

Paying Foreign and Canadian Crews Comparable Wages Not Good Enough



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By Thora Sigurdson, Nicola Sutton, and Derek Knoechel

SELI Canada Inc. entered into a joint venture with SNC Lavalin and successfully bid on a contract to build a large rapid transit project in the Vancouver area. The so-called “Canada Line” has been a “hot button” project, causing heated debate about the cost to taxpayers, the disruption to businesses and traffic, and the use of foreign workers.

The British Columbia Human Rights Tribunal has recently concluded that SELI discriminated against its Latin American crew. Those workers were paid wages comparable to the Canadian workers but less than members of a crew brought over from Europe. Damages may run to the millions of dollars.

SELI specializes in tunnel work and carries out business internationally. The company staffs jobs primarily through a mobile international workforce that moves from project to project and is supplemented by local employees. It was originally intended that SELI would staff the Canada Line project from its Latin America team, but because of delays and other difficulties, a European crew was brought in partway through the project.

The Construction and Specialized Workers Union, Local 1611 obtained certification to represent the Canadian and Latin American workers. Its bargaining unit did not include the more highly paid European workers. The union was of the view that the terms and conditions of employment discriminated against the Latin American workers and took up the fight on their behalf (Construction and Specialized Workers’ Union et al v. SELI Canada Inc. et al, 2008 BCHRT 436).

The union first went to the British Columbia Labour Relations Board, claiming that SELI had discriminated against the Latin American workers by paying them less than the Canadian workers. However, the board ruled against the union. It found that, when all compensation was considered, the Latin American workers were paid comparably to the Canadian workers.

Unsuccessful at the Labour Board, the union filed a human rights complaint with the B.C. Human Rights Tribunal. The allegation that the Latin American workers were discriminated against because they were paid less than the Canadian workers was again dismissed by the tribunal on the basis that it had been dealt with in the Labour Board proceedings. However, the allegation of discrimination between the Latin American workers and the European workers proceeded before the tribunal.

The union’s claim was fairly straightforward: It claimed that the two groups were properly comparable and that the Latin American workers were paid less and had adverse housing, meal, and expense arrangements than the European crew members.

SELI's response was more complicated. It claimed that the European workers were more skilled and/or had more experience than the Latin American workers. In addition, the company relied on what it claimed were its international compensation practices. It said its practice was that when a worker started out, he would get the market rate at the place of the first project. When transferred, he would get the higher of the market rate at the first project or the market rate at the project to which he was transferred.

Thus, SELI argued, because wages were generally higher in Europe than in Latin America, the European workers were paid more than the Latin American workers on the Canada Line project. The difference was not based on the workers' place of origin, but because of the company's international compensation program.

The tribunal released its 177-page decision in December of 2008. To briefly summarize, the tribunal found that the evidence did not support SELI's justifications for the pay differences. The tribunal found that the Latin American and European workers were equally skilled overall. With respect to the international compensation policy, the tribunal noted that a number of the Latin American workers had worked on projects in Europe and other higher-paying markets including Hong Kong but apparently had not received the increase in pay that the policy would seem to require.

Furthermore, the tribunal found that SELI had not adequately canvassed local market wage rates. The tribunal concluded the policy did not support the difference in compensation between the two groups of workers.

Since the Europeans were paid more than the Latin America workers for substantially the same work, therefore the union had established discrimination on the face of it. And SELI's international compensation policy did not provide a nondiscriminatory justification for the difference, or a "bona fide occupational requirement" (BFOR), as required under the provincial Human Rights Code.

The tribunal found that in applying the policy, SELI had taken "advantage of the existing disadvantaged position of these workers, who are from poorer countries, and [perpetuated] that disadvantage." In doing so, the company was found to have "perpetuated, compounded and entrenched existing patterns of inequality" contrary to the Human Rights Code.

The tribunal awarded damages equal to the difference in salaries and expenses between the Latin American workers and the European workers (plus interest) and \$10,000 for each Latin American worker for "injury to dignity, feelings, and self-respect." The tribunal did not quantify the wage differential award, but it is expected that it could run to millions of dollars.

The employer has filed for judicial review of the decision in the British Columbia Supreme Court. That judicial review has not yet been heard.

Commentators have noted that it is difficult to understand how compensation equivalent to that paid to the Canadian workers can be said to “perpetuate disadvantage,” particularly when the compensation paid to the Canadian and the Latin American workers was the result of the collective bargaining process. (Also noteworthy is the fact that the bargaining unit has since been decertified.) Others have questioned why the highest wage rate is necessarily the “right” wage rate for comparison purposes.

In the meantime, employers carrying out business internationally will want to plan carefully when bringing foreign work crews into Canada. Difficulties may arise if compensation differences are based on one’s country of origin or other non-work-related factors.