to gain from the proposed solution. As such, these hearings were usually between the worker and the discretion of a government body and had less to do with the employer. This pattern is also visible in HRTs.

Grievances about entitlement to benefits appeared in three HRTO decisions and were each connected to discrimination based on citizenship or place of origin and were also linked to the personal circumstances of the worker. For example, in *Sulph v. Workplace Safety and Insurance Board,* the TFW could not access healthcare services in their home country and claimed that the WSIB ought to assist him because the injury was sustained while working in Ontario under the TFWP. This issue also occurred in *Smith v. Workplace Safety and Insurance Boar*d, 2020 HRTO 723, in which it was argued that WSIB decisions were inherently discriminatory against repatriated TFWs. Lastly, in *Smith v. Workplace Safety and Insurance Board, 2020 HRTO 774* it was argued that the WSIB should provide housing costs, while the worker received medical treatments in Ontario.

***Differential treatment by government authorities***

Differential treatment by government authorities was handled exclusively by HRTs and appears in 6.7 percent (2) of HRT decisions. Situations where the government failed to provide certain services to TFWs because of their status occurred in four proceedings: *Peart v. Ontario, 2014* concerns the death of Ned Peart, a TFW who worked in the agricultural sector. This case discussed the legislative exclusions that create inequality between TFWs and regular workers in Canada. In August 2002, Ned Peart was crushed under a 1000-pound tobacco bin while working at a tobacco farm in Ontario. The Chief Coroner determined that the subsequent police report regarding the incident was enough evidence to conclude that Peart's death was a result of his own

actions, and therefore, an inquest was unnecessary. Unlike Canadians working in vulnerable occupations in mines, construction sites, pits, and quarries, migrant farm workers are not entitled to a mandatory inquest considering a workplace death in Ontario, despite their precarious position. The second form of differential treatment concerned tensions with law enforcement. This occurred in *Hosein et al. v. Ontario* and *Logan v. Ontario,* in which TFWs were racially profiled by the OPP and threatened with their future employment in the TFWP if they did not provide DNA samples for a criminal investigation. In this example, the status of TFWs was used as a means of exclusion as well as control.

Overall, there were 60 cases in which grievances about work conditions, termination of employment, wage discrepancies, harassment, access to benefits and differential treatment by government authorities were discussed. We know that decisions address multiple grievances at the same time, and that some of these grievances are related to each other in practical circumstances which, along with common barriers, can complicate the issues that surround TFWs. We also see that different tribunal types are more likely to handle certain grievances than others. HRTs demonstrate the capacity to address every grievance discussed here, while LTs were largely focused on access to benefits and loosely dealt with work and living conditions, termination of employment, and harassment. The most obvious reason for this surrounds the purpose and functions of each tribunal. Under the LT category, the primary tribunals (ABWCAC, the ONSWIB, and the ONSWIAT) are meant to determine workers' entitlement to injury-related benefits. On the other hand, HRTs have a more breadth in terms of the issues they deal with as long as they can be considered human rights concerns. As such, issues dealt with by LTs can often overlap into the jurisdiction of HRTs.

## 5.4 Common barriers

The common barriers faced by TFWs, specifically in a legal sense, impact the proceedings and the decisions that are made. In the decisions under study, we can identify three primary barriers that TFWs faced: (1) the threat of reprisal; (2) access to the legal system, and (3) temporary status. Table 2 presents the incidence of these barriers in LT and HRT hearings, accounting for all initial hearings that explicitly mention a barrier. Out of 25 hearings, HRTs mention the common barriers faced by TFWs more often than LTs. This is likely to do with the functions of either tribunal type, as HRTs typically do more investigation into a particular grievance compared to LTs. As such they would be more inclined to consider the barriers of TFWs than LTs. Many hearings did not mention the presence of a barrier which is why Table 2 only accounts for 25 proceedings.

***Table 2.*** *Incidence of common barriers*

| | *Labour Tribunal* | *Human Rights Tribunal* |
|---|---|---|
| *Threat of reprisal* | 50% (3) | 37% (7) |
| *Access to the legal system* | 33% (2) | 32% (6) |
| *Temporary status* | 17% (1) | 32% (6) |
| *Total* | 100% (6) | 100% (19) |

(1) ***Threat of reprisal***

The threat of reprisal was a common theme in both LT decisions and HRT decisions, and in some cases determined whether a complaint or claim was made in a timely manner. Reprisal is defined as an instance where a worker was "fired, suspended or disciplined (or threatened to be), intimidated, coerced or penalized in any way" because the worker exercised their rights, complied

with provincial employment regulations, made a report about employer conduct, or provided evidence at a hearing regarding employment standards (OEA, 2019).

Of the proceedings in this study, five addressed the fear or experience of reprisal directly. First, *Jerome Angcog et al. v Amco Farms Inc., 2021* (ONLRB) featured seven TFWs who were harassed and threatened with dismissal by their employer, after reporting health and safety concerns to human resources. Similarly, in *Luis Gabriel Flores v Scotlynn Sweetpac Growers Inc., 2020,* (ONLRB) a TFW's employment was terminated because he raised health and safety concerns to his employer. In *Decision No. 2015-0671 (Re), 2015* (ABWCAC), a TFW experienced a foot injury because of his work. The employer threatened to terminate their employment if they reported the injury. *Monrose v. Double Diamond Acres Limited* (HRTO) featured an employee whose employment was terminated because he complained about being called a monkey by persons of authority. In these cases, reprisal was mentioned as a reason for workers' hesitancy to report their grievances. In other situations, workers who did report labour grievances to their employer indeed faced some level of reprisal. For example, in *2015-0671(Re), 2015* (ABWCAC), a TFW's workplace injuries worsened because their employer created "an atmosphere of fear that kept workers from reporting injuries" (para 16). Lastly, in *Hosein et al. v. Ontario* and *Logan v. Ontario,* the future employment of TFWs was threatened if they did not provide DNA samples to the OPP. To mitigate the impact of reprisal, these workers decided to raise their concerns as a group, because they believed their employers "might be less able to reprise against them all (54) if they had 'safety in numbers" along with "the benefit of relative anonymity as part of a large group" (para 238).

(2) ***Access to the legal system***

A second barrier for TFWs that becomes apparent in the decisions is related to their familiarity with the Canadian legal system. In some cases, TFWs' inaction or hesitancy to advocate for themselves seems to be because they are (a) unaware of their rights in Canada; (b) do not know how to navigate the legal system, or (c) do not know where to find legal aid or counsel. In three cases, a TFW's understanding of the Canadian or provincial legal system seemed to be an important factor in shaping whether grievances were reported in the first place and how quickly an application, claim or appeal could be filed. In *Hosein et al. v. Ontario, 2018,* the judge acknowledges that the lack of social supports for internet access and "experience with seeking out legal services" impacted TFWs' ability to learn about "Canadian law, processes or supports to access the [human rights] Tribunal" (para 25). In *Decision No: 2011-352, 2011* (ABWCAC), a TFW in Alberta did not report their injuries due to her "unfamiliarity with the WCB process" (para 17). In these cases, the situation often worsens or is left unaddressed, because the worker was not aware of the legal resources at their disposal or how to access them. With this in mind, there are likely many complaints or claims that have not been filed by TFWs, and therefore could not be included in this study, because of this barrier.

The personal circumstances of TFWs also played a role in their access to the legal system, specifically in terms of their ability to fully participate in a proceeding. Not all TFWs have immediate and easy access to social services, internet, funds, transportation, and communication in their home countries. In this sense, navigating a foreign legal process from abroad can prove to be particularly laborious. *Francis v. Great Northern Hydroponics* is a good example of how this barrier impacts the legal process. In this proceeding, the TFW had been repatriated back to Jamaica, yet had to navigate the legal system and correspond with legal counsel in Ontario while

recovering from an injury. The TFW was unable to respond to allegations of misconduct that were brought up by the employer during the proceeding, because she was unaware of those claims. In these instances, the decisions made in tribunals about TFWs may not always be fair, because the worker is not able to speak for themselves.

(3) ***Temporary status***

The temporary status of TFWs is an important indication of the red tape before them, as well as the difficulties this group faces because of their status. Especially for TFWs working on a closed work permit, the ability to attend or adequately participate in a proceeding is usually determined based on how well the TFW can communicate with their counsel, other participating parties, or the tribunal in general after repatriation. As discussed above, in some cases, TFWs were unable to defend themselves adequately in a legal setting because they could not physically attend the hearing. In *Puji v. 1819010 Alberta Ltd o/a Liquor King Spruce Grove* (AHRC), the TFW was unable to attend the hearing because her work permit was near expiration (para 5). Similarly in *Hazel v. 624091 Alberta Ltd., 2013 HRTO*, the worker could not physically attend the hearing unless they received a visitor's visa, something they did not have the resources to gain. This was also observed in *Francis v. Great Northern Hydroponics*.

A worker's ability to attend the hearing is an important consideration given that the work permits of TFWs will expire after a certain amount of time, and applying for a new one prolongs the legal process. The length of time to resolve a grievance in either tribunal is a particularly important factor when we consider temporary permits. In terms of comparison, in this study, there does not seem to be much of a difference in resolution times between HRTs and LTs. Instead, the permit barrier could persist more in either tribunal, depending on the province in which the proceeding is held. In this sense, there may be a higher inclination for TFWs in Ontario to pursue

justice through a labour tribunal, because the process will likely be faster than in the HRTO. On the other hand, AHRC proceedings may be a more efficient than LTs in Alberta. Of course, the true efficacy of these tribunals can be better determined when the outcomes are examined in the following section.

Considering the reality of these barriers paired with the factors discussed in this paper, the efficacy of HRTs and LTs to handle the grievances of TFWs becomes increasingly important for two reasons. First, the time and location are likely major determinants of which tribunal a TFW will use. If a primary barrier for a TFW is about their status; the faster an issue can be resolved, the less likely they will need to pursue the legal matter from abroad. On the other hand, if reprisal, personal circumstances, or a general lack of access to the legal system are active components, a complaint or claim might not be filed in the first place, or workers will hesitate to do so, such as in *Hosein et al. v. Ontario and Logan v. Ontario.*

## 5.5 Outcomes

The outcomes of each hearing were determined based on which participating party was favoured in the decision. A total of 37.6 percent of all hearings were decided in favour of TFWs, meaning that this group in some way gained from the proceeding in the form of awards (i.e., monetary compensation for damages), some receipt of employment benefits (i.e., workplace re-integration or work transition aid and loss of earnings benefits), or – in HRTs – a remedy enforced by the decision-making authority to prevent the occurrence of the same grievance in the future.

Figure 6 illustrates the key differences between tribunals in terms of the overall outcomes. As expected in both provinces, HRTs are more likely to produce favourable outcomes for TFWs than LTs. In Ontario, 52.9 percent of decisions made by the HRTO were favourable to TFWs, while in the AHRC, this was 45.4 percent. On the other hand, in LTs, 29 percent of decisions in

Ontario and 29.6 percent in Alberta were favorable for TFWs. There is some nuance within in these percentages, specifically in terms of who the grievance target was. Typically, hearings dealt with conflicts between one or more workers and their employer, or the worker and a government body. Matters between the worker and the employer were relatively straight forward because they usually entailed issues surrounding work and living conditions, termination of employment, wage discrepancies, or harassment. In contrast, matters between TFWs and government bodies did not always indicate hostility between workers and the government, instead, they were a result of some disagreement with a decision-making body.

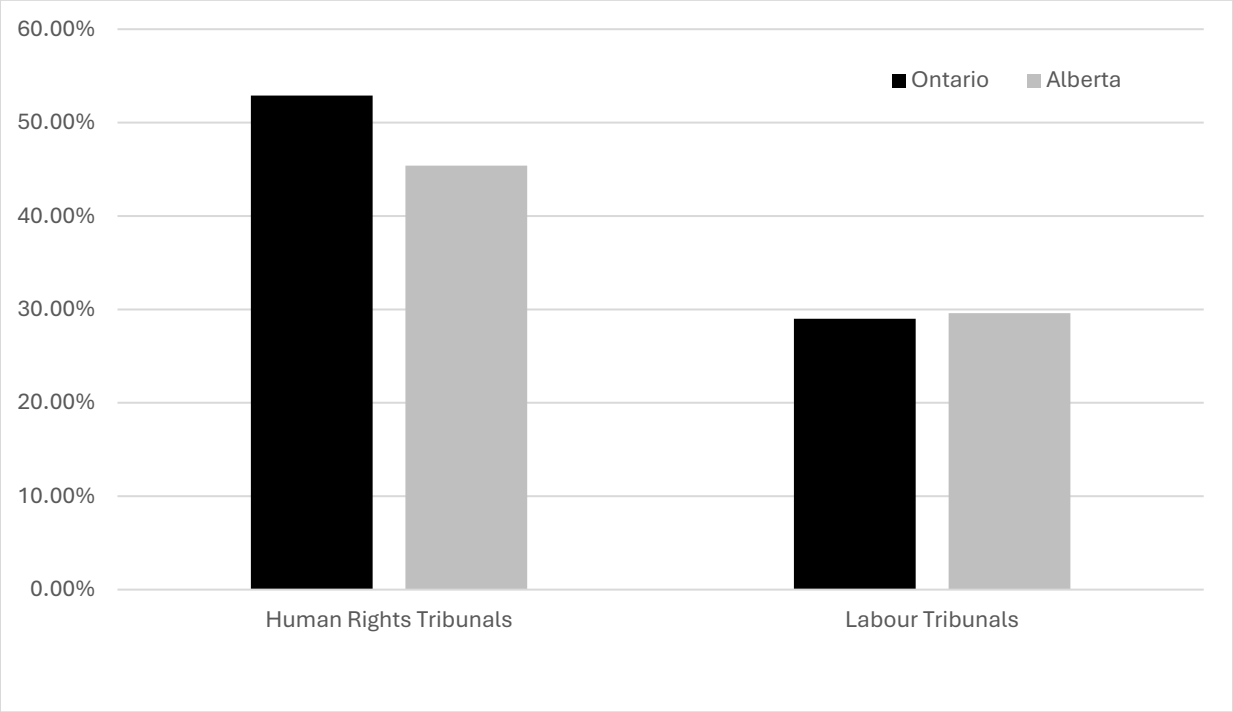


***Figure 6.*** *Percentage of favourable outcomes for TFWs, by tribunal type*

Out of 72 LT decisions, 65.3 percent (47) targeted a government body. In Ontario, 27 LT decisions were made by the ONWSIAT because of a decision made by the ONWSIB, while in Alberta, the ABWCAC heard 26 appeals of ABWCB decisions. These appeals were usually about

TFWs' entitlement to certain workplace benefits, as discussed in section 5.3. In HRTs, issues between a government body and TFWs usually concerned government conduct or a failure of the government to provide certain services or benefits. These observations become clearer when we compare proceeding outcomes where the grievance target was the employer with those about a government body.

The following tables outline the outcomes of LTs and HRTs for all participating parties (TFWs, employers, and government bodies). This accounts for all initial, interim and final decisions in the dataset. For LT proceedings, TFWs had favourable outcomes 29.1 percent of the time (see Table 3). In HRTs, adjudicators decided in favour of TFWs in 51.1 percent of decisions (see Table 4). HRTs tended to have fewer hearings in which the grievance target was the government; in these situations, the outcome was favourable to the worker 38.5 percent of the time, and the government body 15.4 percent of the time. In employer situations, workers saw favourable outcomes 56.7 percent of the time, while employers accounted for 16.7 percent. This further supports the assumption that HRTs would produce more favourable results for TFWs compared to LTs. It also shows, that when the government is a grievance target, they are comparatively more likely to have a favourable outcome than an employer. This difference is likely a result of two factors: the functions of the respective tribunal types and capacity to resolve issues. At the provincial levels, these differences might not be as meaningful as at the tribunal level.

***Table 3.*** *Hearing outcomes in Labour Tribunals.*

| ***Labour Tribunals*** | *Worker vs. Employer* | *Worker vs. government body* | *Total* |
|---|---|---|---|
| *Favourable to worker* | 24% (6) | 31.9% (15) | 29.1% (21) |
| *Favourable to employer/government body* | 8% (2) | 23.4% (11) | 18.1% (13) |
| *Favourable to both parties* | 16% (4) | 21.3% (10) | 19.4% (14) |
| *Neutral* | 52% (13) | 23.4% (11) | 33.3% (24) |
| *Total* | 100% (25) | 100% (47) | 100% (72) |

***Table 4.*** *Hearing outcomes in Human Rights Tribunals.*

| ***Human Rights Tribunals*** | *Worker vs. Employer* | *Worker vs. government body* | *Total* |
|---|---|---|---|
| *Favourable to worker* | 56.7% (18) | 38.5% (5) | 51.1% (23) |
| *Favourable to employer/government body* | 16.7% (5) | 15.4% (2) | 15.6% (7) |
| *Favourable to both parties* | 0 | 7.7% (1) | 2.2% (1) |
| *Neutral* | 26.7% (9) | 38.5% (5) | 31.1% (14) |
| *Total* | 100% (32) | 100% (13) | 100% (45) |

Again, the most obvious reason for these tribunal differences is the functions, purposes, and capacities of either tribunal type. Because HRTs are better equipped to investigate the nuances of a given issue, they are more likely to prove the mistreatment of a TFW, as opposed to LTs, which are more concerned with determining entitlement to benefits – especially in this case, where the bulk of LT decisions were made in the ONWSIAT. Comparatively, HRTs deal with a greater

variety of sensitive grievances such as harassment, differential treatment, and work conditions, which require deeper investigation. It should be noted that interim decisions are captured in these measurements, which presents differences in the actual impact of these outcomes; interim decisions did not always determine entitlements or awards, but instead were issues of case management, administration or witness appointments. Alternatively, LT hearings consider appeals made by TFWs about a decision previously made by the decision board. The success of government bodies in these settings is indicative of boards and tribunals (i.e., ONWSIB, ONWSIAT, and ABWCAC) standing by their original decisions. In this case, government bodies saw favourable outcomes 23.4 percent of the time. Another reason, as stated above, is the restrictions of LTs, which prevents decisions outside of the scope of labour relations and compensation from being addressed in these legal settings. HRTs have much more breadth and often cross over into issues of labour, as is the case in every HRT proceeding in this study.

# Conclusion

The purpose of this study is to determine the differences between the legal outcomes of TFWs in LTs and HRTs. This was done through a comparative investigation of the fortunes of TFWs in HRTs in Alberta and Ontario in which I make several key findings about TFWs in Canada, and the ways that Canadian judicial systems approach their grievances. Overall, the primary differences found in this study surround the tribunal type. First LT decisions are more frequently made than HRT decisions. We also know that amongst the various sectors within which TFWs work, that Ontario's agricultural sector was both the most populated but also most volatile in terms of how many decisions about TFWs had to do with this sector. In the context of TFWs these observations could be explained by regulatory shifts in the TFWP such as the federal

enforcement system as well as a rise in TFWs across Canada, in specific economic sectors. Second, we observed that Ontario and Alberta have opposite patterns in terms of how quickly the tribunals in either province make decisions. Where LTs in Ontario were faster than the HRTO, the AHRC was faster than LTs in Alberta. As such, my overall expectation is only held true in Ontario, where LTs often had one decision regarding the grievance and the HRTO had interim decisions more often, thus prolonging the resolution time for TFWs. As such, it is evident that the duration of proceedings is more meaningfully compared between provinces than between tribunals. This could be because the tribunals under study have differing legal bindings, determined by the province. This observation also has implications for this study, because the duration of proceedings may impact TFWs' choice in legal avenues in very different ways, depending on what province they work in.

There were several grievances discovered in this study, in particular working and living conditions; termination of employment; wage discrepancies, harassment, access to benefits; and differential treatment by government bodies. While these grievances are unsurprising, they expand upon the initial expectations for this thesis, indicating that there are many issues pertaining to TFWs. From a comparative perspective, we also know that these grievances appear most often in HRTs, while access to benefits accounts for 82.2 percent of LT grievances. This confirms that HRTs have more capacity to handle a wider variety of issues, compared to LTs, which seem to be largely restricted to issues about benefits. Within this, in utilizing the legal system there were a few barriers that TFWs tended to encounter, namely, the threat of reprisal, a lack of access to the legal system, and their temporary status. These barriers caused a few rifts in the regular lives of TFWs as well as deter them from pursuing legal recourse in the first place. Finally, HRTs are more likely to make more favourable decisions for TFWs than LTs. We can conclude that this is largely

due to the functional differences and capacities of either tribunal type. Because HRTs investigate a wider variety of issues, adjudicators may be more sympathetic to TFWs than those in LTs, which may be more inclined to strongly consider the interests of the government or the employer.

Put together, these findings allow us to draw a few important conclusions relating to the TFWP and legal recourse. To start, there are important differences between HRTs and LTs that are generally consistent across provinces, namely, the outcomes, grievances, and barriers. However, an interesting deviation from these observations are the differences in resolution times for each proceeding in Alberta, in which, the AHRC reaches decisions faster than LTs, while Ontario's tribunals have an opposite pattern. With this observation in mind, an analysis of more provinces would be needed to comment on the general decision-making times in LTs and HRTs in Canada. This also creates space for further study surrounding the choices TFWs and their representatives make when determining the best legal avenue in which to file a claim or complaint.

While these findings allow us to make crucial observations of the TFWP and legal recourse for foreign workers in Canada, there are still limitations to this study. For one, this study relies exclusively on summaries of decisions, as I could not access the full transcripts of each proceeding. As such, there is no way of knowing if there were other issues, discussed in the hearings that were not documented in the decisions. Therefore, the findings here present a limited understanding of each hearing. Another limitation is that my findings are restricted to only two provinces. This leaves out the other eight provinces that consistently employ TFWs. As such, it would be beneficial for future research to cover LTs and HRTs in all Canadian provinces that receive TFWs. These findings also present an opportunity for further research about the connections between law and foreign work. This study could be further expanded upon with a more detailed research method, such as through interviews with TFWs, lawyers, representatives, employers or decisionmakers,

allowing for a more thorough understanding of the grievances, barriers, and overall experiences of TFWs in Canadian law.

These findings are important because they give us insights about of the use and outcomes of legal action in the context of the TFWP. Firstly, although legal recourse through LTs and HRTs often produces favourable outcomes for TFWs, there are still several barriers that prevent them from seeking legal aid, or that make it difficult to do so adequately. This makes them a particularly disadvantaged group in the Canadian justice system. The best way to overcome these barriers lies within the capacities and efficacy of tribunals to receive and assess complaints and claims made by TFWs. Generally, tribunals should have faster decision-making processes to better accommodate the temporary status of TFWs. As TFWs seem to appear in LTs more often, these tribunals need to be better equipped a wider variety of grievances brought by TFWs. Beyond courts and tribunals, government bodies at the federal and provincial levels should aim to establish stronger policies and regulations that adequately protect TFWs. To do this, there needs to be more focus on both the conduct of employers as well as general perceptions of TFWs by decisionmakers. Especially in a legal sense, barriers surrounding the temporariness of these migrant workers (i.e., work permits and the threat of reprisal) impact whether legal recourse can be effectively used by this group. As such, policies protecting the legal pursuits of TFWs may improve the true efficacy of this avenue as a means of self-advocacy.

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