Date Issued: December 3, 2008
File: 4196

Indexed as: C.S.W.U. Local 1611 v. SELI Canada and others (No. 8), 2008 BCHRT 436

IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Construction and Specialized Workers' Union Local 1611 on behalf of Foreign workers on temporary work visas from Central and South America, at this time Costa Rica, Columbia, and Ecuador, who are employed by the Respondents and are employees covered by the bargaining certificate granted by the Labour Relations Board of British Columbia between the Construction and Specialized Workers' Union, Local 1611, and SELI Canada Inc. and SNCP-SELI Joint Venture

COMPLAINANT

A N D:

SELI Canada Inc., SNCP-SELI Joint Venture and SNC Lavalin Constructors (Pacific) Inc.

RESPONDENTS

REASONS FOR DECISION

Tribunal Panel: Heather M. MacNaughton,
Barbara Humphreys
and Lindsay M. Lyster

Counsel for the Complainant: Charles Gordon, assisted by, for parts of the hearing or in written submissions, Christopher Misura, Carol Whittome, Josh Paterson and Kevin Blakely

Counsel for the Respondents:	Peter A. Gall, Q.C., assisted by, for parts of the hearing or in written submissions, John Heaney, Craig Munroe and Nitya Iyer
Counsel for Certain Employees:	Keith J. Murray (written submissions with respect to applications by Certain Employees)
Dates of Hearing:	September 24, October 1 – 4 and 23 – 25, November 5 – 6 and December 5 – 7, 2007, January 21, 25 and 28, February 13 – 15 and 29, March 10 and 12 –13, and April 10, 2008

TABLE OF CONTENTS

I INTRODUCTION

[1] The Construction and Specialized Workers' Union, Local 1611 ("CSWU") filed a representative complaint on behalf of a group of Latin American workers employed by the entities responsible for the construction of the tunnel on the Canada Line project, formerly known as the "RAV Line" project. The Canada Line project is one of the infrastructure improvements being constructed in Vancouver in advance of the 2010 Olympics. When complete, it will link Richmond and the Vancouver International Airport with downtown Vancouver. The tunnel constructed by the Respondents goes underneath downtown Vancouver from Waterfront Station to the south side of False Creek.

[2] The Complainant Group was described by CSWU in the complaint as:

> Foreign workers on temporary work visas from Central and South America, at this time Costa Rica, Columbia, and Ecuador who are employed by the Respondents and are employees covered by the bargaining certificate granted by the Labour Relations Board of British Columbia between the Construction and Specialized Workers' Union, Local 1611, and SELI Canada Inc. and SNCP-SELI Joint Venture.

[3] The term "Latin American" was used throughout the hearing to describe the members of the Complainant Group, and in this decision we refer to the group on whose behalf the complaint was filed as the "Complainant Group" or the "Latin American" workers.

[4] CSWU named SELI Canada Inc., SNCP-SELI Joint Venture and SNC Lavalin Constructors (Pacific) Inc. as the respondents to the complaint. SELI Canada Inc. is a wholly owned subsidiary of SELI SPA, which is based in Rome, Italy, and which specializes in tunnel boring operations worldwide. SNC Lavalin Constructors (Pacific) Inc. is a wholly owned subsidiary of SNC Lavalin Canada Inc. SNCP-SELI Joint Venture is a joint venture between SNC Lavalin Constructors (Pacific) Inc. and SELI Canada Inc, and is responsible for constructing the tunnel on the Canada Line project. We refer to the respondents collectively as the "Respondents", and to the three respondents individually as "SELI", and occasionally "SELI Canada", "the Joint

Venture" and "SNC Lavalin", respectively, as required. We also refer to SELI SPA as "SELI" or "SELI SPA", as required.

[5] CSWU alleges that the Respondents discriminated against members of the Complainant Group on the basis of their race, colour, ancestry and place of origin in respect of the terms and conditions of their employment, contrary to s. 13 of the *Human Rights Code*. The members of the Complainant Group were included in the bargaining unit represented by CSWU at the time the complaint was filed.

[6] Members of the Complainant Group had worked for SELI on the La Joya hydroelectric project in Costa Rica, and were brought by the Respondents to Vancouver to work on the Canada Line project in or about April 2006. At that time, the members of the Complainant Group started assembling the tunnel boring machine ("TBM") to be used on the Canada Line project, after which they began the specialized tunnelling work. Canadian residents were hired to do non-specialized work outside the tunnel. Thereafter, the Respondents brought other workers from Europe, who came to Vancouver starting in or about September 2006, to work alongside members of the Complainant Group performing specialized work in the tunnel. We refer to this group as the "European" workers.

[7] In the original complaint, filed August 3, 2006, CSWU alleged that the Latin Americans were discriminated against in comparison to the Canadian residents with whom they worked initially. CSWU amended the complaint on October 12, 2006, to add allegations that the Latin Americans were discriminated against in comparison to the Europeans who had, by that time, started to arrive and work on the project.

[8] In the first written preliminary decision rendered in these proceedings, we granted the Respondents' application that CSWU was estopped from relitigating its allegation that the Respondents discriminated against the Latin Americans in comparison to the Canadian residents, an issue on which the Labour Relations Board (the "LRB") had ruled against CSWU in proceedings before it: *C.S.W.U. Local 1611 v. SELI Canada and others*, 2007 BCHRT 404. As a result, the complaint before us deals solely with allegations of discrimination as between the Latin Americans and the Europeans working for the Respondents on the Canada Line project.

[9] CSWU alleges that the Latin American workers were discriminated against in the terms and conditions of their employment. There are four main aspects of the alleged discrimination:

- Lower salaries, with the Latin Americans being paid substantially less than the Europeans for performing the same or similar work;
- Adverse housing, with the Latin Americans residing at the 2400 Motel on Kingsway, and most of the Europeans being housed in condominiums rented by the Respondents in the False Creek area, close to the worksite;
- Adverse meal arrangements, with the Latin Americans being given money for breakfast, and tickets redeemable at two restaurants chosen by the Respondents for lunch and dinner, and most of the Europeans being given money for breakfast and dinner, and tickets for lunch only; and
- Adverse expense arrangements, with the Latin Americans being required to submit expenses for reimbursements, receiving an average reimbursement of about $76 per month, and the Europeans being given allowances of $300 per month, regardless of actual expenses incurred.

[10] The Respondents deny any discrimination. They dispute some of CSWU's allegations about the wages, living conditions and benefits provided to the two groups. They admit, however, that the Europeans were paid more than the Latin Americans. The core of their defence is that the European workers were paid more than the Latin Americans because of SELI's international compensation practices.

[11] In brief, the Respondents say that the European workers were paid more than the Latin Americans on their respective previous SELI projects. The Respondents could not pay the Europeans less than what they had earned on their previous projects and, in accordance with SELI practice, they were given raises to come to Vancouver. As a result, the Europeans earned more than the Latin Americans who, while they were also given raises to come to Vancouver after their previous project, continued to earn less than the Europeans.

[12] The Respondents also raise other defences, including that the experience and skills of the Europeans were more valuable than those of the Latin Americans. The Respondents submit that the Latin Americans, many of whom had worked for SELI on only one previous project in Costa Rica, were less experienced and skilled than the Europeans, and point to this as a non-discriminatory explanation for the different terms and conditions of employment between the two groups of workers.

II SUMMARY OF DECISION

[13] We have concluded that the complaint is justified. CSWU established a *prima facie* case that the Respondents discriminated against the members of the Complainant Group in treating them differently from, and adversely as compared to, members of the European comparator group in respect of salaries, accommodation, meals and expenses. The Respondents did not establish a justification for their *prima facie* discriminatory conduct. In particular, SELI's international compensation practices, as revealed in the evidence before us, did not constitute a *bona fide* occupational requirement or "BFOR".

[14] As a result of this conclusion, we have ordered what we consider to be the appropriate remedies, including that the Respondents pay each member of the Complainant Group the difference between the salary paid to them and the average salary paid to members of the comparator group, the difference between the expenses paid to members of the two groups, and compensation for injury to dignity, in the amount of $10,000 each.

[15] We have permitted the four members of the Complainant Group, who applied to do so, to opt out of the complaint, with the result that they do not receive the remedies ordered.

III THE PROCEEDINGS AND THE STRUCTURE OF THIS DECISION

The proceedings

[16] This hearing took place on 24 days over eight months. It had originally been scheduled for two weeks, which was reduced to a week in a pre-hearing conference just

prior to the commencement of the hearing, during which counsel assured the Tribunal that a week would be sufficient to hear the complaint.

[17] Prior to the hearing, the parties entered into an Agreed Statement of Facts ("ASF"), which was entered as an exhibit, and which is reproduced below. Incorporated within the ASF were three volumes of agreed upon documents.

[18] Counsels' time estimate proved wholly inaccurate. Despite the ASF, the parties ultimately called 29 witnesses, five of them twice. The hearing was sometimes highly contentious, which added to the length and difficulty of the proceedings.

[19] Further, the hearing was conducted in the face of the reality that the Respondents' work on the Canada Line project would soon be coming to an end, and with it, the non-resident workers on the project would be leaving the country. The hearing needed to be completed before any non-resident workers who were going to testify left the province. Initially, the Respondents advised the panel and CSWU that the project was expected to complete at the end of December 2007; they later revised this estimate to mid-February 2008; and ultimately the TBM "broke through" in early March 2008, thereby bringing the substance of the Respondents' and the workers' work on the project to an end. Not without some difficulty, both parties were able to call all their witnesses prior to the conclusion of the hearing.

[20] In the course of the hearing, the parties called upon the panel to decide a large number of strongly contested interlocutory matters. Many of those were addressed in formal written decisions; others were dealt with orally. The seven written decisions are summarized below:

1. *C.S.W.U. Local 1611 v. SELI Canada and others*, 2007 BCHRT 404 ("*CSWU No. 1*" or the "Estoppel decision"). Issued October 23, 2007.

   The Respondents applied for an order prohibiting CSWU from relitigating the issue of whether the terms of compensation contained in the collective agreement for the Latin American and Canadian resident employees discriminated against the Latin American workers.

   The panel granted the application.

   This decision is described in greater detail below in addressing the collective bargaining context.

2. *C.S.W.U. Local 1611 v. SELI Canada and others (No. 2)*, 2007 BCHRT 419 ("*CSWU No. 2*" or the "Re-opening decision"). Issued November 5, 2007.

   The Respondents applied to re-open the then outstanding application with respect to CSWU's representative status and CSWU's retaliation complaint, after the close of submissions, for the purposes of putting in further evidence in the form of two affidavits, obtaining disclosure of retainer letters from CSWU, and cross-examining CSWU witnesses.

   The panel denied the application. The reasons are set out in the decision, and include that the affidavits were inherently unreliable as they contained hearsay, some of it double hearsay, from unidentified sources. The retainer letters were not relevant to the representation issue, as they would not indicate the level of support for the complaint, whether at the time it was filed or at the time of hearing, as they were created for a different purpose. Further, they were subject to solicitor-client privilege.

3. *C.S.W.U. Local 1611 v. SELI Canada and others (No. 3)*, 2007 BCHRT 423 ("*CSWU No. 3*" or the "Representative Status and Retaliation decision"). Issued November 9, 2007.

   At or near the outset of the hearing, the Respondents challenged CSWU's status as the representative of the Complainant Group, and CSWU alleged that the Respondents had engaged in retaliation, contrary to s. 43 of the *Code*. The panel originally decided that it would deal with these issues in the context of the hearing of the merits of the complaint. The contentious nature of the proceedings made this unworkable, and the panel, with the agreement of the parties, later decided to deal with these issues before dealing with the merits of the complaint.

   The Representative Status and Retaliation decision is comparatively lengthy, and the reasons not readily summarized. Rather than attempt to do so, we set out the following extracts from the decision, first dealing with the allegations of retaliation, and then the challenge to CSWU's status as the representative of the Complainant Group:

   - The crux of the Union's retaliation complaint is a petition which the Employer presented to members of the Complainant Group for signature. It was written in Spanish. Translated, it says: "I no longer wish the Union to represent me before the Human Rights Tribunal." (para. 21)

   - In all of the circumstances, the panel concludes that a reasonable complainant in Mr. Gamboa's and Mr. Barbosa's position would have found being presented with the petition in the manner they were coercive and intimidating. They would reasonably have

perceived that their Employer was linking their willingness to sign the petition with their prospects for future work. (para. 43)

- The petition was clearly intended for a purpose. On the evidence of the Employer's managers, it was Mr. Ciamei who directed that the petition be prepared and presented to the employees. In the absence of any explanation from Mr. Ciamei about another possible purpose, the panel concludes that the purpose of the petition is clear from the context in which it arose, and its timing. That purpose was twofold. First, it was an attempt to intimidate and coerce individual members of the Complainant Group to withdraw their support for the Union to represent them in this complaint. Second, it was an attempt on the Employer's part to create evidence to be used to attack the Union's representative status and, if successful, either derail this complaint or, at a minimum, reduce the potential number of remedial claims against the Employer in the event the complaint is justified on the merits. (para. 43)

- As a result of all of the foregoing, the panel concludes that the complaint of retaliation contrary to s. 43 of the *Code* has been established. (para. 49)

- The Employer applies to disqualify the Union as the representative of the Complainant Group because it never was, or is no longer, an appropriate representative as it failed to meet the minimum standards the Employer says are necessary to be an adequate representative, and it does not represent the interests and wishes of all members of the Complainant Group. (para. 50)

- The panel is not persuaded by the arguments put forward by the Employer that the Union is not a proper representative to proceed with the complaint on behalf of the Complainant Group. Given the Employer's actions coinciding with the start of the hearing, the panel is satisfied that it would not now be possible to determine the true wishes of group members regarding this complaint. In any event, Mr. Gamboa and Mr. Barbosa have testified that they wish to have the Union proceed, and the panel concludes that, given all the circumstances, this is sufficient. (para. 100)

- For the reasons given, the panel concludes the Employer engaged in retaliation contrary to s. 43 of the *Code*. Also for the reasons given, the panel concludes that the Employer has failed to establish that the Union is not a proper representative of the Complainant Group. The panel has ordered a number of remedies for the retaliation established, including a declaration, a cease and desist order, and costs, as set out above. (para. 120)

4. *C.S.W.U. Local 1611 v. SELI Canada and others (No. 4)*, 2007 BCHRT 442 ("*CSWU No. 4*" or the "Stay or Adjournment decision"). Issued November 27, 2007.

The Respondents filed a petition for judicial review of *CSWU No. 3*. They applied to the panel for a stay or adjournment of the Tribunal's proceedings pending resolution of their application for judicial review.

The panel denied the applications.

In considering the request for an adjournment of the hearing dates, which coincided with the days the Respondents wanted the petition to be heard in Court, the panel held that the request was not reasonable. While the Respondents' desire to have the judicial review hearing held soon was understandable, CSWU had not agreed to the dates proposed by the Respondents, and no motion had been made to the Court to have the matter proceed on those dates. As a result, the stated basis for the adjournment did not yet exist. Further, the panel held that granting the adjournment would be unduly prejudicial to CSWU. This conclusion was based in part on the information before the panel at that time, which indicated that the project could complete either in late December or February, with the result that any delay in the hearing could result in employee witnesses no longer being in the country and therefore being unavailable to testify. It was also based on the inherent prejudicial effect of granting an adjournment of unforeseeable length in the midst of hearing.

In considering the request of a stay of the Tribunal's proceedings, the panel accepted, for the purposes of the application, that there was a serious issue to be tried. The panel did not accept that the Respondents would suffer irreparable prejudice if the stay was not granted. The panel concluded that the balance of convenience did not favour granting a stay.

On December 3 and 4, 2007, the Respondents applied in Court for an interim stay of the Tribunal's proceedings, and CSWU cross-applied for an adjournment of the judicial review proceedings, which at that time continued to be scheduled for December 5 and 6, when the hearing before the Tribunal was also scheduled to resume. The Court denied the Respondents' application, and granted CSWU's: oral reasons for judgment, December 4, 2007.

In the result, the proceedings before the Tribunal continued. The Respondents' application for judicial review of *CSWU No. 3* has not yet been heard in court.

5. *C.S.W.U. Local 1611 v. SELI Canada and others (No. 5)*, 2007 BCHRT 451 ("*CSWU No. 5*" or the "Bias decision"). Issued December 5, 2007.

At the resumption of the hearing following the previous two panel decisions and the Court's decision denying the Respondents' stay application and granting CSWU's adjournment application, the Respondents applied to the panel to have us disqualify ourselves on the ground of bias. The Respondents submitted that the panel could only have reached its decision in *CSWU No. 3* that CSWU had standing to pursue the complaint if it had already concluded the complaint would succeed. Further, the Respondents submitted that the panel, having made its decision in *CSWU No. 3*, now had a direct interest in the complaint succeeding. On both these bases, the Respondents submitted there was a reasonable apprehension of bias.

The panel denied the application. We concluded that a reasonable person, fully apprised of the circumstances, would not conclude that the panel had prejudged the complaint, or that it had an interest, direct or otherwise, in the complaint succeeding.

6. *C.S.W.U. Local 1611 v. SELI Canada and others (No. 6)*, 2008 BCHRT 31 ("*CSWU No. 6*" or the "Expert Evidence decision"). Issued January 24, 2008.

   The Respondents indicated their intention to call Rebecca Powers as a witness to give evidence about a report which was published by Ms. Powers' employer, Mercer Human Resource Consulting (the "Mercer Report"). CSWU objected to the proposed evidence.

   The panel decided that Ms. Powers' proposed evidence was expert opinion evidence, and that the Report is an expert report. We concluded that Ms. Powers was not the proper witness to call to speak to the Mercer Report as she was not involved in its writing, editing, or peer review. Despite the fact that the Respondents failed to comply with the requirement for introducing expert evidence contained in Rule 33, the panel exercised its discretion to permit the Respondents to introduce the Mercer Report, provided that they called as a witness one of its author/editors or peer reviewers, and that CSWU was permitted to call expert evidence in rebuttal.

   Ultimately, the Respondents called Carlos Mestre to testify about the Mercer Report.

7. *C.S.W.U. Local 1611 v. SELI Canada and others (No. 7)*, 2008 BCHRT 80 ("*CSWU No. 7*" or the "Opting Out decision"). Issued February 29, 2008.

   Counsel for then unidentified "Certain Employees" filed an application for a declaration that they had the right to opt out of the complaint or, in the alternative, for intervenor status in the proceedings.

   The panel concluded that members of the Complainant Group were permitted, on application, and subject to certain conditions, to opt out of the Complainant Group and the complaint.

> Five members of the Complainant Group later applied to opt out, one of whom subsequently withdrew his application, leaving four in total. Later in this decision, we address that application, concluding that the four applicants may opt out.

[21] In this decision, we do not address further any of the interlocutory issues and decisions, except to the extent necessary to address the following matters: our reasons for our decision allowing CSWU to call rebuttal evidence; and our decision on both the merits of the complaint, and the application of Certain Employees to opt out of the complaint.

The appendices

[22] In an effort to reduce the length and increase the readability of this decision, while at the same time ensuring that all information necessary to a full understanding of the proceedings, evidence and issues is included, we have created five appendices, which form part of this decision.

[23] Appendix A is a chronology of the proceedings, which briefly summarizes the major issues raised by the parties, significant correspondence between the Tribunal and the parties, the panel's oral and written decisions, and the witnesses who testified.

[24] Appendix B is a chronology of the proceedings between CSWU and the Respondents before the LRB.

[25] Appendix C is a list of the exhibits introduced.

[26] Appendix D is a list of the witnesses who testified.

[27] We have reproduced as Appendix E the "TBM Bored Tunnel Organization Chart" created by the Respondents at CSWU's request, which was referred to in paragraph 16 of the ASF, as it is of assistance in understanding much of the evidence and analysis. It reflects a snapshot of the positions occupied by members of both the Complainant Group and the comparator group as of the date of its creation, sometime shortly prior to the start of the hearing.

[28] The names of the workers on the project, including those who testified before us, were not spelled consistently in the parties' materials. We have attempted to adopt

consistent spelling throughout, taken, wherever possible, from the immigration documents submitted by SELI to Canadian authorities in order to obtain temporary work permits for the workers. To increase clarity, each time we refer to an individual worker, we use their full name, unless it is not necessary to do so in context.

The roadmap

[29] We offer the following roadmap to the structure of the body of the decision to assist the reader in following and understanding it.

[30] The next section of the decision sets out the parties' ASF. We refer to and highlight some but not all of the facts contained in the ASF elsewhere in the decision. In keeping with the parties' agreement, however, all of the facts contained in it are accepted as true, for the purposes of this decision. Throughout the decision, we make additional findings of fact as necessary. Not all witnesses nor all parts of their testimony are specifically referred to in the body of this decision, but we have taken into account all evidence before us in reaching our conclusions.

[31] Context is crucial to any discrimination analysis. In the next three sections, we set out three factual contexts which are necessary to this decision. First, we address the SELI context, introducing its international compensation practices, a matter returned to in much greater depth in the BFOR analysis. Second, we address the project context, discussing the nature of the Respondents' work on the Canada Line, and the employees who worked on it. Third, we address the collective bargaining context, discussing the relationships between the Respondents, CSWU, and the workers on the project. Facts arising out of these three contexts are discussed in greater detail as necessary in the course of our analysis.

[32] Having described the contexts necessary to understanding this complaint and decision, we next turn to CSWU's application to call rebuttal evidence about the work performed by the Costa Rican members of the Complainant Group on the La Joya project. In this section of the decision, we set out the procedural and evidentiary background to that application, provide our reasons for granting the application, and make our findings of fact about the work performed on the La Joya project. The rebuttal

application and findings of fact related to it form a relatively discrete part of the decision. They were placed in this location in the decision because they inform the discrimination analysis which follows.

[33] We then turn to the analysis of whether the members of the Complainant Group were discriminated against. The analysis has a number of parts. First, we consider the parties' submissions about what is necessary to establish a *prima facie* case of discrimination. Having reached our conclusions on this point, we go on to determine if CSWU has met its burden of establishing the three elements of a *prima facie* case.

[34] The first element requires CSWU to establish that the members of the Complainant Group share characteristics related to each of the four grounds of alleged discrimination: race, colour, ancestry and place of origin. We conclude that they do.

[35] The second element requires CSWU to establish that the members of the Complainant Group were treated adversely. In the context of this case, this element involves a comparator group analysis, comparing members of the Complainant Group to members of the comparator group, made up of European workers performing the same or substantially similar work on the project. We conclude that the Respondents treated members of the Complainant Group adversely as compared to members of the comparator group, in respect of salaries, accommodation, meals and expenses.

[36] The third element requires CSWU to establish that the grounds of discrimination were factors in the adverse treatment. The parties framed the complaint differently: CSWU as one of adverse effect or systemic discrimination; the Respondents as one of direct discrimination. In this part of the decision we discuss the significance of the characterization to what must be proven in order to establish that the grounds of discrimination were factors. We conclude that the complaint is, in essence, one of adverse effect discrimination, albeit with some characteristics of direct and systemic discrimination. We conclude that CSWU has established that the race, colour, ancestry and place of origin of members of the Complainant Group were factors in the adverse treatment they suffered. We further conclude that the differences in treatment are not explained by any differences in the experience, skills or duties of the members of the two groups.

[37] We conclude that CSWU has established a *prima facie* case of discrimination.

[38] The Respondents' chief defence to the complaint was that the differences in treatment, at least in terms of salary, were the result, not of discrimination, but of SELI's international compensation practices. In their submissions, the parties located this defence at two different points in the analysis: the Respondents included it as part of the *prima facie* case analysis, while CSWU treated it as a potential BFOR justification. We agree with CSWU about where in the analysis SELI's international compensation practices should be considered. We therefore consider the evidence about those practices as part of a BFOR analysis, not the *prima facie* case analysis.

[39] In the next section, we consider whether SELI's international compensation practices justify the *prima facie* discrimination we have found. We conclude that, on the evidence before us, they do not, with the result that the complaint is upheld as a contravention of the *Code*.

[40] Having concluded that the complaint is justified, we consider the application made by four members of the Complainant Group to "opt out". We grant their application.

[41] In the final section, we consider what remedies should be ordered for the discrimination we have found. We order the Respondents to cease and refrain from committing the same or a similar contravention of the *Code*, and declare that the conduct complained of is discriminatory. We order financial compensation to members of the Complainant Group for the differences in salary and expenses paid to members of the Complainant and comparator groups. We give directions about how the quantum of those damages is to be determined, and remain seized in case the parties are unable to agree. Finally, we order compensation to members of the Complainant Group for the injury to their dignity, feelings and self-respect as a result of the discrimination to which they were subjected.

[42] Finally, in *CSWU No. 3*, the Representative Status and Retaliation decision, we ordered the Respondents to pay CSWU costs for improper conduct. The parties disagreed about the scope and quantum of costs payable. We require further submissions on these issues, and will write separately to the parties about the submissions required.

IV THE AGREED STATEMENT OF FACTS

[43] As indicated, the parties entered into an Agreed Statement of Facts, which we reproduce here, in its entirety, not including the three Books of Documents incorporated by reference.

> 1. The following facts have been agreed to by the Parties. In addition, the Books of Documents referred to form a part of these Agreed Facts.
>
> **I. The Project and the Parties**
>
> 2. The Canada Line is a new rapid transit rail line that is currently under construction in Vancouver. It will link downtown Vancouver with Richmond and the Vancouver International Airport.
>
> 3. The section of the Canada Line from Waterfront Station as far south as 64th Avenue is underground. The portion of the line from Waterfront Station to the south side of False Creek is being built by boring two tunnels. The Complaint concerns the work of boring the two tunnels (the "Project").
>
> 4. The Canada Line is funded by the Governments of Canada and British Columbia, the Greater Vancouver Transportation Authority, the City of Vancouver and the Vancouver Airport Authority. An entity called Canada Line Company has overall authority for the Canada Line. Another entity called InTransitBC ("InTransit"), also known as the "Concessionaire", has been contracted to design, build, partially finance and maintain the Canada Line for a 35 year period. InTransit has contracted with SNC Lavalin Canada Inc. to be the "EPC Contractor", giving it responsibility to engineer, procure and construct the Canada Line.
>
> 5. The EPC Contractor has contracted the Project to the Respondent, SLCP-SELI Joint Venture (the "Joint Venture"). The Joint Venture is between SNC Lavalin Constructors (Pacific) Inc. ("SNC Lavalin"), a wholly-owned subsidiary of SNC Lavalin Canada Inc., and SELI Canada Inc. ("SELI"). SELI is a wholly owned subsidiary of SELI SPA, which is based in Rome, Italy and specializes in tunnelling boring operations worldwide.
>
> 6. Under the joint venture agreement, SELI provides the tunnelling expertise for the Project. Labour is supplied by SELI, and by the Joint Venture. Certain managerial and non construction employees are provided by SNC Lavalin.

II. The Employees

7. It is understood and agreed that the employees with which this complaint is concerned ("Employees") are non-managerial employees of SELI or the Joint Venture who perform construction work on the Project, whether above or below ground.

8. SELI SPA employs individuals from many different countries and frequently deploys its employees with expertise in tunnelling to various projects around the world. SELI SPA offered a number of its employees with tunnelling experience who were working on SELI SPA projects at various locations around the world the opportunity to work on the Project in Vancouver. Employees who wished to work on the Project were hired by SELI.

9. All of these non-resident Employees had previously been employed by SELI SPA or its subsidiaries on other tunnelling projects for periods ranging from 12 months to 20 years.

10. The Joint Venture hired workers resident in the Lower Mainland to work on the Project. None of these workers had previously worked for SELI SPA.

11. The number of workers employed on the Project and the number of shifts has varied, depending upon the particular stage of the Project.

III. Nature of the Work

12. Employees rotate through all shifts, switching between shifts on a weekly basis. The work on the Project can be divided between the underground and aboveground shifts which are as described below.

13. The work underground involves the tunnel boring machine ("TBM") boring a tunnel through the rock. Presently, there are 3 shifts of 8 hours each. The TBM is operated by a TBM Pilot. There is also a TBM Mechanic and a TBM Electrician associated with operating the TBM. As the TBM progresses, pre-formed concrete rings are erected which form the interior of the tunnel. These rings are erected using hydraulic equipment by an Erector Operator and an Erector Operator Helper. Once the rings have been erected, they are bolted together and then sealed using grout pumped from a batch plant on the surface; this work is done by a Grouting Pump Operator. The material excavated by the TBM is taken by conveyor and loaded into rail cars; the conveyor is operated by the Conveyor Operator. The rail cars are picked up by a locomotive and pulled to the surface where the excavated material is removed, and the empty cars returned to be filled. The locomotive is operated by the Loco Operator. As the TBM progresses, more track and service lines (water, air and grout) need to

be laid for the tunnel to proceed; this work is done by the several General Labourers. Finally, each shift underground is supervised by a TBM Shift Foreman and sometimes (depending on the criticality of the tunnel section) also by a tunnel engineer.

14. The work aboveground is concerned with supporting the underground excavation. This consists of operating the batch plant which produces the grout used to seal the rings; this plant is operated by the Grout Plant Operator. There is also a gantry crane which is operated by the Gantry Crane Operator, and two to three General Labourer positions that help unload the rail (muck) cars and load the concrete segments and other materials.

15. In addition to the above production work, there is a significant amount of maintenance and support work involved in the Project. Underground maintenance is done daily on the maintenance shift and involves a Hydraulic Mechanic, a Diesel Mechanic, Welders, a Cutterhead Mechanic and a Cutterhead Mechanic Helper. Aboveground, there are a number of other positions in the yard working day shift only; these include a Yard Foreman, Muck Pit Excavator Operator, several Forklift Operators, a Crane Operator, many Segment Repair & Rail workers and a large number of General Labourers.

16. In response to a request by the Complainants, the Respondent compiled a document entitled "TBM Bored Tunnel Organization Chart" showing each of the positions on the Project and the employees occupying those positions. A copy of that document is at tab 122 of the documents.

IV. Terms and Conditions of Employment

17. Offers of employment were made to resident Canadian Employees starting in January, 2006. These offers were made in writing and set out the start date, position, hourly rate of pay, benefits and other conditions of employment. Copies of representative offers of employment made to the resident-Canadian Employees are set out at tabs 40 to 78 of the documents.

18. SELI SPA began asking its existing workers whether they were interested in working on the Project in the winter of 2005 and spring of 2006. Because the SELI SPA projects in Latin America were coming to an end, many employees on those projects accepted work on the Project.

19. Existing SELI SPA Employees were hired by SELI starting in January 2006.

20. SELI and the Joint Venture made the arrangements, including having documents drafted, for the Employees who were coming from Latin America to obtain work permits that would allow them to work on the Project in Vancouver. For each of the foreign workers, these documents included, *inter alia,* the following:

- A letter to Citizenship & Immigration Canada setting out the type of work permit sought, the duration thereof, the proposed position for the worker and his duties on the Project, the reason that the particular worker had been selected for the Project, and his salary in Canadian dollars.

- An Application for a Work Permit Made Outside of Canada, signed by the worker.

- A Letter of Assignment, setting out the conditions of the assignment, including the compensation package, and signed by the worker, on SELI SPA letterhead.

- A Declaration to Citizenship and Immigration Canada by SELI SPA setting out the terms of transfer from SELI SPA to SELI, including the position to be held and salary to be paid in Canadian dollars.

21. After arriving in Vancouver, these Employees were asked to sign a second Letter of Assignment, this one on SELI letterhead, containing some different assignment conditions. These Letters of Assignment expressed the annual salary in net U.S. dollars.

22. Copies of the documents submitted to Citizenship & Immigration Canada, as well as the Letters of Assignment signed in Vancouver, that have been produced for each of these workers are found at tabs 1 to 39 of the book of documents. Some of the documents for certain Employees have not been located.

23. Employees coming from Europe began accepting employment with SELI on the Project in July and August 2006. They were given Letters of Assignment on SELI Canada letterhead, which they signed. These set out the assignment conditions, including annual salary which is expressed either in net Canadian dollars or net Euros. Copies of the Letters of Assignment and documents submitted to Citizenship & Immigration Canada for each of the European workers are found at tabs 79 to 99 of the book of documents.

24. On June 30, 2006, the Union was certified by the B.C. Labour Relations Board (the "LRB") for a bargaining unit described as "employees engaged in tunnelling operations in British Columbia,

except office, sales, engineering and surveying" employed by SELI and the Joint Venture.

25. The bargaining unit includes 59 of the 103 Employees currently employed on the project.

26. The Union and Employer are parties to a collective agreement. That agreement was the result of an application for a last offer vote made by the Employer under s. 78 of the B.C. *Labour Relations Code*. A copy of the collective agreement is found at tab 123 of the book of documents. Schedule "A" of the collective agreement sets out the base compensation for "Canadian Resident Employees". Schedule "B" of the collective agreement sets out the base compensation for the "Non-resident Employees".

27. The terms and conditions of the 44 non-bargaining unit Employees are set out in their respective individual Letters of Assignment or employment agreements.

28. Of the 59 bargaining unit Employees employed on the Project, 24, who normally reside in the Lower Mainland, are treated as "Canadian Resident Employees" under the collective agreement. The remaining 35, including Luis Alajandro Montanez Lara who normally resides in Manitoba, are treated as "Non-resident Employees" under the terms of the collective agreement.

29. Payroll documents showing the amounts paid to each employee on the Project from April 2006 to the end of May 2007 are set out at tabs 110 to 117 of the book of documents.

30. As set out in the collective agreement and, where applicable, their individual contracts of employment, all non-resident Employees were provided with accommodation in Vancouver. The documents pertaining to employee accommodations are set out at tabs 101 to 108 of the book of documents. At the current time, the employees in question are accommodated as follows:

First Name	**Family Name**	**Country**	**Accommodation**
Wilson	De Carvalho	Brazilian	627 Moberly Rd
Luis Alajandro	Montanez Lara	Canada	2200 Dundas Street
German Dario	Caro Fonseca	Colombia	2400 Motel

Hector Manuel	Sanchez Mahecha	Colombia	2400 Motel
Henry	Builes Tamayo	Colombia	2400 Motel
Jose Anselmo	Lopez Salguero	Colombia	2400 Motel
Rogelio	Cortes Huertas	Colombia	2400 Motel
David Jesus	Noguera Lopez	Costa Rica	1422 E. 61 Avenue
Elian	Duran Aguilar	Costa Rica	1422 E. 61 Avenue
Anthony Raul	Gamboa Elizondo	Costa Rica	2400 Motel
Cristhian	Leiton Calderon	Costa Rica	2400 Motel
David	Bonilla Granados	Costa Rica	2400 Motel
Douglas	Barboza Cedeno	Costa Rica	2400 Motel
Efrain	Calderon Araya	Costa Rica	2400 Motel
Ernesto de la T.	Camacho Cordero	Costa Rica	2400 Motel
Franklin	Mora Gamboa	Costa Rica	2400 Motel
Gabriel	Esquivel Garcia	Costa Rica	2400 Motel
German	Cordero Camacho	Costa Rica	2400 Motel
Gilberto	Martinez Cordero	Costa Rica	2400 Motel
Ignacio	Sanchez Alvarado	Costa Rica	2400 Motel
José Antonio	Barboza Sanchez	Costa Rica	2400 Motel
Jose Luis	Barboza Cedeno	Costa Rica	2400 Motel

Jojans	Sanchez Chaves	Costa Rica	2400 Motel
Juan Jose	Ruiz Mora	Costa Rica	2400 Motel
Luis Alberto	Retes Anderson	Costa Rica	2400 Motel
Mario Alberto	Alvarado Camacho	Costa Rica	2400 Motel
Mario	Flores Brenes	Costa Rica	2400 Motel
Martin Alonso	Serrano Gutierrez	Costa Rica	2400 Motel
Marvin Enrique	Vasquez Moya	Costa Rica	2400 Motel
Walter	Quiros Monge	Costa Rica	2400 Motel
Felipe	Zuniga Perez	Costa Rica	2400 Motel
Carlos Elidio	Picon Alarcon	Ecuatoriana	2400 Motel
Yandry Eugenio	Tuarez Fortis	Ecuatoriana	2400 Motel
Magusig	Mendoza	Filipines	2400 Motel
Alex	Villajuan	Filipines	2400 Motel
Giuseppe	Scorzafava	Italiano	2400 Motel
Giuseppe	Folino	Italiano	2400 Motel
Tommaso	Buffa	Italiano	2400 Motel
Giuseppe Felice	Lopez	Italiano	2400 Motel
Guerino	Mellea	Italiano	2400 Motel
Mirco	Giannotti	Italiano	633 W. 8th Avenue

Rotella	Ferruccio	Italiano	807 W. 8th Avenue
Julio Vitor	Soares Pereira	Portogallo	2400 Motel
Tiago Andre	De Sousa Ribeiro	Portogallo	2400 Motel
Vitorino Manuel	Ribeiro	Portogallo	2400 Motel
Antonio E.	Pinto Rodrigues	Portogallo	2400 Motel
Jose Paulo	Da Silva Tavares	Portogallo	619 Moberly Rd
Antonio Fernando	Barbedo Da Silva	Portogallo	627 Moberly Rd
Bruno Miguel	Ferreira Ribeiro	Portogallo	627 Moberly Rd
Pedro Filipe	Nascimiento Morais	Portogallo	655 Moberly Rd
Pere Salellas	Payrot	Spagna	2400 Motel
Salvador	Garcia Gonzalez	Spagna	619 Moberly Rd
Jose Antonio	Collar Blanco	Spagna	619 Moberly Rd
Jorge	Romero Berengena	Spagna	619 Moberly Rd
Antonio	Lopez Cozar	Spagna	655 Moberly Rd

31. The Parties agree that the following employees perform substantively the same work as employees holding the same positions as indicated on the "TBM Bored Tunnel Organization Chart" contained at tab 131 of the Documents:

Hector Manuel Sanchez Mahecha	Foreman
Rogelio Cortes Huertas	Foreman
German Dario Caro Fonseca	Pilot
Ernesto de la Trinidad Camacho Cordero	Erector Operator

Anthony Raul Gamboa Elizondo	Erector Operator
Cristhian Leiton Calderon	Segment Transport
Henry Builes Tamayo	Electrician
Walter Quiros Monge	Grouting Operator
Gabriel Esquivel Garcia	Loco Operator
Juan Jose Luis Mora	Loco Operator
David Bonilla Granados	Rail & Cleaning
Jojans Sanchez Chaves	Rail & Cleaning
Jose Luis Barboza Cedeno	Rail & Cleaning

(To be consistent with references to them elsewhere in this decision, we have amended this paragraph of the ASF to reflect the workers' full names.)

[44] In addition to the ASF, during the course of the hearing the Respondents stipulated the following facts:

a. The European workers received a $750 monthly allowance designated as "pocket money" on their payslips; and

b. It is composed of $150 for breakfast ($5/day), a further $300 for dinner ($10/day), and a further $300 for miscellaneous expenses.

V THE SELI CONTEXT

[45] SELI SPA is based in Rome, Italy, and specializes in tunnelling projects. SELI SPA has extensive international operations. The evidence before us revealed that SELI SPA has carried out tunnelling projects throughout Europe; in Central and South America, including the La Joya project in Costa Rica; Hong Kong; the Philippines; Africa; and the Middle East. So far as the evidence before us shows, the Canada Line project is its first project in Canada.

[46] SELI staffs these projects through the deployment of a mobile international labour force that has expertise in SELI's tunnelling technology, and moves from project to project. Any additional labour needs are filled by hiring local employees to work on the project in a particular location.

[47] SELI's practices in compensating its workforce are a significant issue in this complaint, as the Respondents rely on them to explain or justify the differences in compensation paid to the Latin Americans and the Europeans working on the Canada Line project. In brief, the Respondents say that the compensation package offered to SELI's international labour force for a particular project is a function of three elements:

a. the employee's actual compensation for work at the location of the project for which the employee is currently employed ("Current Project");

b. the labour market rates for roughly comparable work at the location of the project for which the compensation package is being developed ("Next Project"); and

c. the length of the employee's service at SELI or its affiliated companies and his/her particular skills and ability to operate particular equipment.

[48] According to the Respondents, if an employee's compensation on the Current Project is less than the labour market rates for roughly comparable work on the Next Project, the employee will be offered a compensation package that is at least equivalent to the applicable labour market rates at the location of the Next Project. On the other hand, if an employee's compensation on the Current Project is more than the labour market rates for roughly comparable work on the Next Project, the employee will be offered a compensation package that is at least equivalent to the employee's compensation on the Current Project.

[49] Again according to the Respondents, SELI's compensation structure ensures that each individual who, having worked on a Current Project, accepts employment on a Next Project, will receive an increase in pay. The Respondents say that the amount of that increase will depend on the following factors:

a. the employee's compensation on the Current Project;

b. whether labour market rates in the location of the Current project are higher or lower than they are in the location of the Next Project;

c. the experience and skills gained by the employee on the Current Project (as well as previous projects); and

d. SELI's need for those skills and experience on the Next Project.

[50] A number of factual and legal issues arise with respect to SELI's international compensation practices. One key issue is whether the Respondents' assertions about those practices are borne out in the evidence before us. A second key issue is whether, as established in the evidence before us, those practices either provide a non-discriminatory explanation or justify the differences in compensation paid to the Latin American and European workers on the Canada Line project.

[51] We do not address those issues now. They are addressed through the course of the decision, especially in the following two parts of the decision: in considering the third element in the *prima facie* case analysis, namely whether the race, colour, ancestry and place of origin of members of the Complainant Group were factors in the adverse treatment to which they were subjected while working on the Canada Line; and in considering whether SELI's compensation practices justify the *prima facie* discriminatory treatment established against members of the Complainant Group.

VI THE PROJECT CONTEXT

Introduction to the project

[52] SELI Canada is a wholly owned subsidiary of SELI SPA. SELI Canada is the directing party in the Joint Venture with SNC-Lavalin constructing the underground tunnel portion of the Canada Line rapid transit system between the Waterfront SkyTrain station and False Creek. As part of the joint venture agreement, SELI Canada provides the tunnelling expertise and equipment.

[53] We repeat the following parts of the ASF:

3. The Canada Line is funded by the Governments of Canada and British Columbia, the Greater Vancouver Transportation Authority, the City of Vancouver and the Vancouver Airport Authority. An entity called Canada Line Company has overall authority for the Canada Line.

> Another entity called InTransitBC ("InTransit"), also known as the "Concessionaire", has been contracted to design, build, partially finance and maintain the Canada Line for a 35 year period. InTransit has contracted with SNC Lavalin Canada Inc. to be the "EPC Contractor", giving it responsibility to engineer, procure and construct the Canada Line.
>
> 4. The EPC Contractor has contracted the Project to the Respondent, SLCP-SELI Joint Venture (the "Joint Venture"). The Joint Venture is between SNC Lavalin Constructors (Pacific) Inc. ("SNC Lavalin"), a wholly-owned subsidiary of SNC Lavalin Canada Inc., and SELI Canada Inc. ("SELI"). SELI is a wholly owned subsidiary of SELI SPA, which is based in Rome, Italy and specializes in tunnelling boring operations worldwide.
>
> 5. Under the joint venture agreement, SELI provides the tunnelling expertise for the Project. Labour is supplied by SELI, and by the Joint Venture. Certain managerial and non construction employees are provided by SNC Lavalin.

[54] The oral evidence before us was that the Respondents bid on and obtained the project in or about May 2005. As we discuss in further detail below, Andrea Ciamei, SELI's Project Manager on the Canada Line project, testified about his efforts to determine the Canadian market rate for the work to be performed, and those rates were, he testified, used to put together the bid. No tender or contractual documents showing the basis upon which the Respondents bid or obtained the project were entered into evidence.

[55] As we discuss in further detail below, the Respondents advertised in Canada for workers to perform the specialized tunnelling work, but no applications were received. The Respondents then decided to use Latin American workers who had been working on the La Joya project, which was coming to an end, to perform the specialized tunnelling work on the Canada Line project, supplemented by a few key European managers and technicians. Canadian residents were hired, starting in January 2006, to perform aboveground, non-specialized work. As set out in the ASF, there are also a few positions located aboveground which support the specialized tunnelling work, namely the Batching Plant Operators, Gantry Crane Operators, Crane Operator, and Yard Labour, and the Latin American workers who held those positions are part of this complaint.

[56] According to Mr. Ciamei, the Respondents' Canada Line office opened on November 1, 2005, and site preparation began in January 2006. As discussed in further detail below, the Latin American workers arrived in April and May 2006. Their first task was to assemble the TBM. Tunnelling began on June 10, 2006, with two shifts, made up almost entirely of Latin Americans performing all specialized tunnelling work.

[57] SELI submitted documents to Canadian immigration authorities in order to obtain work permits for the Latin American and European workers. As mentioned in the ASF, these included, in each case: a letter to Citizenship and Immigration Canada, setting out the type of work permit sought, the duration thereof, the proposed position for the worker on the Canada Line project and his duties on the project, the reason that the particular worker had been selected for the project, and his salary in Canadian dollars; an Application for a Work Permit Made Outside of Canada, signed by the worker; a Letter of Assignment, on SELI SPA letterhead, setting out the conditions of the assignment, including the compensation package, and signed by the worker; and a Declaration to Citizenship and Immigration Canada by SELI SPA setting out the terms of transfer from SELI SPA to SELI Canada, including the position to be held and salary to be paid in Canadian dollars.

[58] In addition, workers signed a second a Letter of Assignment after they arrived in Canada, which contained some different terms and conditions of employment than those set out in the Letters of Assignment signed abroad. The Respondents were unable to locate all of the documents referred to in these two paragraphs for all Latin American and European workers; those that were located were entered into evidence, either as part of the ASF or as subsequent exhibits.

Senior project management

[59] It is useful to set out the names and titles of the managers responsible for the Canada Line project who testified in these proceedings.

[60] Fabrizio Antonini is a General Director and Shareholder in SELI SPA. As such, he is responsible for all SELI jobsites worldwide, including Human Resources. He occasionally visited the Canada Line project.

[61] Andrea Ciamei was SELI's Project Manager for the Canada Line project, and as such, the most senior Respondent manager on site.

[62] Roberto Ginanneschi was SELI's TBM Tunnel Manager, and as such, responsible for the specialized tunnelling work, including supervising all of the workers at issue in this complaint.

[63] Piero Angioni was employed by SELI as its General Administrator on the Canada Line project. His duties were exclusively administrative rather than technical in nature. Because of his fluency in Spanish, he was designated as the primary liaison for the members of the Complainant Group.

[64] Gabriele Dell'Ava was employed by SELI as the Supervisor of the work external to the tunnel on the Canada Line project. The workers he supervised are not directly at issue in this complaint.

[65] Christopher Wates was employed by the Joint Venture as its Human Resources Manager. He also assisted with SNC Lavalin and SELI employees working on the project.

[66] Four other SELI SPA managers, who had no direct involvement with or responsibility for the Canada Line project, also testified. Three of them, Romeo Gencarelli, Lorenzo Pellegrini and Pietro Favaretto, were involved in the La Joya project. Their duties and evidence are discussed in the course of dealing with the evidence about what the Costa Rican employees did on that project. The final SELI manager to testify was Marco Sem, who works in Italy, and is responsible for Human Resources for SELI SPA.

The Latin American workers

[67] As indicated above, the Respondents' evidence was that, after they were unsuccessful in attracting any Canadian residents to apply for the specialized tunnelling work, they decided to bring a group of Latin Americans who had been working on the La Joya project, which was nearing completion, to Vancouver to perform the specialized tunnelling work on the Canada Line. The Respondents' plan, at this stage, was for the

Latin Americans, supplemented by a few key European personnel, to perform all the tunnelling work.

[68] The vast majority of the immigration documents for the Latin American workers were submitted by SELI to the Canadian authorities in March 2006. The immigration documents and Letters of Assignment show that all but two of the Latin American workers arrived in Vancouver to start work on the Canada Line project in April and May 2006.

[69] The only exceptions are as follows. SELI submitted documents to Canadian immigration authorities with respect to:

- Henry Builes Tamayo, a Columbian TBM Electrician, in January 2006; his Letter of Assignment indicates he was to start on February 22, 2006.
- Raul Otoniel Rozo Muñoz, a Columbian TBM Mechanic, in January 2006; his Letter of Assignment indicates he was not to start work until May 2006.
- Jose Anselmo Lopez Salguero, a Columbian TBM Loco Mechanic, in January 2006; his Letter of Assignment indicates a March 2006 start date.
- Hector Manuel Sanchez Mahecha, a Columbian Shift Foreman, in January 2006; according to his Letter of Assignment, he was to start work in Vancouver in April 2006.

[70] Immigration documents and/or Letters of Assignment were entered into evidence for 40 Latin American workers. This includes Luis Alajandro Montanez Lara, who is originally from Columbia, for whom there are no immigration documents because he had obtained landed immigrant status in Canada prior to coming to work on the project in October 2006.

[71] Of those 40 Latin American workers who started work on the Canada Line project, the largest number were Costa Ricans who had worked for SELI on the La Joya project for what the immigration documents indicated were periods of up to three years – there were 30 employees in this category. There were also eight Columbians, including Mr. Montanez Lara, who had worked on between two and seven previous SELI projects, for periods ranging up to 26 years. Finally, there were two Ecuadorians, who had worked for SELI since 2000 on two previous projects.

[72] Not all of the Latin American workers stayed for the entire length of the project. It is not possible from the documents entered into evidence to determine precisely when every Latin American worker left, or how many Latin American workers were working on the Canada Line project for each month until the project completed and the remaining Latin Americans left, in March 2008.

[73] Some meaningful snapshots of the Latin American contingent working on the Canada Line project can be taken.

[74] Mr. Ciamei swore an affidavit in support of the Respondents' application to dismiss the complaint on September 20, 2006. Mr. Ciamei's affidavit was entered as an exhibit in these proceedings, and he confirmed the truthfulness of its contents when he testified. In his affidavit, Mr. Ciamei lists the non-resident employees working on the Canada Line project as of the date the complaint was filed, August 3, 2006. Thirty-eight Latin American workers are listed. In the table below we have added the positions held by each of them, as indicated on the Organization Charts which were entered into evidence.

[75] All of the Organization Charts were created by Mr. Ginanneschi. The one on which we chiefly rely is reproduced as Appendix E, and was created shortly before the hearing began in September 2007. The date of the earlier one is not indicated on the document, and Mr. Ginanneschi did not testify as to when it was created. It is apparent, however, from the names that appear upon it, that it was created some time relatively soon after the complaint was filed in August 2006 and the Europeans began work in September 2006. Mr. Ginanneschi testified that he created the latest one in December 2007. The employees' positions as written on the Organization Charts are not necessarily the same ones indicated in the immigration documents or Letters of Assignment, but we find that they are the most reliable documentary indicator of the work actually performed by the workers on the project.

Name	**Country**	**Position as listed on Appendix E; position as listed on earlier and later Organization Charts given where different**
Anthony Raul Gamboa	Costa Rica	Erector Operator; earlier listed as

Elizondo		Erector Operator Helper
Carlos Elidio Picon Alarcon	Ecuador	TBM Mechanic
Cristhian Leiton Calderon	Costa Rica	Segment Transport Beam Operator; earlier listed as Erector Operator; later listed as Rail and Cleaning
Cristobal Barboza Rivera	Costa Rica	Not listed on Appendix E; earlier listed as Rail and Cleaning; therefore appears to have left project before Appendix E was created
David Bonilla Granados	Costa Rica	Rail and Cleaning
David Jesus Noguera Lopez	Costa Rica	Gantry Crane Operator
Douglas Barboza Cedeno	Costa Rica	Erector Operator Helper; later listed as Conveyor Operator
Efrain Calderon Araya	Costa Rica	Conveyor Operator; earlier Organization Chart lists as Shuttle Conveyor Operator (which appears to be the same thing as Conveyor Operator); not listed on later Organization Chart, and therefore appears to have left project before it was created
Elian Duran Aguilar	Costa Rica	Crane Operator
Ernesto de la Trinidad Camacho Cordero	Costa Rica	Erector Operator
Felipe Zuniga Perez	Costa Rica	Yard Labour
Franklin Mora Gamboa	Costa Rica	Gantry Crane Operator; earlier listed as Yard Labour
Gabriel Esquivel Garcia	Costa Rica	Loco Operator; earlier listed as Shuttle Conveyor Operator
German Cordero Camacho	Costa Rica	Erector Operator Helper
German Dario Caro Fonseca	Columbia	TBM Pilot
Gilberto Martinez Cordero	Costa Rica	Yard Labour
Hector Manuel Sanchez Mahecha	Columbia	Shift Foreman
Henry Builes Tamayo	Columbia	TBM Electrician
Ignacio Sanchez Alvarado	Costa Rica	Yard Labour

Jose Anselmo Lopez Salguero	Columbia	Diesel Mechanic
Jose Antonio Barboza Sanchez	Costa Rica	Rail and Cleaning
Jose Luis Barboza Cedeno	Costa Rica	Gantry Crane Operator
Jose Maria Martinez Pena	Columbia	Not listed on Appendix E; listed on earlier Organization Chart as TBM Pilot; therefore appears to have left project before Appendix E was created
Jojans Sanchez Chaves	Costa Rica	Rail and Cleaning; earlier listed as CHD Mechanic Helper; later listed as Erector Operator Helper
Juan Jose Ruiz Mora	Costa Rica	Loco Operator
Luis Alberto Retes Anderson	Costa Rica	TBM Maintenance Mechanic; later listed as Diesel Mechanic Helper
Luis Diego Brenes Perez	Costa Rica	Does not appear on Appendix E; earlier listed as Erector Operator; therefore appears to have left project before Appendix E was created
Manuel Francisco Artavia Fonseca	Costa Rica	Does not appear on Appendix E; listed on earlier Organization Chart as Loco Operator; therefore appears to have left project before Appendix E was created
Mario Alberto Alvarado Camacho	Costa Rica	Erector Operator Helper; earlier and later listed as Segment Transport Beam Operator
Mario Alonso Sanchez Chaves	Costa Rica	Does not appear on Appendix E; listed on earlier Organization Chart as Shuttle Conveyor Operator; therefore appears to have left project before Appendix E was created
Mario Flores Brenes	Costa Rica	Yard Labour
Martin Alonso Serrano Gutierrez	Costa Rica	Yard Labour; earlier listed as Grouting Pump Operator
Marvin Enrique Vasquez Moya	Costa Rica	Batching Plant Operator

Oscar Andres Ramirez Luna	Costa Rica	Does not appear on Appendix E; listed on earlier Organization Chart as Gantry Crane Operator; therefore appears to have left project before Appendix E was created
Raul Otoniel Rozo Munoz	Columbia	Does not appear on Appendix E or the earlier Organization Chart; therefore appears to have left project before either was created
Rogelio Cortes Huertas	Columbia	Shift Foreman
Walter Quiros Monge	Costa Rica	Grouting Pump Operator
Yandry Eugenio Tuarez Fortis	Ecuador	TBM Mechanic

[76] The only Latin American worker for whom there are immigration documents who does not appear on Mr. Ciamei's list is Allan Fonseca Adams, who is from Costa Rica, and whom it is reasonable to infer left the project before the complaint was filed and Mr. Ciamei swore his affidavit. The only other worker who was treated by the Respondents as a Latin American worker, and who does not appear on Mr. Ciamei's list, is Luis Alajandro Montanez Lara, who joined the project later, in October 2006. As set out above, he is originally from Columbia, but had recently obtained his landed immigrant status in Canada. For this reason, there are no immigration documents for Mr. Montanez Lara, only a Letter of Assignment.

[77] The parties' ASF indicates that, as of the date it was prepared, sometime shortly before the beginning of the hearing in September 2007, there were 32 Latin American workers working on the project; eight Latin American workers had left the project by that time. Those eight workers, and the approximate dates they left the project, as determined by a review of the incomplete payroll documents entered into evidence, were:

Allan Fonseca Adams	Last shown for pay period: April 2006; and does not appear on next pay period for which we have records, June 2006;
Mario Alonso Sanchez Chaves	Last pay period: December 17-31, 2006;

Manuel Francisco Artavia Fonseca	Last pay period: December 3-16, 2006;
Oscar Andres Ramirez Luna	Last pay period: January 14-27, 2007;
Raul Otoniel Rozo Munoz	Last shown for pay period: June 2006; and does not appear on next pay period for which we have records, August 13-26, 2006; other documents appear to indicate, however, that continued to be paid until September 1, 2006;
Luis Diego Brenes Perez	Last pay period: December 17-31, 2006;
Jose Maria Martinez Pena	Last pay period: January 28-February 10, 2007; and
Cristobal Barboza Rivera	Last pay period: December 3-16, 2006.

[78] By the time the third Organization Chart was prepared in December 2007, one more Latin American worker, Efrain Calderon Araya, had left. We do not have payroll documents from that period to permit us to determine precisely when he did so.

[79] Latin American workers performed a variety of functions within the project, including all of the different sorts of specialized tunnelling work, such as Shift Foreman, TBM Pilot, Erector Operator, Erector Operator Helper, Conveyor Operator, Segment Transport Beam Operator, TBM Mechanic, TBM Electrician, Grouting Pump Operator, Loco Operator, Batching Plant Operator, Gantry Crane Operator, Crane Operator, Rail and Cleaning, and Yard Labour.

[80] From the time they arrived in Vancouver in April and May 2006, until starting in or about September 2006 when the Europeans began to arrive and a third shift was implemented, the Latin Americans performed effectively all of the specialized tunnelling work, working on two shifts. The operation of the TBM requires the coordinated work of operators, helpers and labourers performing all associated tasks. It also requires maintenance personnel. The Latin Americans performed all required tasks.

[81] The terms and conditions of employment of the Latin American workers, and more information about their experience, skills and duties on the Canada Line project, are addressed throughout the decision, including in considering the rebuttal evidence about what work the Costa Ricans performed on the La Joya project; in considering two

elements of the *prima facie* case analysis: whether they were treated adversely in the terms and conditions of their employment, and whether the differences in treatment can be explained by reference to differences in their experience, skills and duties; and in the BFOR analysis.

The European workers

[82] From the outset, there were some Europeans working on the Canada Line project. These included the European managers who have already been listed: Mr. Ciamei, Mr. Ginanneschi, and Mr. Dell'Ava. It also included a number of other Europeans, about whom little evidence was introduced, but who performed true managerial or supervisory functions, work not comparable to the Latin Americans. According to the Organization Charts prepared by Mr. Ginanneschi, all members of this group were identified as "Management". The constitution of the group changed over time as managers came and left the project.

[83] Members of this group, for which immigration documents were introduced, include: Leonardo Pia (listed as Maintenance Plan Manager on all Organization Charts); Miguel Jose Rosinha (listed as Electronic Engineer on all Organization Charts); Luca Segatto (listed as Tunnel Superintendent on the earlier Organization Chart); Roberto Perruzza (listed as Mechanic Responsible on the earlier Organization Chart); Giuseppe Imbesi (listed as Electrical Responsible on all Organization Charts); Edoardo Lanfranchi (listed as Shift Engineer on Appendix E and the later Organization Chart); Rotella Ferruccio (listed as Mechanic Responsible on Appendix E); and Gianfranco Casa (listed as Mechanic Responsible on the later Organization Chart). There are other persons, identified as belonging to this management group on the Organization Charts, for whom we have no immigration documents: Carlo Giri (Shift Engineer on all Charts); and Vasili Fafas (Shift Engineer on later Chart).

[84] Sometime in the summer of 2006, the Respondents decided to add a third shift of workers, made up of Europeans, to the Canada Line project. The reasons for this decision were never clearly established in the evidence. Mr. Ciamei testified that there were problems with the delivery of a key machine part at the beginning, and the start-up

of the project was not as fast as they expected. He said they received a letter from their client, which was not introduced, about delays. As a result, they decided to run three shifts, which necessitated bringing in the European workers. From the documentary record it appears that two of these workers arrived in July or August 2006; the remainder started to arrive in September 2006, and continued to arrive throughout the course of the project. Mr. Ciamei testified that the third shift began in September.

[85] This group of Europeans performed the same or substantially similar work as the Latin Americans. In the table below we list, so far as we are able to determine from the documents introduced, each of the Europeans who performed comparable work to the Latin Americans. We list their position, as indicated on the Organization Charts, and the month in which they arrived in Vancouver and started work on the project, as indicated in their Letters of Assignment. Where payroll information establishes their arrival date, we indicate that. The positions indicated on the Organization Charts are not necessarily the same ones indicated on the immigration documents or Letters of Assignment, but we find they are the most reliable documentary indicator of the work actually performed by the European workers on the project. Once again, as with the Latin Americans, the documents before us do not allow us to determine precisely when every European left the project. Where the documents, including the accommodation records introduced by the Respondents, do allow us to determine when a European left the project, we indicate that on the table.

Name	**Month arrived on project as indicated in Letters of Assignment** **Where payroll information establishes arrival date, also provided** **Where known, date of departure is given in brackets**	**Position as listed on Appendix E; position as listed on earlier and later Organization Charts given where different**
Jose Paulo Da Silva Tavares	July 2006 First payroll – August 2006 (According to accommodation records,	TBM Electrician

	still on project as of February 2008)	
Mirco Giannotti	July 2006 First payroll – August 2006 (According to accommodation records, still on project as of February 2008)	TBM Pilot
Roberto Carlos Verao Pombal	No Letter of Assignment – Application for Work Permit filed in July 2006, so likely arrived in or about September 2006. Never appears on payroll documents. (According to accommodation records, left sometime between January and June 2007)	Not listed on Appendix E; listed on earlier Organization Chart as TBM Electrician
Juan Marcos Balcells Morell	September 2006 Never appears on payroll documents. (According to accommodation records, left project sometime between January and June 2007)	Not listed on Appendix E; earlier listed as Segment Transport Beam Operator
Antonio Fernando Barbedo Da Silva	September 2006 First payroll – September 19, 2006 (According to accommodation records, still on project in February 2008)	TBM Pilot; earlier listed as Grouting Pump Operator; later continued to be listed as TBM Pilot
Jose Antonio Collar Blanco	September 2006 First payroll – September 19, 2006 (According to accommodation records, still on project in February	Loco Operator

	2008)	
Salvador Garcia Gonzalez	September 2006 First payroll – September 19, 2006 (According to accommodation records, left project sometime between June and December 2007)	CHD Mechanic; not listed on later Organization Chart
Wilson De Carvalho	October 2006 Never appears on payroll (Testified in March 2008 – still on project at that time)	Shift Foreman; not listed on earlier Organization Chart
Bruno Miguel Ferreira Ribeiro	October 2006 First payroll – October 17, 2006 (According to accommodation records, still on project February 2008)	Grouting Pump Operator; not listed on earlier Organization Chart
Antonio Lopez Cozar Santiago	February 2007 First payroll – February 6, 2007 (According to accommodation records, still on project February 2008)	Grouting Pump Operator; not listed on earlier Organization Chart
Pedro Filipe Nascimiento Morais	February 2007 First payroll – February 13, 2007 (According to accommodation records, left project sometime between June and December 2007)	Segment Transport Beam Operator; not listed on earlier or later Organization Charts
Vitorino Manuel Ribeiro	February 2007 First payroll – February 13, 2007	Mechanic Helper; not listed on earlier or later Organization Charts; Respondents' oral evidence

	(Left August 2007)	was that he was actually TBM Maintenance Mechanic, but his immigration documents do not indicate any qualifications as a mechanic
Tiago Andre De Sousa Ribeiro	February 2007 First payroll – February 13, 2007 (Left August 2007)	Rail and Cleaning; not listed on earlier or later Organization Charts
Jorge Romero Berengena	February 2007 First payroll – February 6, 2007 (According to accommodation records, still on project February 2008)	Erector Operator; not listed on earlier Organization Chart
Tommaso Buffa	June 2007 No payroll documents for June 2007 forward. (According to accommodation records, still on project February 2008)	Not listed on any Organization Chart, but it appears he worked as a TBM Mechanic
Giuseppe Scorzafava	June 2007 (According to accommodation records, still on project February 2008)	Conveyor Operator; not listed on earlier Organization Chart
Giuseppe Folino	June 2007 (According to accommodation records, still on project February 2008)	Not listed on any Organization Chart, but it appears he worked as an Erector Operator
Giuseppe Felice Lopez	June 2007 (According to accommodation records, still on project February	Conveyor Operator; not listed on earlier Organization Chart; listed on later Organization Chart

	2008)	as TBM Mechanic
Guerino Mellea	No Letter of Assignment – given that Application for Work Permit filed in May 2007, likely arrived in or about June 2007 (According to accommodation records, left project between December 2007 and February 2008)	Segment Transport Beam Operator; not listed on earlier Organization Chart
Pere Salellas Payrot	September 2007 (According to accommodation records, still on project February 2008)	Listed on later Organization Chart as Segment Transport Beam Operator; not listed on Appendix E or earlier Organization Chart
Julio Vitor Soares Pereira	September 2007 (Left November 2007)	Listed on later Organization Chart as Mechanic Helper; not listed on Appendix E or earlier Organization Chart
Alessandro Zangari	October 2007 (According to accommodation records, still on project February 2008)	Listed on later Organization Chart as Conveyor Operator; not listed on Appendix E or earlier Organization Chart
Publio Garcia Alvarez	No immigration documents or Letter of Assignment, but arrived in October 2007 (According to accommodation records, still on project February 2008)	Listed on later Organization Chart as CHD Mechanic Helper; not listed on Appendix E or earlier Organization Chart

[86] There are some Europeans about whom very little evidence was introduced, or the evidence was inconsistent, so that it is difficult to determine if they were managers, worked elsewhere on the project, or were workers performing work comparable to that performed by the Latin Americans.

[87] Immigration documents were introduced for the following persons falling in this category:

- Samer Abu Namous (Letter of Assignment says TBM Superintendent; earlier Organization Chart says Shift Foreman; appears on neither Appendix E nor later Organization Chart), who arrived in June 2006, and left sometime between January and June 2007 according to Respondents' documents about rent paid for him to live in an apartment;

- Simone Norscia (Letter of Assignment says TBM Hydraulic Mechanic, and does not appear on any Organization Chart), who arrived in October 2006, the only documents referring to him are a residential tenancy agreement for an apartment he apparently resided in, paid for by the Respondents, and a 2007 T-4;

- Marco Gressani (Letter of Assignment says TBM Tunnel Lining Superintendent, and does not appear on any Organization Chart), who arrived in June 2007, and is shown as living in an apartment paid for by the Respondents as late as February 2008;

- Vincenzo di Flora (No Letter of Assignment, and does not appear on any Organization Chart, his July 2007 Application for Work Permit says TBM Tunnel Superintendent), it is not clear when he arrived, as there are no documents indicating the periods or locations at which he resided in Vancouver, but he did work on the project, as there is a 2007 T-4 for him; and

- Carvalho Monteiro Gilianes (no Letter of Assignment and does not appear on any Organization Chart), his Application for Work Permit was filed in January 2008, and the Respondents' documents indicate he was residing in the Motel as of February 2008.

[88] In addition, a Vincenzo Golinelli appears on the later Organization Chart as TBM Maintenance Mechanic. We have no immigration documents or Letter of Assignment for him. The Respondents' accommodation records indicate he resided in an apartment paid for by them since on or before December 2007, and continued to do so as of February 2008. There is also a 2007 T-4 for him. Antonio E. Pinto Rodriguez is another European for whom we have no immigration documents or Letter of Assignment. He appears on the later Organization Chart as Electrical Maintenance. There is a 2007 T-4 for him. There are some other Europeans who apparently worked on the project, but we do not have sufficient information about them to draw any conclusions about their roles.

[89] As in the case of the Latin American workers, the terms and conditions of employment of the Europeans performing comparable work, and more information about their experience, skills and duties on the Canada Line project, are addressed throughout the decision, including in considering two elements of the *prima facie* case analysis: whether the Latin Americans were treated adversely in the terms and conditions of their employment, and whether the differences in treatment can be explained by reference to differences in the experience, skills and duties of the members of the two groups; and in the BFOR analysis.

VII THE COLLECTIVE BARGAINING CONTEXT

[90] In this section of the decision, we outline the history of the collective bargaining relationship between CSWU and the Respondents, so far as it is helpful or necessary to understanding the issues before us. Further information about the proceedings before the LRB and its decisions can be found in Appendix B.

Certification, bargaining and the final offer vote

[91] CSWU was certified as the representative of a bargaining unit of employees employed by SELI Canada and the Joint Venture on June 30, 2006.

[92] The certification covers "employees engaged in tunnelling operations, except office, sales, engineering and surveying." The Respondents say that a number of employees falling within this description, namely the European workers, were excluded from the bargaining unit as a result of CSWU's objection to their inclusion in it during collective bargaining. While the parties' positions in collective bargaining were not fully explored in the evidence before us, it is a matter of record that the Europeans were excluded from the bargaining unit and later from the collective agreement. In the LRB's decision dismissing CSWU's objections to the Respondents' final offer vote applicaiton, the LRB stated that the parties agreed in an earlier proceeding before it that the employees from Europe were not included in the bargaining unit: BCLRB No. B36/2007, para. 27 ("Final Offer Vote decision").

[93] CSWU and the Respondents met in a number of bargaining sessions in the summer of 2006, but were not able to negotiate a collective agreement. In late September of 2006, the Respondents applied to the LRB to have their final collective agreement offer put to the employees in a vote. The Respondents' final offer included different compensation packages (net salary plus food, lodging and travel vs. hourly wage) for non-residents and Canadian residents. The terms and conditions for Canadian residents were set out in Schedule A, and included gross hourly rates between $18 and $28 an hour. The terms and conditions for non-residents were set out in Schedule B, which indicated they were to continue to receive compensation in accordance with their employment contracts, ranging from $20,000 to $28,000 US (net). Schedule B also indicated that the Respondents would pay for: work visas, immigration costs, room, board, local transportation to and from work, work clothes and toiletries, long distance telephone charges up to $20 per month, and meals.

[94] CSWU urged the employees to reject the Respondents' final collective agreement offer and raised various objections to the vote in complaints to the LRB, including an allegation that the distinctions in compensation between Canadian residents and Latin American residents were discriminatory and contrary to the *Code*, and therefore constituted an illegal offer. CSWU's complaint further alleged that the Respondents had intimidated or coerced the employees into voting for the last offer, and had improperly "sweetened the pot" during the course of the last offer vote. The final offer vote was held on October 2, 2006, but the ballot box was sealed and the votes not counted pending resolution of CSWU's objections to the vote.

[95] In October 2006, prior to the hearing into CSWU's objections to the last offer vote, CSWU sought a strike mandate from the employees in the bargaining unit in order to assist it in bargaining. The members of the bargaining unit voted against the Union's strike action by a significant margin.

The Final Offer Vote decision

[96] The hearing into CSWU's objections to the final offer vote was held by the LRB in November 2006. In the Final Offer Vote decision, issued February 16, 2007, the LRB dismissed all of CSWU's objections to the final offer.

[97] In the Final Offer Vote decision, the LRB addressed three objections. First, that the Respondents committed an unfair labour practice because they stated to CSWU and the employees that they would cease operations if the employees rejected the final offer vote or voted in favour of a strike. Second, that the differences between the compensation packages of resident and non-resident employees were contrary to the *Code*, and therefore constituted an illegal offer. Third, that the Respondents had "sweetened the pot" between the offer presented to CSWU on September 18, 2006 and the offer presented in its two final offer vote applications to the LRB, filed on September 19 and 26, 2006.

[98] The first and third objections are of lesser significance for our purposes. In relation to the first, the Respondents had written a letter to CSWU and its employees in which they indicated that a strike would force SELI to abandon the project, and had held meetings in which they told the employees that if SELI had to pay what CSWU was asking for, it would have to consider closing the project down. The LRB held that, in the context in which these statements were made, they were not intimidating or coercive, and therefore did not constitute an unfair labour practice: paras. 31 – 78.

[99] In relation to the third, the LRB held that the Respondents had not made changes to the last offer after it was presented to CSWU, and therefore had not "sweetened the pot": paras. 114 – 127.

[100] The second objection is of greater significance for the purposes of this complaint. CSWU submitted that the last offer contained a discriminatory clause and was therefore illegal. The alleged discrimination was as between the Latin Americans, covered by Schedule B, and the Canadian residents, covered by Schedule A. CSWU also submitted that the LRB should look at the differences in the rates of pay paid to the Latin American and European employees, but the LRB declined to do so, holding that the Human Rights

Tribunal was the proper forum to determine whether there was any discrimination generally in the workplace: para. 95.

[101] The LRB turned to a consideration of the terms and conditions of the employment of the Schedule A and Schedule B employees. It agreed with the Respondents' submission that the employment of the Latin American employees in Vancouver was more like a new employment relationship than a temporary transfer of location in the same employment: para. 97. On this basis, the LRB agreed with the Respondents that it was appropriate to take into account items such as the cost of accommodation, meals and airfare in comparing the compensation provided to the Latin American employees to that provided to the Canadian residents, who did not receive such items: paras. 97 – 99.

[102] The parties agreed that the cost of the accommodation provided to the Latin American employees was $500 per month, the cost of the meals provided was $25 per day, and the cost of two economy airfares per year was $3,000, for a total of $18,125 per year: para. 100.

[103] The LRB compared the range of wages paid to employees in the two groups, converting both the net yearly salaries paid to Latin American employees in US funds, and the hourly wages paid to Canadian residents, to Canadian gross salaries. On this basis, it calculated the Canadians were paid between $37,440 and $58,240 and the Latin Americans were paid between $46,556 and $57,978, including the $18,125 in benefits referred to above. The LRB concluded that the Canadians and Latin Americans were paid comparable amounts: para. 105.

[104] CSWU submitted that the Latin Americans were more skilled than the Canadians, relying on the information contained in work permits and job titles. The LRB concluded there was insufficient evidence before it to determine if an individual paid within comparable ranges had been adversely treated: para. 107. Even taking assumed overtime earnings into account, the LRB still concluded that employees in the two groups were paid within the same range: paras. 109 – 110.

[105] The LRB did not decide if the difference in compensation structures was based on place of origin or place of residence: para. 112.

[106] In the result, the LRB dismissed CSWU's complaint that the final offer vote contained a provision that was contrary to the *Code*: para. 113.

Subsequent events

[107] As a result of the LRB's Final Offer Vote decision, the employees' vote on the Respondents' final offer of a collective agreement was counted. The Respondents say that over 75% of the employees voted to accept the final collective agreement offer. As a result, it became the collective agreement between the Respondents and CSWU.

[108] CSWU applied for reconsideration of the LRB's Final Offer Vote decision, and this application was rejected by the LRB on August 1, 2007: BCLRB No. B173/2007. CSWU then sought judicial review of the Reconsideration Panel's decision, on the basis of two alleged breaches of natural justice; its petition was dismissed by the court in January 2008: 2008 BCSC 51.

[109] Concurrent with the final offer vote proceedings before the LRB was another complaint filed by CSWU on July 4, 2006, alleging a number of unfair labour practices. Over the course of these LRB proceedings, CSWU alleged that the Respondents had engaged in a variety of unfair labour practices, including attempting to improperly transfer employees, unilaterally changing the terms of employment for employees during the post-certification freeze period, and fraudulently altering the employees' employment agreements.

[110] The unfair labour practices complaints were heard by the LRB over the course of 21 days from July 13, 2006 through to September 11, 2007. Ultimately, on April 3, 2008, the LRB dismissed the majority of CSWU's allegations, including the allegations of fraud: BCLRB No. B40/2008. An application for reconsideration of this decision remains pending.

[111] On June 1, 2007, a group of employees in the bargaining unit filed an application for decertification of the Union. This required that at least 45% of the employees in the bargaining unit to indicate in writing that they no longer wanted CSWU to represent them in collective bargaining. The decertification vote was held on June 11, 2007.

[112] CSWU challenged the decertification application. The ballots were sealed pending resolution of CSWU's challenges, and particularly the resolution of the fraud allegations made in the then-pending unfair labour practice complaints: BCLRB No. B232/2007.

[113] The Respondents applied to adjourn the hearing before us pending resolution of the then-pending decertification application before the LRB. In an oral decision rendered September 24, 2007, the panel denied the Respondents' application for an adjournment.

[114] On June 24, 2008, after the conclusion of the hearing before us, the LRB decided to hold a hearing into CSWU's objections to certain votes being counted: BCLRB No. B100/2008. The decertification vote was counted, and the Respondents advised us that on July 7, 2008, the LRB decertified CSWU. The Respondents indicated they were prepared to make submissions about the decertification, should the Tribunal so desire. We did not request submissions from the parties about the decertification, as the fact that CSWU was decertified does not affect the issues now before us for decision.

The effect of the Final Offer Vote decision on the proceedings before the Tribunal

[115] As indicated above, the Respondents applied for an order prohibiting CSWU from relitigating the issue of whether the terms of compensation contained in the collective agreement for the Latin American and Canadian resident employees discriminate against the Latin American workers. In *CSWU No. 1*, the Estoppel decision, the panel granted the application.

[116] As set out in our reasons, the parties agreed before us that the first two criteria to establish issue estoppel were present: the LRB's decision was final, and the parties or privies to that decision were the same as those now before the Tribunal: para. 22. We concluded that the third criterion was also present, in that the LRB had decided substantially the same question as was raised in CSWU's original complaint to the Tribunal: whether the difference in the compensation structures in Schedules A and B discriminated against the Latin American workers as compared to Canadian workers: para. 24.

[117] We then considered whether we should exercise our discretion not to apply the doctrine of issue estoppel. We concluded that fairness to the parties and the public interest in the finality of proceedings both suggested that the doctrine should be given effect: paras. 42 – 49.

[118] The effect of the Estoppel decision is that CSWU cannot relitigate the question of whether the Latin Americans were discriminated against by the Respondents in comparison to the Canadian resident workers. As a result, the complaint that continued before us is that the Latin Americans were discriminated against in comparison to the Europeans workers.

[119] While the Respondents vigorously defended themselves against the complaint that they discriminated against the Latin American workers as compared to the European workers, they did not contest the Tribunal's jurisdiction to hear and determine that complaint. As the LRB recognized in its Final Offer Vote decision, the Tribunal "is the proper forum for a determination of the issue of whether there is any discrimination generally in the workplace": para. 95.

[120] The Latin American and European workers, while they come from and normally reside in other countries, and may work in locations around the world, lived and worked in Vancouver, British Columbia for periods of up to two or more years. The Respondents who employed them bid on and obtained a contract to construct an important public work project in this province, the tunnel on the Canada Line project. All three Respondents appear to be incorporated in British Columbia – there is no suggestion that they are not. While the parent company of one, SELI SPA, performs tunnelling worldwide, this project was in British Columbia. The Respondents, while doing business in this province, and their employees, while living and working in this province, are subject to and are entitled to the protections of the laws in effect in this province, including the *Human Rights Code*.

VIII APPLICATION TO CALL REBUTTAL EVIDENCE AND RELATED FINDINGS OF FACT

[121] Having set out the parties' ASF, and summarized the relevant contextual facts about SELI, the project and the employees working on it, and the collective bargaining

relationships between the parties, we turn to address CSWU's application to call rebuttal evidence, and make our findings of fact about the matters related to it. These findings also inform our later conclusions.

[122] As already indicated, one of the issues we were required to address in the course of the hearing was CSWU's application to call rebuttal evidence. In a letter decision dated March 5, 2008, the panel communicated its decision to grant the application, stating that our reasons would follow in the final decision.

[123] In this part of the decision, we set out the procedural and evidentiary history relevant to the application to call rebuttal evidence, provide reasons for our decision to allow CSWU to call rebuttal evidence, and make findings of fact with respect to the matters related to the rebuttal evidence.

Procedural background to the application

[124] The possibility that CSWU might seek to call rebuttal evidence was first raised by CSWU in a November 19, 2007 written submission in response to the Respondents' applications for an adjournment or stay. Its relevance, at that stage, was with respect to how long the hearing would take to complete, and ensuring that all evidence from members of the Complainant Group could be heard before they left the country at the conclusion of the project.

[125] The possibility of CSWU calling rebuttal evidence was also discussed in oral submissions on December 5, 2007, just before CSWU closed its case. At that time, the potential for rebuttal evidence arose because of the late production of documents and notification of witnesses by the Respondents to CSWU. The Respondents objected to any possibility of CSWU calling rebuttal evidence, submitting that this would be an impermissible attempt by CSWU to split its case.

[126] By February 15, 2008, the rebuttal evidence question had crystallized, with CSWU indicating that it would be seeking to call evidence to rebut what Mr. Gencarelli had just testified to about the work performed by the Costa Rican workers on the La Joya project. With the agreement of the parties, the panel directed the parties to provide

written submissions with respect to whether CSWU should be permitted to call rebuttal evidence. The submissions were filed between February 25 and March 4, 2008.

[127] CSWU applied to call rebuttal evidence to refute the Respondents' evidence that Costa Rican members of the Complainant Group did not operate or perform maintenance on any TBM-related machinery on the La Joya hydroelectric project in Costa Rica. This evidence was proferred by the Respondents in support of their position that members of the Complainant Group had less experience and skills than members of the European comparator group.

Evidentiary background to the application

[128] The evidentiary background to the application begins with the Respondents' response to the complaint, filed September 20, 2006. In it, they attributed any differences in the terms and conditions of employment between the Latin American and Canadian resident employees to their usual place of residence. This was before the amendment to the complaint alleging discrimination as between the Latin American and European employees. The Respondents stated that "the non-resident [*i.e.* Latin American] workers have specialized skills in relation to the use and operation of SELI's tunnel boring machine (TBM) which the resident workers do not possess".

[129] Included with the Respondents' application to dismiss the complaint, which was filed at the same time as their response to the complaint, was the affidavit from Mr. Ciamei, SELI's Project Manager on the Canada Line project, and as such the Respondents' senior manager on site. Mr. Ciamei swore that:

> …
>
> 4. Tunnelling of this kind is very specialized work requiring employees with the requisite experience and expertise. Workers with these skills are very difficult to find. Such workers are often not available in the various areas of the world where SELI SPA runs projects.
>
> 5. … SELI SPA offered a number of SELI employees with tunnelling expertise, who were then working on projects in Central and South America, an opportunity to work on the Canada Line project in Vancouver …

> 6. All of the non-resident employees hired for the Canada Line project have been employed by SELI SPA or its subsidiaries on other SELI tunnelling projects. All have specialized tunnelling expertise. SELI Canada recruited the non-resident employees with the tunnelling expertise they required. They have long-term employment relationships with the SELI group and regularly work all over the world…
>
> …
>
> 8. … The non-resident employees on the Canada Line project perform different work from the resident employees, as they have different skills and expertise. In particular, the non-resident workers have specialized skills in relation to the use and operation of SELI's tunnel boring machine (TBM) which the resident workers do not possess. Most of the resident workers have been hired as labourers, although the resident employees also include mechanics, electricians and equipment operators.

[130] In summary, Mr. Ciamei swore that all of the non-resident employees, including the Latin Americans, and including within that group, the Costa Ricans, have specialized tunnelling expertise, specialized skills in the use and operation of SELI's TBM, and long-term employment relationships with SELI, regularly working for SELI all over the world. Further, Mr. Ciamei swore that all non-resident employees, including the Costa Ricans, performed specialized work on the Canada Line project, which was different from the non-specialized labour work performed by the Canadian residents. As set out above, Mr. Ciamei confirmed in his evidence before us that the contents of his affidavit are true.

[131] The parties entered into the ASF, which included the Books of Documents containing immigration documents for most members of the Complainant Group and the European workers. The immigration documents include applications for work permits produced and submitted by SELI to Canada Citizenship and Immigration. The Books of Documents also included Letters of Assignment for most workers on the project. The Letters of Assignment constitute the written contract of employment between the Respondents and the workers, signed by Mr. Ciamei and the individual workers after they arrived in Canada. In some cases, there were also earlier Letters of Assignment, signed while the workers were still abroad, which had different terms and conditions of employment.

[132] The work permit applications all refer to the applications being made "pursuant to the C12 category applicable to Intra-company Transferee – Senior Manager or alternatively Specialized Knowledge Worker". They all refer to the work experience of the members of the Complainant Group. Generally, the Costa Ricans are stated to have two or more years of experience with the TBM, including in many cases two or more years as an operator of various specific kinds of TBM-related machinery, such as Mortar Pump, Segment Crane, Erector, and Muck Loader. The applications consistently refer to the applicants, all members of the Complainant Group, as being ideally suited to occupy various named positions in the construction of the Canada Line project.

[133] The work permit application for Luis Alberto Retes Anderson is reasonably representative of the applications for the Costa Ricans. Dated March 30, 2006, and signed by Pietro Favaretto, SELI's Administrator and Financial Manager on the Costa Rica project, it states:

> Mr. Retes Anderson's application is made pursuant to the C12 category applicable to Intra-company Transferee – Senior Manager or alternatively Specialized Knowledge Worker. We submit that Mr. Retes Anderson qualifies for a work permit based on the following considerations:
>
> a) He will be transferred to SELI Canada's office in Vancouver, British Columbia to assume the specialized knowledge position of T.B.M. Cutterhead Mechanic from SELI's branch in Costa Rica, Central America, where he currently holds the position of T.B.M. Cutterhead Mechanic;
>
> b) He has been employed with the SELI organization for nearly 3 years;
>
> c) Mr. Retes Anderson is currently employed in the specialized knowledge position of T.B.M. Cutterhead Mechanic. He is responsible for the maintenance of the cutterhead wear, assisting in troubleshooting of general matters concerning the cutterhead and replacing the broken or worn blades;
>
> d) … the joint venture company requires specialists T.B.M.'s Cutterhead Mechanics with experience in similar projects. SELI Canada and SNC-Lavalin do not possess this specialized expertise. In addition, proprietary knowledge of the SELI organization's operations and methodologies are required in order to effectively execute this major project;

e) Mr. Retes Anderson has been identified as ideally suited to occupy the position of T.B.M. Cutterhead Mechanic on SELI Canada and SNC-Lavalin's joint venture. He possesses experience on tunnels bored by T.B.M., and has participated in large-scale projects. His most recent position with SELI in Costa Rica was to act as T.B.M. Cutterhead Mechanic at La Joya hydroelectric project. In this position, he was responsible to ensure the correct and safe maintenance of the T.B.M.'s cutterhead wear, assisting in troubleshooting of general matters. This experience is directly applicable to the position of T.B.M. Maintenance on the RAV project, and is not readily available in Canada;

f) While in Canada, Mr. Retes Anderson will participate to the assembly of the EPB T.B.M. and then for the day-to-day operations of the RAV project, ensuring the proper maintenance of the cutterhead wear…

…

The Applicant

Mr. Retes Anderson possesses nearly 3 years of professional experience with T.B.M. and almost 2 years as T.B.M. Cutterhead Mechanic. He has been with the SELI organization since 2003, and has occupied positions increasing in responsibility to currently occupy the position of T.B.M. Cutterhead Mechanic. He has contributed to large-scale projects for clients in Costa Rica. In addition, the projects on which Mr. Retes Anderson has offered his services have had significant public benefit. This diverse experience will be of significant benefit to SNC-Lavalin and SELI Canada as it executes its massive public transportation project in British Columbia.

[134] Other applications are similar in tone and content. For example, Mr. Favaretto also signed the March 7, 2006 application for a work permit for Cristhian Leiton Calderon to work as an Erector Operator. It states that Mr. Leiton Calderon currently holds the Specialized Knowledge position of Erector Operator, and that he has been employed with SELI for more than two years. Mr. Leiton Calderon is said to have been identified as ideally suited to occupy the same position on the Canada Line project. The application says that in his most recent position with SELI he was responsible for positioning precast segments in order to create concrete rings over the tunnel lining, and that that experience is directly applicable to the position as Erector Operator on the Canada Line project, and not readily available in Canada. Under the heading "The

Applicant", Mr. Leiton Calderon is said to possess over two years professional experience with the TBM, and one and a half years experience as Erector Operator.

[135] Also included for some of the Latin American workers are declarations from Mr. Antonini to Citizenship and Immigration Canada. Mr. Antonini is the General Director for all jobsites for SELI worldwide, and he testified that he has specific responsibility for Human Resources. For example, in a letter dated March 3, 2006, Mr. Antonini declared that Mr. Retes Anderson currently held the position of TBM Cutterhead Mechanic. In a similar letter of the same date, he declared that Douglas Barboza Cedeno was currently employed as a TBM Mortar Pump Operator.

[136] The Respondents did not provide an opening at the outset of the hearing. At no time in CSWU's case, including in their cross-examination of Anthony Raul Gamboa Elizondo, Douglas Barboza Cedeno, Jojans Sanchez Chaves, Martin Alonso Serrano Gutierrez, Cristhian Leiton Calderon and Luis Alajandro Montanez Lara, all members of the Complainant Group called by CSWU as part of its case in chief, did the Respondents contest the experience of the Latin American employees. In brief, those witnesses' experience, as stated by SELI in their work permit applications, was as follows:

Gamboa Elizondo	One year professional experience with TBM, and more than six months as muck loading operator
Barboza Cedeno	Almost two years professional experience with TBM, and more than one year as TBM mortar pump operator
Sanchez Chaves	Over two years professional experience with TBM, and one and half years as TBM erector operator
Serrano Gutierrez	Almost two years professional experience with TBM, and more than one year as TBM mortar pump operator
Leiton Calderon	Over two years professional experience with TBM, and one and half years as TBM erector operator

There is no work permit application for Mr. Montanez Lara as he is now a Canadian resident.

[137] Further, Mr. Gamboa Elizondo, Mr. Sanchez Chaves, Mr. Serrano Gutierrez and Mr. Leiton Calderon all testified in direct about their experience on the La Joya project in Costa Rica. Again, this evidence was not challenged in cross-examination.

[138] On November 24, 2007, the Respondents wrote a letter to the Tribunal in relation to the then pending applications for a stay or adjournment. In that letter, the Respondents stated that their response to the amended complaint was the same as their response to the original complaint, *i.e.* compensation is based upon SELI's international pay practices.

[139] On December 6, 2007, the Respondents provided their opening statement. It focussed on SELI's compensation structure as the justification for the differences in compensation paid to the Latin American and European workers. It states that "the exclusive basis for the difference in compensation that is the subject of this complaint is the fact that labour market rates actually differ from place to place and time to time." The Respondents' opening statement contains no suggestion that differences in compensation are based on differences in experience or skills.

[140] According to CSWU, the Respondents initially indicated to it that Mr. Antonini would be their sole witness on the merits of the complaint, and that he would speak to SELI's international compensation structure. Mr. Antonini testified on December 6 and 7, 2007. Mr. Antonini did testify about SELI's international compensation structure, among other things. In particular, he gave some general evidence in direct examination about what the Costa Rican employees had done on the La Joya project, referring to their experience in tunnelling being two years working with a kind of TBM which he described as "not so similar to this one, a little bit different" from that used on the Canada Line project, and to the more critical work on the La Joya project having been performed by specialists from Italy, Columbia and Ecuador.

[141] By way of explanation, SELI used a "double-shield" TBM on the La Joya project, and an "EPB" TBM on the Canada Line project. SELI knew when it bid on the Canada Line project that it would be using an EPB TBM, and that the Costa Rican employees had only worked on the double-shield TBM. Apparently, this was not seen as an impediment to using the Costa Rican workers to assemble the EPB TBM and to perform the tunnelling work with it.

[142] The Respondents' second witness on the merits of the complaint, Mr. Ginanneschi, started to testify on December 7, and continued to testify on January 21, 25 and 28, and February 13, 2008. Mr. Ginanneschi was employed by SELI as the TBM Site Manager on the Canada Line project; he had no involvement in the Costa Rican project.

[143] Mr. Ginanneschi's evidence was wide-ranging. In direct examination, he was questioned about his understanding of the previous experience of the various employees working on the Canada Line project. This evidence was hearsay, as it was based upon what Mr. Ginanneschi said others, in particular Mr. Gencarelli, Mr. Pellegrini, and the Costa Rican workers themselves, had told him about their experience. Mr. Gencarelli was SELI's Production Manager, and Mr. Pellegrini was its Project Manager, on the Costa Rican project. As such, Mr. Pellegrini was Mr. Gencarelli's superior, with Mr. Pellegrini's role being roughly equivalent to Mr. Ciamei's, and Mr. Gencarelli's roughly equivalent to Mr. Ginanneschi's, on the Canada Line project. CSWU objected to Mr. Ginanneschi's testimony on the basis of its hearsay nature, and the panel overruled the objection, ruling that the evidence would be admitted, with the panel ultimately determining what, if any weight, it should be accorded.

[144] In general, Mr. Ginanneschi testified that none of the Costa Ricans had operated TBM-related machinery on the La Joya project. He testified that neither any of them, nor anyone else, told him that they had operated such machinery on that project. Mr. Ginanneschi compared the previous experience and the current skills and duties of the European and Latin American workers, and consistently testified that the Europeans were superior.

[145] In cross-examination, the inconsistencies between his evidence about the Costa Rican employees' previous experience, and the information contained in the immigration documents, was put to Mr. Ginanneschi. Mr. Ginanneschi denied ever having seen the immigration documents. While he would not say that the documents misrepresented the workers' experience, stating that they were not his documents and he was not responsible for them, he continued to maintain his evidence that, contrary to what is clearly stated in those documents, the Costa Ricans had no experience operating TBM-related machinery. Even when it was put to him that, in some cases, he assigned workers to perform the very

jobs which the immigration documents indicated they had previously performed, Mr. Ginanneschi continued to maintain that he had no knowledge that the Costa Ricans had ever performed those jobs before.

[146] In the midst of Mr. Ginanneschi's direct evidence, on January 18, 2008, the Respondents wrote CSWU, expanding their witness list, stating that their "possible witnesses included Piero Angioni, Antonio Dambra, Romeo Gencarelli, Chris Wates, Andrea Ciamei, Gabriele Dell'ava, as well as any of the employees".

[147] Mr. Gencarelli testified on February 15, 2008. Mr. Gencarelli testified that none of the Costa Rican members of the Complainant Group had operated or maintained TBM-related machinery on the La Joya project, of which he was the Production Manager. The substance of his testimony was that none of the Costa Rican employees had fixed jobs; they did manual labour "cleaning" the tunnel and the TBM, removing debris created by the tunnelling process. He was asked about a list of Costa Rican employees, including Anthony Raul Gamboa Elizondo, Douglas Barboza Cedeno, Jojans Sanchez Chaves, and Martin Alonso Serrano Gutierrez, among others, and denied that they had operated equipment, saying that they did manual labour only. He testified that Cristhian Leiton Calderon worked as an Erector Operator for two months, but was dismissed due to problems he created. He testified that Luis Alberto Retes Anderson, in addition to cleaning the tunnel, may have assisted the mechanic, cleaning the workshop.

[148] CSWU cross-examined Mr. Gencarelli at some length, challenging his evidence about what the Costa Rican employees had done on the La Joya project. It was put to Mr. Gencarelli that Mr. Favaretto had itemized the Costa Rican employees' experience operating or maintaining TBM machinery in the immigration documents he prepared. In direct, Mr. Gencarelli had testified that he had nothing to do with the preparation of those documents, and had not discussed them with anyone, including Mr. Favaretto. In cross-examination, he denied that at least some of what Mr. Favaretto had written, for example about Mr. Retes Anderson, was true. He also specifically denied that Mr. Leiton Calderon had been employed as an Erector Operator for at least six months, saying it was for only two months, and denied that what Mr. Favaretto had written about Mr. Leiton Calderon holding the position for one and half years was true.

[149] Mr. Gencarelli specifically denied that what Mr. Antonini had written in his declaration to Citizenship and Immigration Canada about Mr. Retes Anderson being employed as a TBM Cutterhead Mechanic was true. Mr. Gencarelli gave similar evidence about the remainder of the Costa Rican employees, disagreeing with both the employees' evidence and the information in the immigration documents about their experience.

[150] In support of its application to call rebuttal evidence, CSWU submitted that the Respondents, through Mr. Gencarelli's evidence, had sought to introduce a further defence to the complaint, namely, that the differences in pay between the Europeans and Latin Americans was attributable to differences in experience. CSWU submitted that it could not reasonably have anticipated this evidence, given the representations made by the Respondents in their response to the complaint and their application to dismiss; the immigration documents contained in the ASF; the lack of cross-examination of its witnesses about these issues; and the lack of an opening statement. Further, CSWU submitted that there would be no unfairness to the Respondents if the proposed rebuttal evidence were permitted.

[151] CSWU raised concerns about the timing of the rebuttal evidence. In its application, it indicated that it was expected that the TBM would "break through", that is, come to the surface, thereby bringing the tunnelling work to an end, on March 1 or 3, 2008. It anticipated that the workers would be required to dismantle the TBM for about two weeks, following which they would leave the country. CSWU therefore sought an order that the rebuttal evidence be called on March 10, 2008, the next scheduled hearing day, and that, if any necessary witnesses were to depart before then, their evidence be obtained by other means.

[152] A flurry of correspondence followed the application. The Respondents sought, and received, a list of the proposed rebuttal witnesses and further clarification of the scope of the proposed evidence. In respect of the latter, CSWU advised that each of the workers "would testify as to their work experience on the La Joya Costa Rican project, and particularly any equipment they operated on that project … [and that they] anticipate[d] that the evidence will be that the great majority of the Costa Rican workers

had TBM operating or maintenance experience consistent with what was put to Mr. Gencarelli on cross-examination".

[153] On March 3, 2008, CSWU advised the Tribunal in writing that the TBM broke through on March 2, and that 12 named employees in the Complainant Group were advised shortly thereafter that they were being laid-off, and would be departing on March 6. CSWU stated that when the laid-off employees went to the project office they were told they could leave Canada on either March 6 or March 13, but that in any event they would have to be out of the Motel by March 6. The employees had no other accommodation arrangements, and the majority chose to leave on March 6. CSWU stated that this was contrary to what it understood the Respondents' assurances to be, and asked the panel to reconvene to hear the rebuttal evidence before March 6. CSWU listed six proposed rebuttal witnesses.

[154] On March 4, 2008, the Respondents wrote the Tribunal, refuting some of the assertions made in CSWU's correspondence. The Respondents stated that they did not tell the employees they had to leave the Motel before March 13, and that they expressly told them they could stay until March 13 if they wanted. They expressed upset about what they perceived as CSWU's false allegations. They said that they had made clear to CSWU that they would continue to pay the employees' wages and provide them accommodation, and arrange for a flight after March 10, and suggested that, if there had been any miscommunication, CSWU should have contacted the Respondents to clarify the situation.

[155] On March 4, the panel wrote the parties about this exchange, advising them that we expected them to be able to resolve these issues between themselves. Without making any findings or rulings, we suggested that, if there was concern that some employees might not be available to testify on March 10, the parties should take the steps necessary to preserve their evidence, by examination before a court reporter. We stated that, if we ultimately ruled that CSWU could call rebuttal evidence, the video deposition or transcript would be admitted. We told the parties that if they required any directions or orders, we would make ourselves available for an immediate telephone conference. We

closed by reiterating the schedule for the completion of submissions on the application to call rebuttal evidence.

[156] No telephone conference was requested or held. In accordance with the submission schedule, the Respondents filed their response to the application later on March 4. They opposed the application, submitting that they would be denied a fair hearing were it to be granted. They submitted that evidence about the skills and experience of the members of the Complainant Group was an essential element of CSWU's case, and should have been part of its case in chief. They referred to having put CSWU on notice that it would not be sufficient to call evidence from only a few employees on this point. They agreed that their primary defence to the complaint was based on SELI's compensation practices, but submitted that the comparative experience and skills of the European and Latin American workers was also relevant, and that CSWU should have recognized that in putting in its case.

[157] CSWU replied later on March 4. It submitted that the issue raised by the proposed rebuttal evidence was not whether the Latin Americans and Europeans do the same jobs or have the same skills, matters it conceded were challenged by the Respondents in cross-examination of its witnesses. Rather, the issue raised by the rebuttal evidence was whether the Costa Rican employees had operated TBM-related machinery on the Costa Rican project, a matter upon which its witnesses had not been challenged.

[158] On March 5, 2008, before a court reporter, the parties took the evidence of three witnesses: Jojans Sanchez Chaves, Ernesto de la Trinidad Camacho Cordero, and Juan Jose Ruiz Mora. That day, the Respondents wrote the Tribunal to state that the scope of the rebuttal evidence taken went beyond that identified by CSWU in its submissions.

[159] As indicated above, on March 5, we provided the parties with a letter decision that CSWU would be "permitted to call evidence in rebuttal to the evidence given by Mr. Gencarelli with respect to the work performed by certain members of the Complainant Group on the La Joya project in Costa Rica". We indicated that the issues raised in the Respondents' March 5 letter about the scope of the rebuttal evidence were distinct, and

directed the parties to make written submissions about them. We gave certain other directions about how the additional rebuttal evidence would be heard.

[160] The parties provided the requested submissions on March 6 about the Respondents' objections to the scope of the rebuttal evidence.

[161] On March 7, the panel provided another letter decision, this one about the scope of the rebuttal evidence. We identified two aspects to the questions asked in rebuttal to which the Respondents objected: first, there were questions about the work performed by the Costa Rican members of the Complainant Group in Costa Rica; and second, there were questions asked in anticipation of Mr. Favaretto's and Mr. Pellegrini's evidence, which had not yet been given.

[162] In respect of the first issue, relating to the work performed by the Costa Ricans on the La Joya project, we stated that our previous decision was clear, and directed the parties to attempt to agree about which, if any, questions extended beyond the scope of the order, failing which we would make those determinations.

[163] In respect of the second issue, relating to questions asked in anticipation of Mr. Pellegrini's and Mr. Favaretto's evidence, we noted CSWU's concession that these questions were beyond the scope of our earlier decision. Given that it was impossible to rule on the potential admissibility of the answers to these questions before we heard from Mr. Favaretto and Mr. Pellegrini, we reserved on this issue, again with the direction that the parties were to attempt to resolve this issue, failing which we would make the necessary determinations.

[164] The hearing resumed on March 10, 2008, at which time CSWU called three more rebuttal witnesses: Anthony Raul Gamboa Elizondo, Yandry Eugenio Tuarez Fortis and Luis Alberto Retes Anderson. The Respondents objected to the scope of the evidence given by Mr. Gamboa Elizondo in anticipation of Mr. Favaretto's and Mr. Pellegrini's evidence, in response to which we reiterated what we had earlier told the parties in our letter of March 7. We therefore heard the evidence, reserving on its admissibility.

[165] Ultimately, the parties were able to agree about the scope of the rebuttal evidence which was given before the court reporter and at the resumption of the hearing, and, on

April 9, 2008, submitted certified transcripts and later DVDs of the video depositions, redacted in accordance with counsels' agreement.

[166] In general, the six rebuttal witnesses testified about the work they had performed and had seen other Costa Rican members of the Complainant Group perform on the La Joya project. They all disagreed with Mr. Gencarelli's evidence that, with one or two exceptions, none of the Costa Ricans had operated or maintained TBM-related machinery.

[167] Jojans Sanchez Chaves testified that, on the La Joya project, he worked as the operator of the train unloader, referred to in Spanish as the "carga vagones", for a year, and also worked as a helper to the Erector Operator, the TBM Mechanic, and the Gravel Pump Operator. Ernesto de la Trinidad Camacho Cordero testified that he worked as the operator of the carga vagones, then as the Erector Operator Helper, and finally as the Erector Operator, the last for about eight months. Juan Jose Ruiz Mora testified that he worked as an Erector Operator Helper for the first 11 months, and then as a Locomotive Operator. Anthony Raul Gamboa Elizondo testified that he worked for 11 months, doing a variety of jobs, including injections, perforations, and supervising a small group working with cement. Others referred to this as being the Grout Pump Operator, which we accept is accurate. Yandry Eugenio Tuarez Fortis testified that he worked for two years as a TBM Mechanic. Luis Alberto Retes Anderson testified that his job was to assemble the cutterhead blades, and that he worked both in the tunnel and mainly in the workshop. He said that his title would be mechanic assistant, because, while he knew how to do the job, he lacked the papers to have the title of mechanic.

[168] All six witnesses testified about their observations of other workers on the La Joya project. Allan Fonseca Adams, Gabriel Esquivel Garcia, Juan Jose Ruiz Mora, Manuel Francisco Artavia Fonseca and Mario Alonso Sanchez Chaves were identified as Loco Operators. Cristobal Barboza Rivera and Jose Luis Barboza Cedeno were identified as Segment Transport Beam Operators, referred to in Spanish as the "Astronave". Efrain Calderon Araya, Douglas Barboza Cedeno and Jose Antonio Barboza Sanchez were identified as Gravel Injector or Gravel Pump Operators. Felipe Zuniga Perez, Marvin Enrique Vasquez Moya, Oscar Andres Ramirez Luna and Walter Quiros Monge (the

latter two identified as being in charge of a group) were identified as working in cement injection, which we understand to be essentially the same as a Grout Pump Operator. Franklin Mora Gamboa was identified as a Train Unloader. German Cordero Camacho, Mario Alberto Alvarado Camacho and Jojans Sanchez Chaves (he was also identified as a Labourer, Wagon Loader, and Erector Operator) were identified as Erector Operator Helpers. Luis Diego Brenes Perez (after he returned from an injury, he later worked in the mechanic workshop) and Ernesto de la Trinidad Camacho Cordero were identified as Erector Operators. Mario Flores Brenes was identified as being in charge of sending materials into the tunnel, and as a replacement Locomotive Operator.

[169] Finally on this subject, Mr. Favaretto, Mr. Pellegrini and Mr. Ciamei all subsequently testified about the immigration documents, in which SELI had made representations about the work performed by the Costa Rican employees in Costa Rica. The substance of their testimony, as it relates to the question of what the Costa Rican employees did on the La Joya project, and the Respondents' assertions about that experience on the immigration documents, is as follows.

[170] Mr. Favaretto prepared the immigration documents, and said that he did so carefully, and that they were truthful so far as he is aware. Mr. Favaretto worked some distance from the jobsite in La Joya, and had no direct knowledge of what the workers did. Mr. Pellegrini was the Project Manager on the La Joya project, and had direct knowledge of what the workers he did. Mr. Pellegrini did not prepare the immigration documents, but assisted Mr. Favaretto by giving him the information necessary for him to do so. According to Mr. Favaretto, Mr. Pellegrini explained to him in detail the functions of the workers.

[171] Regarding communications between the SELI managers in Costa Rica and those responsible for the Canada Line project, there is no evidence that any of the Vancouver managers spoke to Mr. Favaretto. Mr. Ciamei testified that he wanted the best workers available from the Costa Rican project, and talked to Mr. Pellegrini about that. Some of the best workers were following Mr. Pellegrini to a project in Brazil, and Mr. Ciamei did not talk to Mr. Pellegrini about the specifics of the Costa Ricans' experience.

[172] Mr. Pellegrini felt that the workers sent to Vancouver were of good quality. He testified that the La Joya project was a success, he was very happy with the productivity of the Costa Rican employees, and the project depended on the quality of the employees.

[173] Mr. Ciamei testified that he never spoke to Mr. Gencarelli. Mr. Gencarelli was not asked about any conversations with Mr. Ciamei.

[174] Mr. Gencarelli said that he talked with Mr. Ginanneschi. His evidence about the timing of their conversations and what they talked about was vague, but in the end he testified that they had no discussions about the background and experience of the Costa Rican workers, only about how many workers wanted to come to Vancouver and if they were ready to do so. Mr. Ginanneschi, on the other hand, testified that he spoke in detail with both Mr. Gencarelli and Mr. Pellegrini about the workers on the Costa Rica project, including their experience and qualifications. Mr. Pellegrini was not asked about any discussions he may have had with either Mr. Ciamei or Mr. Ginanneschi.

[175] Mr. Ciamei had no involvement in preparing the immigration documents, but was involved in the immigration process. He has since reviewed the immigration documents, and believes they are true.

Reasons for allowing the application

[176] We ruled that CSWU could introduce the proposed rebuttal evidence because we were persuaded that CSWU would be denied a fair hearing if it was not allowed to introduce that evidence. CSWU could not reasonably have anticipated that the Respondents would lead evidence that the Costa Ricans did not operate or maintain TBM-related machinery on the Costa Rican project, nor that they would seek to rely on that evidence as part of the explanation or justification for the differential pay rates on the Canada Line project.

[177] The Respondents did not effectively put CSWU on notice prior to the close of CSWU's case that the Costa Ricans' alleged lack of TBM-related experience would form part of their defence to the complaint. In particular, the Respondents, despite being given the opportunity to do so, did not file an amended response to the complaint after the allegations about the European workers were added, nor did they make an opening

statement at the outset of the hearing. While a respondent is not required to make an opening statement at the outset of a hearing, the failure to do so in this case meant that CSWU had no notice of the Respondents' intention to rely on this defence. One would have expected that the Costa Ricans' alleged lack of TBM-related experience, and the defence which rests upon it, would have been a part of both the Respondents' amended response and opening.

[178] The Respondents point to certain comments made by their counsel in the hearing on October 1, 2007, after counsel for CSWU had made its opening statement. The comments were specifically said not to be opening. In those comments, counsel indicated that it would be the Respondents' position that the Europeans have greater skills and experience. We agree with CSWU that the Respondents are attempting to have it both ways, by expressly reserving on their opening until after CSWU closed its case, and later seeking to rely on counsel's earlier comments. A party is entitled to one opening only, and in this case, the Respondents chose not to make an opening until after CSWU closed its case.

[179] Further, CSWU is correct in its submission that the comments from counsel relied upon by the Respondents in support of their opposition to the application to introduce rebuttal evidence are contradicted by the ASF, which the parties introduced at the outset of the hearing. Paragraph 31 of the ASF lists 13 Latin American workers, including nine from Costa Rica, and states that the parties agree that "they perform substantively the same work" as the other employees with the same job title on the Organization Chart. Those other employees are the European workers.

[180] We further agree with CSWU that, in any event, the issue about which it sought to lead rebuttal evidence was not the general one of the comparative skills and experience of the Latin American and European workers. Rather, the issue was the much more specific one, raised squarely in Mr. Gencarelli's direct evidence, and more obliquely by Mr. Ginanneschi's hearsay evidence, that the largest sub-set of the Complainant Group, namely those from Costa Rica, had no experience operating or maintaining TBM-related equipment. This assertion was never raised by the Respondents until Mr. Ginanneschi

and Mr. Gencarelli gave their evidence, and it is not one which CSWU could possibly have anticipated, for at least three reasons.

[181] First, as already indicated, the Respondents never put CSWU on notice that it would lead this evidence. Second, the Respondents did not cross-examine the members of the Complainant Group that CSWU called as part of its case in chief about these issues. Third, the evidence in question directly contradicts the immigration documents submitted by SELI to Citizenship and Immigration Canada in support of their work permit applications, and which form part of the ASF. CSWU could not have anticipated that the Respondents would seek, through Mr. Gencarelli and, to a lesser extent, Mr. Ginanneschi, to contradict the assertions and declarations made by SELI in those documents to the Canadian government about the Costa Rican employees' experience.

[182] For these reasons, we concluded that it would be unfair to CSWU not to permit it to lead the proposed rebuttal evidence. Further, we were not persuaded that it would be unfair to the Respondents to allow the rebuttal evidence. First, the Respondents' litigation strategy resulted in the circumstances that led to CSWU leading the evidence in rebuttal rather than as part of its case in chief. And second, the Respondents, having led the evidence from Mr. Gencarelli and Mr. Ginanneschi which CSWU sought to counter, were fully able to cross-examine the rebuttal witnesses about the work performed by them and the other Costa Rican workers on the La Joya project. Finally, the rebuttal evidence was heard before the Respondents closed their case, giving them the opportunity to address issues related to it through their remaining witnesses, in particular Mr. Favaretto and Mr. Pellegrini.

Findings of fact related to the rebuttal evidence

[183] This is an appropriate place to make our findings of fact, both about the work performed by the Costa Rican members of the Complainant Group on the La Joya project, and about other matters related to the evidence about that issue.

[184] The evidence about what the Costa Rican workers did on the La Joya project is inconsistent, to say the least. The immigration documents submitted by SELI to Citizenship and Immigration Canada indicate that the Costa Rican workers had

substantial specialized tunnelling expertise, expertise that the Respondents required on the Canada Line project because it could not be found among the Canadian workforce. In their testimony, Mr. Favaretto, the Administrator and Financial Manager on the Costa Rican project, and the author of those documents, and Mr. Ciamei, the Project Manager for the Canada Line project, both testified that the information contained in the immigration documents was true. By contrast, Mr. Gencarelli, the Production Manager on the Costa Rican project, testified that some of the information contained in those documents about the work experience of the Costa Rican employees was not true. Mr. Ginanneschi testified that the information he received, both from the managers on the Costa Rica project, and the Costa Rican employees themselves, was inconsistent with the information contained in the immigration documents. The sources of Mr. Ginanneschi's understanding were unclear, however, as neither the managers nor the employees on the Costa Rican project corroborated having given him the information he testified about. Mr. Pellegrini, the Project Manager on the Costa Rican project, confirmed Mr. Favaretto's evidence that he provided him with the information upon which the immigration documents were based. Finally, six of the Costa Rican employees testified about what they and others did on the Costa Rican project.

[185] We have concluded that the best evidence of what the Costa Rican employees did on the La Joya project, and of their experience in tunnelling, is contained in the immigration documents and Mr. Ciamei's affidavit. Mr. Favaretto testified that he carefully prepared the immigration documents on the basis of detailed information provided to him by Mr. Pellegrini. Mr. Pellegrini confirmed that evidence. The immigration documents were prepared to be submitted to the Government of Canada for the purpose of obtaining work permits for the Costa Rican employees. In the absence of reliable evidence to the contrary, it should be presumed that the SELI officials responsible for their preparation would, as testified by Mr. Favaretto, be careful and truthful in their preparation. Further, those documents were prepared prior to the commencement of these proceedings, and would therefore have been uninfluenced by any potential effect on the outcome of this litigation. Finally, the information contained in the immigration documents is, for the most part, consistent with the positions referred to in the subsequent Letters of Assignment, signed by Mr. Ciamei, and, in some cases,

consistent with the positions to which Mr. Ginanneschi assigned the workers on the Canada Line project.

[186] As outlined above, the immigration documents clearly state that the Costa Ricans had specialized tunnelling expertise, including experience operating and maintaining TBM-related equipment.

[187] Mr. Ciamei's affidavit, the contents of which he confirmed were true when he testified, while not going into detail about the particular work experience of each individual Costa Rican employee, substantiates that they had specialized tunnelling expertise, and that they were specifically brought to the Canada Line project for that reason. While that affidavit was sworn for the purposes of this complaint, it is significant that it was sworn prior to the amendment to the complaint adding the allegations about discrimination in comparison to the European workers. It was therefore sworn at a time when the Respondents would have had no reason to devalue the work experience of the Costa Rican workers in comparison with the European workers.

[188] Further, with the exception of a handful of European managers and technical specialists who were here from the outset, the initial complement of employees doing the tunnelling work on the Canada Line project was made up entirely of Latin American workers who had come from the Costa Rican project, including the Costa Rican workers, who made up a majority of that group. The Respondents' evidence was that their plan, at that time, was to complete the project solely with the Latin American workers, working on two shifts. And in fact, until in or about September 2006, when some European workers were brought in to staff a third shift, it was the Latin American workers, including the Costa Ricans, who performed the tunnelling work, including assembling, operating and maintaining the TBM-related machinery. The Respondents' evidence about why the European workers were brought in was somewhat vague, and unsupported by any documentation, but centred on production delays which their client was unhappy with. But there is no suggestion that the Latin American workers, including the Costa Ricans, were incapable of doing the specialized tunnelling work which they had been brought here to do.

[189] By contrast, we find the evidence of Mr. Gencarelli and Mr. Ginanneschi about the work performed by the Costa Ricans on the La Joya project unreliable. There are a number of reasons for this conclusion. First, as already stated, there is the inconsistency between their evidence on this subject, and that contained in the immigration documents and Mr. Ciamei's affidavit. Second, there is the inconsistency between their evidence about the work performed by the Costa Ricans in Costa Rica, and that of Mr. Pellegrini. An example of the latter is Mr. Pellegrini's evidence that Luis Alberto Retes Anderson assisted the Cutterhead Mechanic in repairing the cutterhead on the La Joya project, significantly more skilled work than Mr. Gencarelli had testified Mr. Retes Anderson performed.

[190] Third, there is the inconsistency between their evidence and that of the six Costa Ricans who testified about the subject. While the recollection of some of those witnesses about the duration they or others operated particular pieces of machinery was tested on cross-examination, the substance of their evidence about the kinds of work they and others performed was not shaken. The substance of their evidence was that they and others had operated or maintained TBM-related machinery in Costa Rica, and an outright denial of Mr. Gencarelli's evidence to the contrary.

[191] The aforementioned reasons apply equally to both Mr. Gencarelli's and Mr. Ginanneschi's evidence. There are additional individual reasons for finding each of their evidence unreliable.

[192] In Mr. Gencarelli's case, his evidence was frequently vague or lacking in specificity. He repeatedly testified, in an almost rote manner, that individual Costa Ricans did manual labour only. Yet in cross-examination, it was revealed that he had little or no recollection of the identity of individual Costa Rican workers. In fact it became apparent that he had been given the passport photos of all of the Costa Ricans and some Ecuadorians, and had studied them for some days before giving his evidence. We do not accept that Mr. Gencarelli correctly recalled the work actually performed by individual Costa Rican workers.

[193] In Mr. Ginanneschi's case, his evidence about what the Costa Rican workers had done in Costa Rica was entirely hearsay. He claimed to have learned about these matters

in conversations with managers of the Costa Rican project, but that evidence was not corroborated by the managers in question, in particular Mr. Pellegrini. He also claimed to have questioned individual Costa Rican workers about their work experience at the start of the Canada Line project, but that evidence was not substantiated by the workers who testified.

[194] Further, and despite his evidence about the Costa Ricans' lack of experience, Mr. Ginanneschi assigned the Costa Ricans to work operating TBM-related machinery, and until the Europeans arrived, sometime in or about September, the Latin Americans performed the vast majority of the tunnelling work. The operation of the TBM requires the coordinated efforts of a team of operators, helpers and labourers; it could not be operated in the absence of persons able to perform all necessary tasks.

[195] The earliest Organization Chart, prepared by Mr. Ginanneschi sometime shortly after the complaint was filed and the Europeans had started to be added to the project, shows, for example, Ernesto de la Trinidad Cordero Camacho, Cristhian Leiton Calderon and Luis Diego Brenes Perez working as Erector Operators. It shows Luis Alberto Retes Anderson and Yandry Eugenio Tuarez Fortis working as TBM Mechanics. It shows Juan Jose Luis Mora and Manuel Francisco Artavia Fonseca working as Loco Operators. These examples could be multiplied. It would be remarkable indeed if these, and the other Costa Rican employees, were able to operate and maintain all of the TBM-related machinery on the Canada Line project, and to have done so from the outset of the project, if they had no previous experience doing so in Costa Rica.

[196] Further, Mr. Ginanneschi's evidence more generally appeared, at times, to be tailored to attempt to assist the Respondents' case rather than to tell the truth as he knew it. There are many examples that could be referred to. Below, we provide several.

[197] Mr. Ginanneschi emphasized that SELI had used a double-shield TBM on the La Joya project, while an EPB TBM was used on the Canada Line project. He testified that the EPB TBM is more sophisticated, and more difficult to operate, requiring operators experienced in its use. He further testified that none of the Latin Americans had operated an EPB TBM, but that all of the Europeans had. This evidence was designed to devalue the Latin Americans' experience, and to say that they all required training before they

could operate TBM-related machinery on the Canada Line project. The difficulty is that Mr. Ginanneschi's evidence was inconsistent with the basis upon which the Respondents had intended to staff the Canada Line project, using Costa Rican workers whom they knew, as stated in the immigration documents, had only worked with a double-shield TBM. It is also somewhat inconsistent with the evidence of Mr. Ciamei, who testified that the difference between the double-shield and EPB TBMs is only significant with respect to some positions.

[198] In cross-examination, Mr. Ginanneschi was asked about whether Rogelio Cortes Huertas had ever previously worked with an EPB TBM. Mr. Ginanneschi testified that Mr. Cortes Huertas had not, and that Mr. Cortes Huertas had even told him this. This was demonstrably untrue, as Mr. Cortes Huertas had worked with an EPB TBM on a SELI project in Portugal.

[199] Mr. Ginanneschi repeatedly downplayed the skills and experience of the Latin Americans while extolling those of the Europeans. For example, Mr. Ginanneschi consistently underestimated the length of time the Latin Americans worked on the La Joya project. Despite the fact that the La Joya project took over two years to complete, Mr. Ginanneschi credited a number of the Latin Americans with only one to one and a half years tunnelling experience. These included Ernesto de la Trinidad Cordero Camacho, David Bonilla Granados, Jose Antonio Barboza Sanchez and Mario Alonso Sanchez Chaves. A review of their immigration documents indicates that they had between two and three years experience tunnelling in Costa Rica. When cross-examined on this point Mr. Ginanneschi admitted that they might have had two years experience, but attempted to recast the focus of his evidence as being that they had worked on only one project.

[200] These examples are representative of the frailties in Mr. Ginanneschi's evidence.

[201] For all of these reasons, we conclude that Mr. Gencarelli and Mr. Ginanneschi's evidence about what the Costa Rican workers did in Costa Rica is unreliable. Further, in light of the seriousness of the difficulties with their evidence on this issue, we also find their evidence about other matters, in particular Mr. Ginanneschi's evidence about the work performed by the workers on the Canada Line project, similarly unreliable.

IX ANALYSIS

[202] In this part of the decision, we determine if CSWU has established a *prima facie* case of discrimination against members of the Complainant Group. If it has, we will then determine if the Respondents have established a *bona fide* occupational requirement defence to the complaint. We will then determine if the members of the Complainant Group who have applied to opt out of the complaint may do so. In relation to any parts of the complaint which we find justified, we will determine the remedies to which those members of the Complainant Group who have not opted out are entitled.

Prima facie case

1. What is necessary to establish a *prima facie* case in the circumstances of this complaint?

[203] In their written submissions, the parties were in little if any real disagreement about the elements CSWU must prove, on a balance of probabilities, in order to establish a *prima facie* case of discrimination contrary to s. 13 of the *Code*.

[204] According to CSWU, it must show:

> i. That the members of the Complainant Group fall within one of the protected groups against which discrimination is prohibited by the *Code*;
>
> ii. That the Respondents have treated the members of the Complainant Group adversely; and
>
> iii. It is reasonable on the evidence to infer that the prohibited ground of discrimination was a factor in the adverse treatment.

[205] In their written submission, the Respondents put what CSWU must establish this way:

> i. That the members of the Complainant group were treated adversely in that they were paid less than other SELI employees who perform comparable work;
>
> ii. That the Complainant group shares characteristics of race, colour, ancestry and/or place of origin; and

iii. That there is a nexus or connection between the treatment and the grounds.

[206] The first two elements are largely the same in the two formulations, requiring that members of the Complainant Group share characteristics in respect of which discrimination is prohibited, and adverse treatment.

[207] The parties do not materially differ in their formulations of the element requiring that members of the Complainant Group share characteristics of race, colour, ancestry and/or place of origin. It is clear that the *Code* only prohibits discrimination against persons sharing characteristics related to prohibited grounds of discrimination. The parties do differ with respect to whether members of the Complainant Group share all of grounds relied upon by CSWU. We will return to this issue in our analysis of this element.

[208] In relation to the adverse treatment element, the Respondents narrow the field of adverse treatment to being paid less than other SELI employees who perform comparable work, while CSWU refers more generally to adverse treatment. We will return to the significance of this difference in formulation in considering the adverse treatment element below, as it raises three questions: is a comparator group analysis required; if so, who are the proper comparators; and in what ways are members of the Complainant Group alleged to have been discriminated against? In that analysis, we will also consider the Respondents' submissions about the significance of s. 12 of the *Code* to the interpretation of s. 13.

[209] The parties express the third element differently, but in our view it is a distinction without a difference. Whether expressed as a reasonable inference that the prohibited grounds were a factor in the adverse treatment or as showing a nexus or connection, the substance of the burden on CSWU is the same: it must demonstrate, on a balance of probabilities, that the prohibited grounds were a factor in the adverse treatment or that there is a connection between the two.

[210] In this regard, it is helpful to refer to the British Columbia Court of Appeal's formulation of the test for a *prima facie* case of discrimination in *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union*, 2006 BCCA 57,

and *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58. Those were cases of discrimination on the basis of disability, and the Court, relying on *Martin v. 3501736 Inc. (c.o.b. Carter Chevrolet Oldsmobile)*, [2001] B.C.H.R.T.D. No. 39 (Q.L.), 2001 BCHRT 37, para. 22, held that the complainant need establish that he or she had (or was perceived to have) a disability, that he or she received adverse treatment, and that his or her disability was a factor in the adverse treatment: para. 38 of *Health Employers Assn.*

[211] It is apparent from these decisions that the Court of Appeal views the two formulations of the third element of the *prima facie* put forward by the parties as interchangeable. In *Kemess*, the arbitrator stated that the termination of the grievor must be found to be *prima facie* discriminatory if he had a physical or mental disability, was treated adversely by his employer, and "it is reasonable on the evidence to infer that the disability was a factor (not necessarily the sole or overriding factor) in the adverse treatment": para. 30. The arbitrator found that all three elements had been established, as the grievor's possession and use of marijuana at work were partly the product of his addiction, with the result that there was a nexus between his disability and the misconduct for which he was terminated: paras. 31 – 32. The Court of Appeal held that the arbitrator's analysis on the issue of *prima facie* discrimination was correct: para. 34.

[212] The parties' submissions raise the issue of whether this is a complaint of direct or adverse effect discrimination, and the significance of that characterization for the analysis. In its written and oral submissions, CSWU submitted that members of the Complainant Group experienced adverse effect or systemic discrimination. In their oral submissions, the Respondents argued that CSWU was, in fact, seeking to establish a case of direct discrimination. In reply, CSWU disagreed, submitting that it was putting the case forward as one of adverse effect discrimination.

[213] Since the decision of the Supreme Court of Canada in *British Columbia (P.S.E.R.C.) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("*Meiorin*"), the distinction between direct and adverse effect discrimination is no longer one which need be made: paras. 25 – 53. The terminology remains useful chiefly as a reminder that discrimination need not be intentional or direct in order to be discrimination. The focus is on the effects of the

respondent's actions, not the reasons they engaged in them. This principle is given statutory effect in s. 2 of the *Code*, which provides that "discrimination in contravention of this Code does not require an intention to contravene this Code".

[214] As stated by McIntyre J. in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 ("*O'Malley*"), the Supreme Court decision which first recognized adverse effect discrimination:

> The *Code* aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.
>
> …
>
> … On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the *Code* I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the *Code*. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply…. (paras. 12 – 18) (emphasis added)

[215] McIntyre J. defined discrimination *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, a *Charter* case frequently relied upon in human rights cases, in similar terms:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities,

> benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. (para. 37)

[216] Lastly with respect to the question of what is necessary to establish a *prima facie* case, we refer to the more recent decision of the Supreme Court of Canada in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161, where, in concurring reasons, a minority of the Court again considered what discrimination is. After referring to the preceding passage from *Andrews*, they stated:

> At the heart of these definitions is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.
>
> What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.
>
> If such a link is made, a *prima facie* case of discrimination has been shown. It is at this stage that the *Meiorin* test is engaged and the onus shifts to the employer to justify the *prima facie* discriminatory conduct. If the conduct is justified, there is no discrimination (paras. 48 – 50) (emphasis added)

[217] These comments by the concurring minority in *McGill* must be understood within the context in which they were made. *McGill* involved an automatic termination clause in a collective agreement, under which employees who were absent for three years had

their employment terminated. A disabled employee's employment was terminated under the clause, and she grieved.

[218] A majority of the Court dealt with the case on the basis that the employee's termination was *prima facie* discriminatory, but that the employer had met its duty to accommodate, with the result that the termination did not violate the Quebec *Charter of Human Rights and Freedoms*. In dealing with the case on this footing, the majority did not provide any analysis of the why the application of the automatic termination clause to the terminated employee was *prima facie* discriminatory.

[219] The minority chose instead to address the case on the basis that the employee had not established a *prima facie* case of discrimination. After the passage just quoted, the minority expressed its view that automatic termination clauses are not automatically *prima facie* discriminatory. It viewed the three year period provided as generous. It placed considerable emphasis on the fact that the clause represented a negotiated trade-off that provided significantly greater protection to disabled employees than otherwise provided for at law: para. 57. Both its purpose and its effect were to provide protection from job loss due to disability: para. 61. As the minority put it, the clause did:

> not target individuals arbitrarily and unfairly because they are disabled; it balances an employer's legitimate expectation that employees will perform the work they are paid to do with the legitimate expectations of employees with disabilities that those disabilities will not cause arbitrary disadvantage. (para. 63)

[220] In other words, the minority saw the automatic termination clause in issue in *McGill* as an ameliorating provision which improved rather than worsened the position of disabled employees.

[221] Thus, the minority's reasons in *McGill* reaffirm what has been clear since as long ago as *Andrews*: not all distinctions are discriminatory. The purpose and effect of distinctions must be considered to determine if they are discriminatory. The distinction at issue was not, according to the minority, discriminatory, because it did not target disabled employees arbitrarily and unfairly; rather, it ensured that they were treated more advantageously than the law would otherwise require, providing both certainty and balance between the legitimate expectations of employer and employee alike. The

automatic termination clause, understood within this context, did not have an adverse effect on the employees to whom it applied, and was therefore not discriminatory.

[222] Considered in light of these judicial statements about the nature of discrimination, it is apparent that the focus of the analysis, regardless of whether the discrimination alleged might be characterized as direct, adverse effect, or systemic, is on the effects of the respondent's actions on the complainant. As *Health Employers Assn.* and *Kemess* make clear, it is sufficient if the respondent's actions have a negative or adverse effect on the complainant because of the fact that he has characteristics related to a prohibited ground of discrimination. As the minority in *McGill* explained, the essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly. Clearly, this does not mean that the respondent must have intended to discriminate against the complainant because of the grounds relied upon. It is apparent that the minority in *McGill* did not intend, through its reasons, to negate the concept of adverse effect discrimination as developed in the Court's earlier decisions.

[223] The present complaint, as is often the case, has multiple aspects, some of which might be termed direct, some adverse, and some systemic in nature. In light of *Meiorin*, we need not parse out those various aspects and analyze them differently. Much of the complaint focuses on salary differential, and this aspect of the complaint is essentially one of adverse effect discrimination, as CSWU alleges, not that the Respondents intentionally singled out members of the Complainant Group for adverse treatment in terms of their salary because of their race, colour, ancestry or place of origin, but rather that the Respondents' practices had an adverse effect on them because of those grounds. Other aspects of the complaint, dealing with accommodation, meals and expenses, have characteristics of both direct and adverse effect discrimination. Given the multifaceted nature of the complaint, and the way in which the Respondents' practices are alleged to have worked together to result in discrimination, the complaint has some characteristics of systemic discrimination. Again, post-*Meiorin*, these distinctions no longer have much, if any, analytical significance.

[224] Lastly on the question of what must be proven to establish *prima facie* discrimination, we note that neither party argued that we must apply the analytical framework for determining a breach of s. 15 of the *Charter* set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The potential applicability of the *Law* framework to complaints of discrimination under the *Code* was raised most squarely in *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601, in which the Court said that *Law* analysis was inapplicable to that complaint, while leaving open the possibility that it might apply in some other case, in particular, one with "governmental overtones": para. 39.

[225] It is noteworthy that in no subsequent decision, including *Health Employers Assn.* and *Kemess*, has the Court of Appeal suggested that *Law* should be applied in analyzing human rights complaints. For its part, the Supreme Court of Canada has, in *R. v. Kapp*, 2008 SCC 41, indicated that, even in *Charter* cases, *Law* does not "impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 identified in *Andrews* and developed in numerous subsequent decisions": para. 24.

[226] As explained by the Supreme Court in *Kapp*, the *Law* analysis is "a way of focussing on the central concern of s. 15 identified in *Andrews* – combating discrimination, defined in terms of perpetuating disadvantage and stereotyping": para. 24. Both *Charter* and human rights jurisprudence, then, is focussed on combating discrimination, and on substantive, rather than formal, equality.

[227] In light of these jurisprudential developments, we agree with the parties that we need not apply the analytical framework set out in *Law* in order to determine if *prima facie* discrimination has been established. Rather, we will employ the fundamental principles established and developed in cases such as *O'Malley*, *Andrews*, *McGill*, *Kemess* and *Health Employers Assn.*

[228] It is with these principles in mind that we turn to the consideration of whether CSWU has established a *prima facie* case of discrimination.

2. Has CSWU established a *prima facie* case?

The first element – what grounds are engaged by the complaint?

[229] CSWU alleges discrimination on the grounds of race, colour, ancestry and place of origin. The Respondents submit that only the ground of place of origin is engaged by the complaint.

[230] In the original complaint, the members of the Complainant Group were described by CSWU as "individuals who are dark-skinned, Spanish speaking, foreign nationals from some of the poorest regions in the world".

[231] It is clear that both the members of the Complainant Group themselves and the Respondents conceived of the members of the Complainant Group as distinct from both the Canadian residents and the Europeans. Anthony Raul Gamboa Elizondo testified that the Latin Americans tended to socialize with one another, and seldom socialized with the European or Canadian resident workers. It is likely that this was due, in whole or in part, to their conception of themselves as a distinct group.

[232] As we will discuss in more detail below in considering CSWU's allegations of adverse treatment, the Respondents treated the Complainant Group as a distinct group. It is reasonable to infer from that distinct treatment that the Respondents perceived the members of the Complainant Group as a distinct group, different from their other employees who did not share the constellation of characteristics shared by the Latin American workers. The following facts are examples of the many ways in which the Respondents treated the members of the Complainant Group as a distinct group:

- Members of the Complainant Group were paid differently than others – in American dollars, bimonthly;

- Members of the Complainant Group were treated as a group when it came to the issue of meal tickets. The Respondents' evidence was clear that they treated European's requests for changes in the provision of meal tickets and money for meals on an individual basis, while members of the Complainant Group were treated as a group. When four or five members of the Complainant Group requested to receive money rather than meal tickets, they were told, and the Respondents testified before us, that a change would only be made if all members of the Complainant Group requested it; requests for changes would not be dealt with individually;

- Essentially all members of the Complainant Group were housed together at the 2400 Motel, while most Europeans were housed in apartments close to the worksite; and

- The Respondents' evidence was that they consider and treat all Europeans as managers, regardless of whether they exercise managerial functions.

[233] In support of its position that the members of the Complainant Group share characteristics encompassed within the four alleged grounds of discrimination, CSWU relies on *Espinoza v. Coldmatic Refrigeration of Canada Inc.* (1995), 29 C.H.R.R. D/35 (Ont. Bd. Inq.), upheld on judicial review, [1998] O.J. No. 4019 (Div. Ct.), in which an Ontario Board of Inquiry considered a complaint of discrimination on the grounds of race, colour, ancestry, ethnic origin and place of origin. The named complainant was from Ecuador. The Board also heard evidence of allegedly discriminatory conduct against other workers from Ecuador and Guatemala. The alleged grounds of discrimination are the same grounds alleged by CSWU, with the exception of "ethnic origin", which, while included in the Ontario statute, is not included in the *Code*.

[234] The Ontario Board stated that, as such, "the complaint alleges discrimination on a number of grounds which are often combined as a kind of wide net to get at certain complex discriminatory conduct": para. 210. After a discussion of the meaning of the operative terms, the Board stated:

> I agree that Mr. Espinoza and those others from Ecuador and other Central and South American countries were identifiable in terms of ethnic origin based on a common language and a common historical colonial past in a specific geographical area. Their ethnicity can be culturally and linguistically defined as "Latin American", with the prominent identifying factor being the Spanish language. (para. 219)

[235] In support of their position that only place of origin is engaged by this complaint, the Respondents submit that race, colour and ancestry are ill-defined terms in human rights law, relying on an extract from Tarnopolsky & Pentney, *Discrimination and the Law*, Vol. II. They submit that the mischief at which these grounds are aimed is assumptions or stereotypes based on a person's actual or assumed heredity. They also submit that there is a diversity of skin colours and ancestries within the Complainant Group, and that language is not engaged within these grounds: *Grewal v. Fletcher*

Challenge Canada Ltd. (1992), 73 B.C.L.R. (2d) 335 at p. 349 (S.C.). Further, they submit that the characteristics of being dark-skinned and Spanish-speaking do not distinguish the members of the Complainant Group from other employees of the Respondents, who speak a variety of languages, and have a variety of skin colours. In this regard, the Respondents point to two Filipino residents, and the Canadian residents, who have a variety of places of origin, whom they say were compensated comparably to the members of the Complainant Group.

[236] We agree with CSWU that the members of the Complainant Group form an identifiable group, which shares characteristics related to the four alleged grounds of discrimination.

[237] The grounds of race, colour, ancestry and place of origin may be combined to define, in a comprehensive way, ethnic identity as a basis of discrimination. As stated by the Board in *Espinoza*, these four grounds "are often combined as a kind of wide net to get at certain complex discriminatory conduct". A similar point is made by Tarnopolsky and Pentney, when they state that attempts to define "race" or "colour" are somewhat irrelevant in human rights law, "as the real concern is not with the 'race' or 'colour' or other hereditary origin of the individual who has been discriminated against, but rather with what the respondent *perceives* the complainant to be": p. 5-19, and later, that while concepts such as "ancestry" and "place of origin" may be illusive of definition, "the drafters of Canadian human rights legislation have attempted to 'get at' many, if not all, of these types of pejorative reference by prohibiting discrimination based on them": p. 5-25.

[238] In other words, these grounds intersect in a complex way to describe a set of characteristics which may result in discrimination. The concept of "intersectionality" has been discussed in a number of human rights decisions, including *Radek v. Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302. The concept recognizes the reality that a person may be subject to compound discrimination, as a result of the combined disadvantaging effect of a number of prohibited grounds: paras. 463 – 465.

[239] In *Bitonti v. British Columbia (Ministry of Health) (No. 3)* (1999), 36 C.H.R.R. D/263, the British Columbia Council of Human Rights held that "place of origin" encompasses the fact of being born in a particular group of countries: para. 148. The Council held that a protected group need not be homogenous, and that what a group must exhibit is a shared characteristic identified as a ground of discrimination: para. 152.

[240] We find that members of the Complainant Group are from a defined geographic area – Central and South America, specifically, Costa Rica, Columbia and Ecuador, thereby bringing the complaint, as in *Bitonti*, within the ground of place of origin. They share a common language – Spanish. While they are not monochromatic, most members of the Complainant Group who testified before us can reasonably be described as relatively dark-skinned. It is reasonable to assume they share some degree of common ancestry. The sum of these characteristics, and related cultural characteristics, such as their food preferences, about which several of them testified, identified the members of the Complainant Group as a distinct group of "Latin American" workers, exhibiting shared characteristics related to the grounds of race, colour, ancestry and place of origin.

[241] The Court's decision in *Grewal* does not eliminate the significance of a common language in this constellation of shared characteristics. *Grewal* was a judicial review of a decision of the British Columbia Council of Human Rights, in which it held that the complainant was discriminated against on the basis of race, colour, ancestry and place of origin when the respondent refused to hire him because he could not communicate adequately in English. The Court disagreed with the Council, holding that a rule requiring proficiency in the English language is not necessarily one which generalizes about a person's ability to do a job based on their membership in a group: para. 43.

[242] The Court stated, however, that:

> There is no question that language is a conveyor of culture. It shapes and is shaped by culture. A culture cannot survive without the ability of its people to give expression to themselves and the way in which they see the world through the articulation of thought in language …
>
> One could hardly disagree with the member designate that language is directly related to race, colour, ancestry and/or place of origin. But it cannot be said that it is *necessarily* related. Apart from its capacity to convey culture, language is also a communication skill that may be

> learned, and the ability to learn any language is not dependent on race, colour or ancestry.
>
> …
>
> Language then has a dual aspect. It is inextricably bound with culture in one sense, but in another it is means of communication unrelated to culture…
>
> This is not to say, however, that discrimination on the basis of language may not in some cases, when scrutinized, be found to actually be based on race, colour, ancestry or place of origin…. (paras. 37 – 44) (emphasis added)

[243] *Grewal* does not stand for the proposition that language is not encompassed within the four grounds in issue. Rather, it recognizes both the cultural significance of language, and that discrimination on the basis of language may be encompassed within discrimination on the grounds of race, colour, ancestry or place of origin. The Board in *Espinoza* also recognized that language can be addressed as "one of the many identifying features of 'ethnicity'": para. 220. Here, as in *Espinoza*, the point is not that members of the Complainant Group were discriminated against because of their shared language, Spanish, but rather that their shared language is one of the factors which helps to define them as a distinct group, and that that shared language is related to their race, ancestry and place of origin.

[244] Contrary to the Respondents' submissions, the fact that they hired two people from the Philippines, Mendoza Magusic Pandinio and Alex Villajuan, both of whom came to work on the Canada Line project in late August 2007, has no bearing on this or any other matter in issue in this complaint. The complaint was filed on behalf of the Latin American employees in August 2006, a year before the Filipinos arrived. The fact that the Respondents, who had control over whom they hired and when, chose to hire these two employees on the eve of the hearing has no bearing on whether the Latin American workers were discriminated against in comparison to the European workers.

[245] Little evidence was led about them, but Mr. Antonini testified that the two Filipino workers were paid slightly more than the majority of the Costa Ricans, at $22,000 vs. $20,000 US net. He explained this on this basis that that was how much the Respondents had to pay the Filipinos to get them to come to the project. The fact that

some persons outside the Complainant Group may have experienced terms and conditions of employment similar to the Complainant Group does not alter the distinctive identifiable nature of that group, or the fact that they may have been discriminated against on the basis of their membership in that distinctive identifiable group. Whether the Filipinos were also subject to discrimination is not a matter before us for decision.

[246] We turn to a consideration of the Respondents' submissions based on the fact that they employed Canadian residents with a variety of places of origin. As we have discussed, in its decision dismissing CSWU's objections to the final offer vote, the LRB rejected CSWU's submission that the proposed collective agreement was contrary to the *Human Rights Code*. In doing so, the LRB held that the compensation packages provided to the Canadian residents and Latin American employees were within the same range. In reaching this conclusion, the LRB included not only the wages paid to members of the two groups, but also additional benefits which only the Latin Americans, as non-residents, required and were provided, such as meals, accommodation and airfare. In *CSWU No. 1*, we granted the Respondents' application and held that CSWU was estopped from pursuing its allegation that the Respondents discriminated against Latin American workers in comparison to Canadian workers.

[247] The effect of *CSWU No. 1* is to prevent CSWU from relitigating the issue of whether the Latin Americans were discriminated against in comparison to the Canadian residents. As a result, the parties led little evidence about the Canadian residents, which makes any arguments based on their circumstances of questionable persuasive value. Regardless of the effect of *CSWU No. 1*, as in the case of the Filipino residents, the compensation paid to the Canadian residents forms part of the larger context in which this complaint arose, but does not assist us in determining whether the Latin American workers were discriminated against in comparison to the Europeans, which is the complaint before us for determination. Finally on this point, the fact that the Canadian residents had a variety of places of origin says nothing about whether members of the Complainant Group, who clearly share a common place of origin, and other identifiable characteristics, were discriminated against on the basis of those shared identifiable characteristics.

[248] In summary, we conclude that members of the Complainant Group share a constellation of identifiable characteristics related to the grounds of race, colour, ancestry and place of origin. All four grounds intersect and are engaged by the complaint. If we are wrong in this conclusion, the Respondents concede that place of origin is engaged in this complaint, which alone would be sufficient to satisfy the first element of the discrimination analysis.

The second element -- is there adverse treatment?

A. Is a comparator group analysis necessary?

[249] The first question which must be answered in relation to the second element is whether a comparator group analysis is necessary. Both parties provided comparator group analyses, and the Respondents clearly premised their submissions upon the necessity of such an analysis, but in oral submissions CSWU questioned whether one was necessary.

[250] A comparator group analysis is not necessary in all human rights cases: see *Kemess*, para. 30. It is not necessary, for the purposes of this complaint, to consider the various circumstances in which such an analysis is or is not necessary, as it is clear that this is a case in which a comparator group analysis is appropriate in considering whether the members of the Complainant Group have experienced adverse treatment. Discrimination, in this case, is a comparative concept.

[251] In large part, this conclusion flows from the manner in which CSWU itself chose to frame the complaint, as amended. In the original complaint, CSWU alleged that "the terms and conditions of [the Complainant Group's] employment with the Respondents were significantly different and perceptibly substandard <u>in comparison</u> to those of their non-Latin American colleagues who perform identical, similar or substantially similar, or less skilled and responsible work" (emphasis added). The comparison upon which CSWU relied at that time was with the Canadian residents, which, as we have already explained, is no longer before us.

[252] The allegation of different and substandard terms and conditions of employment as compared to other employees was maintained in the amended complaint. What was

added was a comparison to the European workers who had recently arrived to work on the project, which, as we have already discussed, constitutes the complaint now before us.

[253] Throughout, CSWU has framed the complaint in comparative terms, comparing the terms and conditions of employment of members of the Complainant Group to those of their colleagues.

[254] We find this approach appropriate in the circumstances of this case, and will engage in a comparator group analysis.

B. Who is the appropriate comparator group?

[255] The next question which must be answered is who is the appropriate comparator group. As stated by Supreme Court of Canada in *Auton v. British Columbia (Attorney General),* [2004] 3 S.C.R. 657:

> … the comparator group should mirror the characteristics of the claimant or claimant group relevant to the benefit of advantage sought, except for the personal characteristic related to the enumerated or analogous ground raised as the basis for the discrimination [*Hodge*, at para. 23]. The comparator must align with both the benefit and the universe of people potentially entitled to it and the alleged ground of discrimination [*Hodge*, at paras. 25 and 31]. (para. 53)

[256] In *Law*, the Supreme Court of Canada indicated that the starting point in identifying the appropriate comparator group is the perspective of the complainant:

> When identifying the relevant comparator, the natural starting point is to consider the claimant's view. It is the claimant who generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry, thus setting the parameters of the alleged differential treatment that he or she wishes to challenge. However, the claimant's characterization of the comparison may not always be sufficient. It may be that the differential treatment is not between the groups identified, but rather between other groups. Clearly a court cannot, *ex proprio motu*, evaluate a ground of discrimination not pleaded by the parties and in relation to which no evidence has been adduced; see *Symes*, *supra*, at p. 762. However, within the scope of the ground or grounds pleaded, I would not close the door on the power of a court to refine the comparison presented by the claimant where warranted. (para. 58)

[257] CSWU submits that the appropriate comparator group:

> is composed of other non-resident workers with tunneling experience and expertise who were engaged in the construction of the Canada Line tunnel. That would include all of the workers on each of the three shifts as set out in the Organization Chart, … as well as the underground maintenance workers (those in the box above shift A on the Organization Chart). While it is composed almost exclusively of workers in the tunnel, it does include those workers above ground who are directly supporting the tunneling operations and require tunneling experience and expertise. These would include the batch plant operator and the gantry crane operator.
>
> These workers, like the members of the Complainant Group, are non-residents with experience and expertise in tunneling who have been engaged in the construction of the tunnel. These features of the comparator group are relevant to the benefits being sought. That is, the fact that they are non-residents relates to the accommodation, meal and expense benefits, as those benefits are given to compensate for living away from home. The fact that they have experience and expertise in tunneling and are engaged in the construction of the tunnel relates to the salary paid. The claim is that these benefits are not paid equally to the members of the Complainant Group in whole or in part because of their race, colour, ancestry and place of origin.

[258] The Respondents submit that the appropriate comparator group is made up of "other SELI employees who perform comparable work". This definition, while less specific than that put forward by CSWU, is not inconsistent with it.

[259] Where the Respondents differ materially from CSWU in relation to the comparator group is in their submission, which we address below, that:

> The evidence establishes that there are only 13 members of the Complainant group [who] were performing work for which there is a higher paid comparator… The Union cannot succeed in its claim with respect to the other members of the Complainant Group.
>
> It is not open to the Union to point to the compensation of these 13 individuals as evidence of adverse treatment of other members of the Complainant group who have no European comparators. Nor is it open to the Union to point to evidence of how other employers compensate employees who perform comparable work.

[260] We find the comparator group described by CSWU as "other non-resident workers with tunneling experience and expertise who were engaged in the construction of the Canada Line tunnel" to be appropriate. We would further make explicit what is

implicit in CSWU's description, namely that the comparator group is made up of Europeans performing non-managerial tasks in the construction of the tunnel. The comparator group so defined mirrors the characteristics of the Complainant Group which are relevant to salaries and benefits sought, except for their race, colour, ancestry and place of origin. The members of the comparator group, like the members of the Complainant Group, are non-residents with expertise and experience in specialized tunnelling work, who were employed by the Respondents in the construction of the Canada Line project. As non-residents, they shared a common need for accommodation, meals and expenses, a need not shared by the resident workers on the project. Their common characteristics as persons with expertise and experience in specialized tunnelling work, performing specialized tunnelling work on the project, relates to the salary paid to them. Those common characteristics also distinguish them from the other workers who performed non-specialized work for the Respondents on the Canada Line project.

[261] These commonalities are all reflected in the ASF, in particular, the following paragraphs:

> 7. It is understood and agreed that the employees with which this complaint is concerned ("Employees") are non-managerial employees of SELI or the Joint Venture who perform construction work on the Project, whether above or below ground.
>
> 8. SELI SPA employs individuals from many different countries and frequently deploys its employees with expertise in tunnelling to various projects around the world. SELI SPA offered a number of its employees with tunnelling experience who were working on SELI SPA projects at various locations around the world the opportunity to work on the Project in Vancouver. Employees who wished to work on the Project were hired by SELI.
>
> 9. All of these non-resident Employees had previously been employed by SELI SPA or its subsidiaries on other tunnelling projects for periods ranging from 12 months to 20 years.
>
> …
>
> 31. The Parties agree that the following employees perform substantively the same work as employees holding the same positions as indicated

on the "TBM Bored Tunnel Organization Chart" contained at tab 131 of the Documents:

Hector Manuel Sanchez Mahecha	Foreman
Rogelio Cortes Huertas	Foreman
German Dario Caro Fonseca	Pilot
Ernesto de la Trinidad Camacho Cordero	Erector Operator
Anthony Raul Gamboa Elizondo	Erector Operator
Cristhian Leiton Calderon	Segment Transport
Henry Builes Tamayo	Electrician
Walter Quiros Monge	Grouting Operator
Gabriel Esquivel Garcia	Loco Operator
Juan Jose Luis Mora	Loco Operator
David Bonilla Granados	Rail & Cleaning
Jojans Sanchez Chaves	Rail & Cleaning
Jose Luis Barboza Cedeno	Rail & Cleaning

(As above, we have amended this paragraph of the ASF to reflect the workers' full names.)

[262] Not included within the appropriate comparator group are administrators, true management employees, and resident employees. None of these people shares the common characteristics of the Complainant Group and the comparator group.

[263] In considering the exclusion of management employees, we must address the evidence led by the Respondents that they consider all Europeans to be managers. This was a point made on several occasions by Mr. Wates in his evidence, and it is also the

basis for the Respondents' position that the European employees are not entitled to overtime pay.

[264] Mr. Wates' evidence on this point was not credible. Mr. Wates testified that the Respondents considered all of the Europeans to be management because they had management and supervisory responsibilities. Mr. Wates maintained this was true even of an employee like Tiago Andre De Sousa Ribeiro, who is listed on the Organization Chart as doing Rail and Cleaning, a job universally recognized by all witnesses as the easiest tunnelling work, and which Mr. Wates himself rated as 1 out of 10 on a scale of difficulty. According to immigration documents submitted by SELI in support of Mr. De Sousa Ribeiro obtaining a work permit, Mr. De Sousa Ribeiro is from Portugal, and has worked for SELI since 2002.

[265] Conversely, Mr. Wates testified that Rogelio Cortes Huertas, who is listed on the Organization Chart as a Shift Foreman, and as such was responsible for the direction of the men and work on his shift, including Mr. De Sousa Ribeiro, was not management. Immigration documents show that Mr. Cortes Huertas is from Columbia, has worked for SELI since 1982, and has been a TBM Foreman for nearly 20 years.

[266] Mr. Wates' evidence that all Europeans were managers flies in the face of all reliable evidence, including that emanating from or agreed to by the Respondents. In particular, in the ASF, the parties agreed "the employees with which this complaint is concerned ("Employees") are non-managerial employees of SELI or the Joint Venture who perform construction work on the Project, whether above or below ground". Further, they agreed that the 13 listed Latin American employees performed substantively the same work as the Europeans listed on the Organization Chart in the same positions. This means, for example, that the parties agreed that Mr. De Sousa Ribeiro performed substantially the same work as David Bonilla Granados, Jojans Sanchez Chaves, and Jose Antonio Barboza, all listed as performing Rail and Cleaning, not management. It also means that they agreed that Rogelio Cortes Huertas and Hector Manuel Sanchez Mahecha performed the same work as Wilson De Carvalho – Shift Foreman.

[267] Mr. Wates' evidence that the Respondents consider all Europeans managers is not evidence upon which we can or do conclude that all Europeans in fact exercise

managerial responsibilities on the Canada Line project. It is true that all managers employed by the Respondents on the Canada Line project are European or Canadian residents, and those managers – including Mr. Ginanneschi, Mr. Ciamei, Gabriele Dell'Ava, Leonardo Pia, Edoardo Lanfranchi, Giuseppe Imbesi, Miguel Jose Rosinha, Ferruccio Rotella, Carlo Giri, Luca Segatto, Gianfranco Casa, Roberto Perruzza, and Vasili Fafas – are excluded from the comparator group, as are the administrators, some of whom, such as Mr. Angioni and Mr. Wates, are Canadian residents. No Latin Americans were managers or administrators.

[268] Mr. Wates' evidence on this point reflects the attitude, expressed by several of the Respondents' witnesses, that the European workers are generally superior to, more valuable, and more deserving of preferential treatment, as compared to the Latin American workers. For example, this attitude was reflected in Mr. Gencarelli's and Mr. Ginanneschi's evidence about the work performed by the Latin American workers on the Costa Rican project, and Mr. Ginanneschi's evidence about the relative experience and skills of the Latin American and European workers on the Canada Line project.

C. Who is the Complainant Group?

[269] We have already identified the 40 Latin American workers who originally made up the Complainant Group in this matter: paras. 67 – 78. In those paragraphs, we also identified the members of the Complainant Group who left the project prior to its completion. Those persons remain members of the Complainant Group.

[270] For reasons we provide below, we have permitted four members of the Complainant Group who applied to do so to "opt out". Technically, therefore, those four employees – Rogelio Cortes Huertas, Hector Manuel Sanchez Mahecha, German Dario Fonseca Caro and Henry Builes Tamayo – no longer form part of the Complainant Group. For reasons discussed below in the analysis of the opting out application, this does not render evidence relating to these four people and their employment with the Respondents irrelevant: paras. 523 – 525. They continue to share all of the relevant characteristics of members of the Complainant Group. Further, given that three of them

are long term SELI employees, evidence about them is particularly important in assessing SELI's international compensation practices.

[271] There are two persons who have unique circumstances, and whose treatment by the Respondents was anomalous. One of these is Wilson De Carvalho; the other is Luis Alajandro Montanez Lara. We consider whether they are appropriately considered for the purposes of the comparator group analysis, and if so, how.

[272] Mr. De Carvalho was born in Brazil. He speaks Portuguese. He has lived in Portugal for the past 17 years. He has worked for SELI since 2001, at which time he had approximately three years previous tunnelling experience. On the Canada Line project, he was paid bi-monthly in Euros, received $300/month in expenses, and received cash rather than meal tickets for dinner. Mr. De Carvalho's 2007 T-4 shows a pre-tax income of $93,527.60, he was not paid overtime, and he was moved from the 2400 Motel to an apartment, on his request. In all of these ways, Mr. De Carvalho was effectively treated by the Respondents as if he were a European.

[273] The Respondents, focusing on Mr. De Carvalho's Brazilian place of origin, point to him as evidence of a lack of discrimination on their part. CSWU does not dispute that Mr. De Carvalho technically falls within the Complainant Group. It submits, however, that the fact that one member of the Complainant Group was not discriminated against is not evidence that the Respondents did not discriminate against the other members of the Complainant Group. Both parties generally treat Mr. De Carvalho for statistical and analytical purposes as a European, most notably in the ASF and in many documents created by the Respondents for the purposes of this hearing. This is consistent with Mr. Antonini's evidence that SELI "met" Mr. De Carvalho in Portugal, and that he earns a European salary and was here in Vancouver as a "European guy".

[274] The fact that a respondent may not discriminate against all members of an identifiable group does not mean that the respondent does not discriminate against some members of that group. This point was conclusively established by the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, para. 62, a sexual harassment case; and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, para. 44, a pregnancy discrimination case. In each case, the Court addressed arguments that

because not all women are sexually harassed or pregnant, discrimination against some women through sexual harassment or on the basis of pregnancy was not discrimination on the basis of sex. In *Janzen*, Chief Justice Dickson stated:

> Discrimination does not require uniform treatment of all members of a particular group … If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value …. (para. 62)

[275] Both *Janzen* and *Brooks* were sex discrimination cases. The same point has also been made in relation to discrimination on the grounds engaged in this case. In *Espinoza*, the evidence showed that some Latin American workers were not treated as poorly as the complainant and others in his group. The Board held that the exemption of some Latin Americans from the adverse treatment Mr. Espinoza experienced did not alter the conclusion that Mr. Espinoza was discriminated against: para. 227.

[276] The same reasoning applies in respect of Mr. De Carvalho.

[277] Further, in general, we agree with CSWU's submissions with respect to Mr. De Carvalho. While, given his birth in Brazil, he technically falls within the Complainant Group named by CSWU as "Foreign workers on temporary work visas from Central and South America", he is not from one of the three named countries of Costa Rica, Columbia and Ecuador. He does not share one of the Complainant Group's identifying characteristics: He is not Spanish-speaking, and has lived in Portugal for 17 years. Further, he is treated by the Respondents as if he is not a member of the Complainant Group; they treat him like "a European guy". That treatment is more important than his technical membership in the Complainant Group. Like the parties, including in their ASF, we consider Mr. De Carvalho's experience as part of the European comparator group.

[278] Luis Alajandro Montanez Lara's situation is in many ways the converse of Wilson De Carvalho's. Mr. Montanez Lara is originally from Columbia, and had recently become a permanent resident of Canada when he joined the Canada Line project. The parties treated Mr. Montanez Lara as a member of the Complainant Group in their materials. Despite his Canadian residency, Mr. Montanez was treated by the

Respondents in the same way as the other Latin Americans in the terms and conditions of his employment. He is properly considered within the Complainant Group, despite his Canadian residency.

D. Is the comparator group analysis limited to the thirteen persons named in the ASF?

[279] We now turn to a consideration of the Respondents' submission that CSWU is limited to comparing only the 13 Latin American employees listed in paragraph 31 of the ASF to the Europeans performing the jobs listed beside their names.

[280] To adopt the Respondents' submission on this point would serve to unduly narrow both the Complainant Group and the comparator group. It would also turn the very nature of a comparator group analysis on its head. A comparator group analysis is just that: a comparator group analysis. So long as the comparator group is appropriately defined to mirror the relevant characteristics of the complainant group, and we are satisfied that is the case with the comparator group defined by CSWU, with the clarification we have made at paragraph 260, the analysis then proceeds to a comparison of the treatment afforded the two groups. The experience of individuals within those groups is obviously relevant to making the group comparison, but the comparison remains one ultimately performed at a group rather than an individual level.

[281] The evidence was overwhelming that, in many cases, there was considerable movement of workers between positions to address the demands of the project, both temporarily and on a more permanent basis. This included, for example, evidence of both Europeans and Latin Americans performing a wide variety of duties, including assisting in maintenance of TBM-related machinery, during the periods the TBM was not in active operation. Cristhian Leiton Calderon, Jojans Sanchez Chaves and Anthony Raul Gamboa Elizondo, among others, testified that they changed positions over the course of the project, and frequently helped out in other positions as required. They did so without any change in their rates of pay.

[282] The more permanent changes are reflected in the Organization Charts entered into evidence, which show a number of Latin American workers being moved from one

position to another over the course of the project. Examples include Cristhian Leiton Calderon, who is shown as moving from Erector Operator to Segment Transport Beam Operator to Rail and Cleaning; Mario Alberto Alvarado, who went from Segment Transport Beam Operator to Erector Operator Helper and back to Segment Transport Beam Operator; Douglas Barboza Cedeno, who moved from Erector Operator Helper to Conveyor Operator; and Jojans Sanchez Chaves, who went from Rail and Cleaning to Erector Operator Helper.

[283] Taken at its narrowest, this movement of workers between positions would mean that, for at least parts of the project, more than the 13 listed members of the Complainant Group occupied the same positions held by Europeans. This includes Mario Alberto Alvarado, whom the earlier and later Organization Charts show as having worked as a Segment Transport Beam Operator; Martin Alonso Serrano Gutierrez, whom the earlier Organization Chart shows as having worked as a Grouting Pump Operator; Manuel Francisco Artavia Fonseca, whom the earlier Organization Chart shows as having worked as a Loco Operator; Douglas Barboza Cedeno, whom the later Organization Chart shows as having worked as a Conveyor Operator; and Efrain Calderon Araia, whom Appendix E and the earlier Organization Charts show as also working as a Conveyor Operator. These are all positions which the Organization Charts show as having also been held by European workers.

[284] More broadly, the evidence was clear that when workers moved from one position to another, either temporarily or permanently, their rates of pay and other terms and conditions of employment were not altered. In other words, the particular positions held by individual workers were not determinative of the terms and conditions of their employment, including their rates of pay. Further, the movement of workers between positions, both temporarily and permanently, demonstrates the interchangeability of the skills required to operate, and even help maintain, most TBM-related machinery.

[285] It would be inconsistent with this evidence about the nature of the workplace to insist on employees fitting into tight pigeon-holes in order for their experience to be relevant to the comparator group analysis, and for the possibility of a remedy, should discrimination be found.

[286] We therefore reject the Respondents' submission that the comparator group analysis, and, by extension, any possible remedy for any discrimination found, are confined to the 13 listed individuals and the Europeans occupying their positions. Rather, the proper comparator group is made up of all non-resident European workers with tunnelling experience and expertise, excluding managers, who were engaged in the construction of the Canada Line project.

E. Relevance of s. 12 of the Code

[287] It is primarily in connection with the second element of the *prima facie* case analysis that the Respondents submit that the Tribunal must consider the effect of s. 12 of the *Code*. Section 12(1) prohibits discrimination in the wages paid to men and women performing substantially similar work in the following terms:

> An employer must not discriminate between employees by employing an employee of one sex for work at a rate of pay that is less than the rate of pay at which an employee of the other sex is employed by that employer for similar or substantially similar work.

[288] While acknowledging that the complaint before us is made under s. 13 of the *Code*, and not s. 12, the Respondents submit that:

> … s. 13 cannot be interpreted without reference to s. 12 and it must be construed in a way that gives meaning to the intention the legislature expressed in enacting s. 12… If s. 13 permitted comparisons between employees who perform dissimilar work of equal value, or it permitted a finding of adverse treatment to be based on assumptions about what compensation the employer would have paid if it had employed others who did perform comparable work, s. 12 would be meaningless. The legislature could not have intended such a result….

[289] In support of these submissions, the Respondents rely on three decisions of the Supreme Court of Canada: *UBC v. Berg*, [1993] 2 S.C.R. 353, p. 371; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (no page or paragraph reference given); and *R. v. Proulx*, [2000] 1 S.C.R., para. 28. We have reviewed those decisions, and can find no support for these submissions. What those cases do stand for, so far as is relevant to the question under consideration, are the propositions that:

- Human rights legislation is of a special nature, not quite constitutional, and is to be approached in a broad, liberal and purposive fashion: *Berg*, para. 26; see also *Mossop*, pp. 46 – 47 of Lexum version, *per* L'Heureux-Dubé J.;

- This approach does not give a tribunal or court licence to ignore the words of the statute. "It is the duty of boards and courts to give [such legislation] a liberal and purposive construction, without reading the limiting words out of the *Act* or otherwise circumventing the intention of the legislature": *Berg*, para. 27;

- Court and tribunals must apply the law. If there is ambiguity as to its meaning or scope, they should the usual rules of interpretation to seek out the purpose of the legislation: *Mossop*, p. 26 of Lexum version, *per* Lamer C.J.;

- In determining legislative intent, one must give the words used in a statute their usual and ordinary sense having regard to their context and the purpose of the statute: *Mossop*, p. 28 of Lexum version, *per* La Forest J.;

- Human rights legislation should be interpreted generously with a view to effect its purpose: *Mossop*, p. 29 of Lexum version, *per* La Forest J.; and

- "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage": *Proulx*, para. 28.

[290] Sections 12 and 13 of the *Code* are very different provisions, designed to address different kinds of discrimination, each with their own unique legislative history. Section 12 is limited to sex-based wage discrimination between persons performing the same or substantially similar work. Section 13, by contrast is limited neither to sex-based or wage discrimination between persons performing the same or substantially similar work. There are occasions where the provisions overlap in their potential application, as in *Reid v. Vancouver (City) Police Board*, [2000] BCHRT No. 28; rev'd 2003 BCSC 1348; rev'd 2005 BCCA 418. Section 13 is much broader in its application than s. 12.

[291] Section 12 obviously has no direct application to the present complaint, which alleges discrimination on the grounds of race, colour, ancestry and place of origin in the area of employment, relying on alleged differences in a number of terms and conditions of employment, including, but not limited to, wages.

[292] The Respondents seem to suggest that CSWU is impermissibly attempting to create a pay equity provision out of s. 13 when s. 12, the provision of the *Code* directed to

disparities in wage rates, does not go so far. To do so, the Respondents submit, would be to render s. 12 superfluous, which cannot have been the Legislature's intention.

[293] That argument might have some plausibility if CSWU were attempting, through its description of the comparator group, to create a pay equity scheme out of s. 13, that is, if it were claiming discrimination based on differences in pay for dissimilar but equally valuable work. That, however, is not the effect of CSWU's submissions about the appropriate comparator group. The use of the comparator group described by CSWU permits the Tribunal to analyze whether the members of the Complainant Group were discriminated against in respect of the terms and conditions of their employment, contrary to s. 13. It does not convert s. 13 into a pay equity provision.

F. Comparative terms and conditions of employment

[294] Neither the Complainant Group nor the comparator group was static through the course of the project. As we described in detail earlier in the decision, at paras. 67 – 78, so far as the documents before us show, there were originally 39 members of the Complainant Group. One more, Luis Alajandro Montanez Lara, arrived later. By the time the hearing began, eight members of the Complainant Group had left the project.

[295] So far as the comparator group is concerned, it changed over the course of the project, as described in detail at paragraphs 84 – 88. So far as we have been able to determine from the documents before us, there were approximately 22 members of the comparator group, although not all of them were present at any given time, as European workers came and went from the project over time.

Salaries

[296] There are difficulties in determining and comparing salaries, for a number of reasons, including the fact that the employees were paid in different currencies, subject to different exchange rates over time; were paid on different schedules; some employees were paid overtime, and some were not; there were changes made by the Respondents to how some employees were paid following a complaint to the Employment Standards Branch; the amounts indicated on the Letters of Assignment may or may not reflect what

the employees were actually paid; and the Letters of Assignment generally refer to net rather than gross amounts.

[297] In the tables that follow, we have primarily relied upon a document prepared by the Respondents, which shows the pre-tax incomes of the Europeans and Latin Americans working on the project in 2007, as recorded on their T-4s, to determine salaries. Using this evidence reduces many of the difficulties described in the preceding paragraph. The resulting difficulty is that it includes only those employees who worked on the project in 2007, and provides a gross amount, which is of little assistance in the case of employees who worked less than a whole year. We therefore include in the tables only those employees who were identified by Mr. Wates in his evidence as working all of 2007.

[298] In terms of the positions held by each worker, we have relied upon the Organization Chart prepared by Mr. Ginanneschi for the Respondents at some time shortly before the hearing, in or about August 2007, a copy of which is included as Appendix E, and which the parties relied upon in their ASF, supplemented by the earlier and later Organization Charts Mr. Ginanneschi prepared, which provide the same information as of sometime shortly after the complaint was filed, in or about September 2006, and December 2007, respectively.

[299] The following tables therefore set out the positions and salaries of those members of the Complainant Group and of the comparator group who worked a full year in 2007.

COMPLAINANT GROUP

Surnames	**Given Names**	**Position(s) on 2007 Organization Charts**	**2007 Annual Gross Salary**
ALVARADO Camacho	Mario Alberto	Erector Operator Helper/Segment Transport Beam Operator	$47,561.03
BARBOZA Cedeno	Douglas	Erector Operator Helper/Conveyor Operator	$48,610.13
BARBOZA Cedeno	Jose Luis	Gantry Crane Operator	$45,653.93

BARBOZA Sanchez	Jose Antonio	Rail and Cleaning	$46,525.91
BONILLA Granados	David	Rail and Cleaning	$45,120.14
BUILES Tamayo	Henry	TBM Electrician	$54,257.11
CAMACHO Cordero	Ernesto de la Trinidad	Erector Operator	$46,515.96
CARO Fonseca	German Dario	TBM Pilot	$50,491.82
CORDERO Camacho	German	Erector Operator Helper	$43,907.61
CORTES Huertas	Rogelio	Shift Foreman	$58,452.08
DURAN Aguilar	Elian	Crane Operator	$46,932.21
ESQUIVEL Garcia	Gabriel	Loco Operator	$49,047.02
FLORES Brenes	Mario	Yard Labour	$44,669.62
GAMBOA Elizondo	Anthony Raul	Erector Operator	$47,830.20
LEITON Calderon	Cristhian	Segment Transport Beam/Rail and Cleaning	$45,368.13
LOPEZ Salguero	Jose Anselmo	Diesel Mechanic	$58,623.78
MONTANEZ Lara	Luis Alajandro	TBM Mechanic	$56,053.56
MORA Gamboa	Franklin	Gantry Crane Operator	$48,865.93
NOGUERA Lopez	David Jesus	Gantry Crane Operator	$48,687.71
PICÓN Alarcón	Carlos Elidio	TBM Mechanic	$49,214.93
QUIROS Monge	Walter	Grouting Pump Operator	$44,872.93
RETES Anderson	Luis Alberto	TBM Maintenance Mechanic/ Diesel Mechanic Helper	$45,779.66

RUIZ Mora	Juan Jose	Loco Operator	$44,982.16
SANCHEZ Alvarado	Ignacio	Yard Labour	$43,686.89
SANCHEZ Chaves	Jojans	Rail and Cleaning/Erector Operator Helper	$44,876.16
SANCHEZ Mahecha	Hector Manuel	Shift Foreman	$60,910.38
SERRANO Gutierrez	Martin Alonso	Yard Labour	$42,354.50
TUAREZ Fortis	Yandry Eugenio	TBM Mechanic	$47,107.18
VASQUEZ Moya	Marvin Enrique	Batching Plant Operator	$46,284.99
ZUNIGA Perez	Felipe	Yard Labour	$40,049.01

COMPARATOR GROUP

Surnames	**Given Names**	**Position**	**2007 Annual Salary**
BARBEDO DA SILVA	Antonio	TBM Pilot	$90,397.01
COLLAR BLANCO	Jose Antonio	Loco Operator	$90,134.13
DA SILVA TAVARES	Jose Paulo	TBM Electrician	$95,660.82
DE CARVALHO	Wilson	Shift Foreman	$93,527.60
FERREIRA RIBEIRO	Bruno Miguel	Grouting Pump Operator	$89,994.18
GARCIA GONZALES	Salvador	CHD Mechanic	$95,495.64
LOPEZ COZAR SANTIAGO	Antonio	Grouting Pump Operator	$81,071.11
ROMERO BERENGENA	Jorge	Erector Operator	$79,342.32

[300] We note that payroll documents for February 2007 indicate that Antonio Lopez Cozar Santiago and Jorge Romero Berengena started work as of February 13, 2007, and thus did not work in January 2007. We nonetheless included them in this table; the salary listed is for a little less than 11 months.

[301] Although the parties calculated and compared the salaries paid to employees in the Complainant and comparator groups somewhat differently, the evidence is clear and undisputed that members of the comparator group were paid more than members of the Complainant Group.

[302] In terms of base salary, the majority of the Costa Ricans were paid a net salary of $20,000 or $20,500 US. The only exceptions are German Dario Caro Fonseca, who is from Columbia but lives in Costa Rica, and Elian Duran Aguilar, who were each paid more, at $21,500 US net. The Columbians and Ecuadorians were paid base net salaries of $21,000 to $27,225 US net. Depending on the applicable exchange rate, these base net salaries are the equivalent of between about $23,000 and $31,000 Canadian.

[303] Still speaking in terms of base salary, the vast majority of the members of the comparator group were paid in net Euros, plus bonuses. The base pay ranged from €33,600 to €39,000. Again depending on the applicable exchange rate, these base net salaries are the equivalent of between about $56,000 and $62,000 Canadian.

[304] The Europeans were therefore paid on average roughly twice the base net salary of the Latin Americans.

[305] The evidence is that members of the Complainant Group were paid for overtime worked while members of the comparator group were not. In this connection we note CSWU's submission that members of the comparator group are legally entitled to overtime pay under the *Employment Standards Act*. It is not this Tribunal's function to determine whether the Respondents' practice of not paying the Europeans overtime pay is contrary to that *Act*. For our purposes, what is most important is what the employees in the different groups were actually paid for work performed; and the evidence is that, regardless of what their Letters of Assignment say, the Latin Americans were paid for overtime work, while the Europeans were not. This difference is taken into account in the T-4s for 2007, which are the basis for the gross salaries, inclusive of paid overtime if

any, listed in the tables below. Proceeding in this manner leaves open the question of the number of hours actually worked by members of the two groups to earn the gross salaries indicated, but that is not a question which can be answered on the evidence before us.

[306] That is because it is not possible, on the evidence before us, to determine how much overtime employees in the two groups worked. The incomplete payroll documents entered into evidence do not show how many overtime hours were worked by or paid to either the Latin American or the European workers. Mr. Wates testified that it would be an onerous calculation to determine the actual overtime worked by each Latin American. He created a document which purported to show the total compensation, including overtime, paid to the Latin American workers. In it, he assumed that the Latin Americans worked eight hours of overtime a week. The basis for this assumption was not established in the evidence; no source documents for the document he created were introduced. There were other difficulties with the document Mr. Wates produced. For example, he included within the benefits received by the Latin Americans $1000 in transportation, which he testified was based upon the cost to the Respondents, including fuel, insurance and depreciation, of the van used to transport the Latin Americans back and forth from the 2400 Motel to the worksite. He also included the Respondents' legal fees in obtaining work permits as a benefit to the Latin American employees. The inclusion of these and other items as benefits to the Latin Americans is of doubtful validity. We are unable to rely on this document for any purpose, including the determination of the amount of overtime worked by or paid to the Latin American workers.

[307] CSWU made the following calculations, which were not challenged by the Respondents, and which we accept as reasonably accurate, which show the differences in the gross salary, including any overtime, paid to the two groups:

	Latin American	**European**	**Difference**	**Percentage Difference**
Average Income	$48,109.76	$89,452.85	$41,343.09	85.93%

Avg. Inc. excl. Lopez & Romero	$48,109.76	$92,534.90	$44,425.14	92.34%
Mean Income	$46,729.06	$90,265.57	$43,536.51	93.18%
Mean Inc. excl. Lopez & Romero	$46,729.06	$91,962.31	$45,233.25	96.80%

[308] The following table, taken from CSWU's written submission, shows the differences in gross incomes earned by persons working in the same positions for the full year in 2007:

Position	**Latin American**	**T4 pre-tax Income**	**European**	**T4 pre-tax Income**
Foreman	Hector Manuel Sanchez Mahecha	$60,910.38	Wilson De Carvalho	$93,527.60
Foreman	Rogelio Cortes Huertas	$58,452.08	Wilson De Carvalho	$93,527.60
Pilot	German Dario Caro Fonseca	$50,491.82	Antonio Barbedo Da Silva	$90,397.01
Erector Operator	Ernesto de la Trinidad Camacho Cordero	$46,515.96	Jorge Romero Berengena	$79,342.32
Erector Operator	Anthony Raul Gamboa Elizondo	$47,830.20	Jorge Romero Berengena	$79,342.32
Electrician	Henry Builes Tamayo	$54,257.11	Jose Paulo Da Silva Tavares	$95,660.82
Grouting Operator	Walter Quiroz Monge	$44,872.93	Antonio Lopez Cozar Santiago	$81,071.11
Grouting Operator	Walter Quiros Monge	$44,872.93	Bruno Miguel Ferreira Ribeiro	$89,994.18

Loco Operator	Gabriel Esquivel Garcia	$49,047.02	Jose Antonio Collar Blanco	$90,134.13
Loco Operator	Juan Jose Ruiz Mora	$44,982.16	Jose Antonio Collar Blanco	$90,134.13

[309] The foregoing shows that, in terms of gross salaries, these Latin Americans were paid about 60% of the gross salaries paid to Europeans working in the same positions in 2007. We find that, on any calculation, members of the Complainant Group were paid substantially less than members of the comparator group performing the same or substantially similar specialized tunnelling work.

Accommodation

[310] In determining the other terms and conditions of the workers' employment, we have relied on a variety of sources, including paragraph 30 of the ASF, which shows where the listed employees resided, and a number of other documents, prepared and introduced by the Respondents, showing the accommodation, meals, and expenses provided, and the parties' oral evidence.

[311] When the Latin American workers arrived in Vancouver in or about April 2006, they were all housed in the 2400 Motel on Kingsway. The Respondents provided a van to transport the Latin American workers to and from the project. With four minor exceptions, all members of the Complainant Group remained in the Motel for the duration of their employment on the Canada Line project. The exceptions were Luis Alajandro Montanez Lara, who moved to an apartment on Dundas Street sometime after his family joined him in Vancouver, to which the Respondents contributed $700.00 per month; two employees, whom it appears were evicted from the Motel and moved to an apartment paid for by the Respondents on E. 61st Avenue, at a total cost of $780.00 per month; and Luis Alberto Retes Anderson, who moved out of the Motel in disputed circumstances in the midst of the hearing.

[312] At the outset, all managers and administrators were housed by the Respondents in apartments around False Creek, within walking distance of the project.

[313] When the European workers began to arrive some, such as Jose Paulo Da Silva Tavares, were immediately or very shortly thereafter housed in the False Creek apartments. Others, such as Jose Antonio Collar Blanco, were temporarily housed at the 2400 Motel, and were then moved to the False Creek apartments. No Latin Americans were ever moved to the False Creek apartments. Mr. Ciamei testified that it was his decision who lived where. He said the Europeans, such as Mr. Collar Blanco, were moved to the apartments because they were skilled and he wanted them closer to the site. He had no explanation why he never moved any Latin Americans, including Rogelio Cortes Huertas, from the Motel to the False Creek apartments.

[314] It is impossible, from the documents provided by the Respondents, to determine precisely where each European lived for each month they lived in Vancouver working on the Canada Line project. This is because the accommodation documents introduced were incomplete, and sometimes contradictory. The following table provides the best information we have with respect to where the members of the comparator group lived.

Name	**Month arrived on project as indicated in Letters of Assignment** **Where payroll information establishes arrival date, also provided** **Where known, date of departure is given in brackets**	**Where lived** **Rental cost where known**
Jose Paulo Da Silva Tavares	July 2006 First payroll – August 2006 (According to accommodation records, still on project as of February 2008)	Apartment throughout. Single occupancy. $1300 per month. This and all apartment rental costs do not include cleaning, hydro, furniture, internet, TV and telephone. The Respondents introduced documents which estimated the cost of cleaning, hydro and furniture, which they paid for, at $445.00 per month for this and essentially all apartments. They estimated the cost of TV, internet and local telephone at $120 per

		month, which they said the apartment residents paid for, unlike those living at the 2400 Motel.
Mirco Giannotti	July 2006 First payroll – August 2006 (According to accommodation records, still on project as of February 2008)	Apartment throughout. Single occupancy. $1285 per month.
Roberto Carlos Verao Pombal	No Letter of Assignment – Application for Work Permit filed in July 2006, so likely arrived in or about September 2006. Never appears on payroll documents. (According to accommodation records, left sometime between January and June 2007)	Apartment throughout. Single occupancy. $1010 per month.
Juan Marcos Balcells Morell	September 2006 Never appears on payroll documents. (According to accommodation records, left project sometime between January and June 2007)	Likely after a stay of half a month in the 2400 Motel, moved to apartment for the remainder of stay. Triple occupancy. $1600 per month.
Antonio Fernando Barbedo Da Silva	September 2006 First payroll – September 19, 2006 (According to accommodation records, still on project in February 2008)	2400 Motel until March 2007, when moved to apartment for the remainder of stay. Triple occupancy. $1325 per month.
Jose Antonio Collar Blanco	September 2006 First payroll – September 19, 2006 (According to accommodation records, still on project in February 2008)	Likely after a stay of half a month in the 2400 Motel, moved to apartment for the remainder of stay. Triple occupancy. $1600 per month; later increased to $1665 per month.

Salvador Garcia Gonzalez	September 2006 First payroll – September 19, 2006 (According to accommodation records, left project sometime between June and December 2007)	Likely after a stay of half a month in the 2400 Motel, moved to apartment for the remainder of stay. Triple occupancy. $1600 per month.
Wilson De Carvalho	October 2006 Never appears on payroll, although there is 2007 T-4 for him (Testified in March 2008 – still on project at that time)	2400 Motel until March 2007, when moved to apartment for remainder of stay. Triple occupancy. $1325 per month.
Bruno Miguel Ferreira Ribeiro	October 2006 First payroll – October 17, 2006 (According to accommodation records, still on project February 2008)	2400 Motel until March 2007, when moved to an apartment for remainder of stay. Triple occupancy. $1325 per month.
Antonio Lopez Cozar Santiago	February 2007 First payroll – February 6, 2007 (According to accommodation records, still on project February 2008)	2400 Motel until June 2007, when moved to an apartment for remainder of stay. Double occupancy. $1400 per month.
Pedro Filipe Nascimiento Morais	February 2007 First payroll – February 13, 2007 (According to accommodation records, left project sometime between June and December 2007)	Likely 2400 Motel until June 2007, when moved to an apartment for remainder of stay. Double occupancy. $1400 per month.
Vitorino Manuel Ribeiro	February 2007 First payroll – February 13, 2007 (Left August 2007)	Appears 2400 Motel throughout. Triple occupancy. $1316.50 per month. This and all figures for the 2400 Motel include all costs, including cleaning, telephone and kitchen or fridge where applicable.

Tiago Andre De Sousa Ribeiro	February 2007 First payroll – February 13, 2007 (Left August 2007)	Appears 2400 Motel throughout. Triple occupancy. $1316.50 per month
Jorge Romero Berengena	February 2007 First payroll – February 6, 2007 (According to accommodation records, still on project February 2008)	Appears 2400 Motel until June 2007, when he moved into an apartment for the remainder of stay. He appears to have replaced Balcells Morell when he left the apartment he shared with Collar Blanco and Garcia Gonzalez. $1600 per month; later increased to $1665 per month.
Tommaso Buffa	June 2007 No payroll documents for June 2007 forward. (According to accommodation records, still on project February 2008)	2400 Motel throughout. Initially double occupancy at $1211.50 per month. Later triple occupancy at $1845.00 per month.
Giuseppe Scorzafava	June 2007 (According to accommodation records, still on project February 2008)	2400 Motel throughout. Initially double occupancy at $1211.50 per month. Later double occupancy at $1405.00 per month.
Giuseppe Folino	June 2007 (According to accommodation records, still on project February 2008)	2400 Motel throughout. Initially double occupancy at $1211.50 per month. Later triple occupancy at $1845.00 per month.
Giuseppe Felice Lopez	June 2007 (According to accommodation records, still on project February 2008)	2400 Motel throughout. Single occupancy. Initially $953.50 per month. Later $1015.00 per month.
Guerino Mellea	No Letter of Assignment – given that Application for Work Permit filed in May 2007, likely arrived in or about June 2007	2400 Motel throughout. Double occupancy at $1211.50 per month.

	(According to accommodation records, left project between December 2007 and February 2008)	
Pere Salellas Payrot	September 2007 (According to accommodation records, still on project February 2008)	2400 Motel throughout. Single occupancy. Initially $965.50 per month. Later $1015.00 per month.
Julio Vitor Soares Pereira	September 2007 (Left November 2007)	2400 Motel throughout. No information on cost.
Alessandro Zangari	October 2007 (According to accommodation records, still on project February 2008)	2400 Motel throughout. Triple occupancy at $1845.00 per month.
Publio Garcia Alvarez	No immigration documents or Letter of Assignment, but arrived in October 2007 (According to accommodation records, still on project February 2008)	2400 Motel until December 2007, when he moved to an apartment for the remainder of his stay. Appears to have replaced Garcia Gonzalez when he left the apartment he shared with Collar Blanco and Romero Berengena. Triple occupancy. $1665 per month.

[315] All Europeans who arrived to work on the project prior to June 2007 were housed in the False Creek apartments, either immediately upon their arrival, or after a stay at the 2400 Motel. The only exceptions were Vitorino Manuel Ribeiro and Tiago Andre De Sousa Ribeiro, who appear to have stayed at the 2400 Motel the whole time they were in Vancouver, from February to August 2007. Mr. Ciamei explained that the Respondents did not always have an apartment immediately available, which is why some Europeans were temporarily housed at the Motel. Those Europeans who arrived in or after June 2007 were housed at the 2400 Motel for the duration of their stay in Vancouver. Mr. Ciamei testified that this was because the Respondents could not find any more apartments. The only exception appears to be Publio Garcia Alvarez, who moved to an apartment after a short stay at the 2400 Motel in or about December 2007.

[316] The apartments are within walking distance of the worksite, while those staying at the 2400 Motel were transported back and forth to work by van. They also had to commute to the two restaurants, located on West Broadway, at which they were required to take their meals.

[317] Wilson De Carvalho, who stayed at both venues, testified about them. He initially lived at the 2400 Motel, and was moved, at his request, to one of the apartments, which he preferred. Anthony Raul Gamboa Elizondo, although he had been no closer than the doorstep, testified that he had heard from co-workers that the apartments were "fucking beautiful". As Rogelio Cortes Huertas testified, Latin American workers staying at the 2400 Motel were not given a choice about where to stay.

[318] The Respondents' main response on the accommodation issue was to lead evidence about the comparative costs, to them, of housing workers at the two venues. There were a number of problems with this evidence, including its late production, and substantial questions as to whether all real costs accruing to the Respondents were accurately accounted for. This may be in part due to what Mr. Wates testified was the Respondents' poor record-keeping system.

[319] In reply to the Respondents' evidence on this issue, CSWU did its own calculations of the comparative cost to the Respondents of housing workers at the Motel as opposed to the apartments.

[320] The parties differed on the average costs per occupant of the two kinds of lodging.

[321] Despite the difficulties with the evidence on the accommodation issue, we find, on all of the evidence before us, that it was probably more expensive, on average, for the Respondents to house people in the apartments than at the 2400 Motel. It is clear, for example, that on March 10, 2006, Mr. Ciamei and another SELI manager, Antonio Dambra, and the manager of the 2400 Motel signed an agreement which indicated that "room charges are C$500.00 per month per person based on double occupancy or greater". The Motel appears to have raised its rates, in some cases very significantly, over the course of the time workers were housed there. Even with those rate increases, however, when the rental rates for the apartments are considered, and the additional costs incurred by the Respondents are factored in, such as furnishing the apartments, and

paying for cleaning and hydro, the average per person cost to the Respondents of housing people in the apartments would still likely be greater.

[322] In this regard, it is also relevant to note that, when Luis Alajandro Montanez Lara moved out of the 2400 Motel to live with his family, the Respondents paid him $700.00 per month cash as a contribution towards his housing, substantially less then they were prepared to pay for the apartments in which Europeans such as Mirco Giannotti and Jose Paul Da Silva Tavares, also both single occupancy, lived. Similarly, when the two other Latin American workers left the 2400 Motel, the apartment in which the Respondents chose to house them, which was nowhere near the worksite, cost $780.00 per month, substantially less than the apartments in which Europeans such as Antonio Lopez Cozar Santiago and Pedro Filipe Nascimiento Morais, also double occupancy, lived.

[323] On the evidence before us, we conclude that the Respondents incurred greater costs, on a per capita basis, to house workers in the False Creek apartments than at the 2400 Motel, and more generally, that the Respondents incurred greater costs, on average, in housing Latin Americans than Europeans in Vancouver while they worked on the Canada Line project.

[324] The heart of the accommodation issue, however, is not what it cost the Respondents to house workers in the two venues, but what the value or benefit to the workers was, either of staying in one of the two venues, or in having a choice about where to stay. This is to be assessed from the perspective of a reasonable complainant.

[325] On the evidence before us, we conclude that a reasonable complainant, if given the choice, would prefer to stay at one of the False Creek apartments than at the 2400 Motel. Wilson De Carvalho testified that this was his preference. Further, a reasonable complainant would certainly prefer to be given a choice about where to live, as Mr. De Carvalho, but not members of the Complainant Group, were. We find that members of the Complainant Group were treated adversely in comparison with members of the comparator group in terms of where they were housed while working on the project.

Meals and meal tickets

[326] All Latin American workers received 60 meal tickets per month for lunch and dinner and $150 for breakfast. Most European workers received 30 meal tickets per

month for lunch, and $150 for breakfast and $300 for dinner. Some Europeans had different arrangements. In particular, four Europeans, who joined the project later, in June 2007, received 60 meal tickets and $150 for breakfast. Jose Paulo Da Silva Tavares had yet a different arrangement, receiving a larger sum of money and no tickets.

[327] Early on in the project, the Respondents had also provided the Latin Americans with meal tickets for breakfast. When a majority of them at a meeting with Mr. Antonini said that they would prefer to receive money for breakfast, the Respondents agreed to make that change.

[328] The evidence showed that at least some members of the Complainant Group did not like eating at the two restaurants at which the tickets could be used for lunch and dinner. Anthony Raul Gamboa Elizondo and Jojans Sanchez Chaves both testified that they asked members of management if they could be given money rather than the meal tickets. Mr. Sanchez Chaves explained that this was because the food provided by the restaurants was not the kind of food they liked. Luis Alajandro Montanez Lara, the Canadian resident from Columbia, testified that, after he moved out of the 2400 Motel when his wife came to join him in Vancouver, the Respondents continued to give him 60 tickets per month, and not money, even though he did not want and did not use the tickets. Eileen Fu, the owner of one of the restaurants, testified that she had received some complaints from the Latin American workers about the kind of food offered by the restaurant, although she believed that she had satisfied their concerns through learning new recipes. For his part, Rogelio Cortes Huertas testified that he liked the tickets because he did not have to look around for a restaurant to eat in.

[329] Mr. Angioni, the person designated as the Latin Americans' primary management contact, and Mr. Ciamei both confirmed that some Latin American workers – they estimated between three and five of them – asked for money rather than meal tickets, but that in order for the Respondents to comply with these requests, all of the Latin Americans would have needed to come forward and make this request. Mr. Angioni testified that Mr. Montanez Lara asked to be given money instead of tickets, but that request was denied because the company cannot change its organization for what every worker wants. Mr. Angioni and Mr. Ciamei testified that this was because of the

Respondents' agreements with the two restaurants to purchase a minimum of 60 meals a day.

[330] Mr. Angioni and Mr. Ciamei's evidence showed that the Respondents were prepared to make individual arrangements with individual European workers about meals. Mr. Ciamei testified that the Respondents dealt with the Europeans one by one, giving them what they preferred.

[331] The evidence clearly demonstrated that the Latin American workers were treated differently than the European workers in relation to meal arrangements. The Latin Americans were given tickets rather than money, and the Respondents refused to consider individual requests from Latin Americans for different arrangements. We find that, from the perspective of a reasonable complainant, it would more likely than not be preferable to be given a sum of money to do with as you wish than to be given tickets redeemable at only two restaurants. The freedom to choose where and what you eat would be seen by most people as preferable to having to eat at the same two restaurants every day for nearly two years.

Expenses

[332] The Respondents treated members of the Complainant Group and the comparator group differently in regard to expenses other than meal expenses. With the exception of Jose Paulo Da Silva Tavares, who received $800 per month for all expenses, including meals, all Europeans received $300 per month for miscellaneous expenses, exclusive of meals, which we have already addressed.

[333] By contrast, none of the Latin Americans received a monthly allowance for expenses. Rather, they were permitted to claim certain expenses, such as laundry and some phone charges, and receive reimbursement. Mr. Angioni's evidence established that, on average, Latin Americans received just over $76 per month in reimbursed expenses, most of which was for laundry.

[334] We find that the Latin Americans experienced clearly different, and adverse, treatment, in comparison to the Europeans. They received, on average, about one quarter of the financial value of the European workers. Further, they had to make expense claims for specific items, rather than receiving a monthly allowance to do with as they pleased.

Clearly a reasonable complainant would prefer the arrangement enjoyed by the European workers.

The third element – were the grounds of discrimination factors in the adverse treatment?

A. What evidence and submissions are relevant to the third element of the prima facie case?

[335] The parties disagree about whether some or all of the evidence and submissions put forward by the Respondents in support of their position that the Latin Americans were not discriminated against should be considered at this stage of the analysis, or later, in the context of whether the Respondents have established a *bona fide* occupational requirement or "BFOR".

[336] The Respondents placed all of their submissions, other than those we have already addressed, in the context of the third element of the *prima facie* analysis, that is, they argued that CSWU had failed to establish a nexus between any adverse treatment experienced by the Latin Americans and the grounds of discrimination relied upon. Their primary argument was that any differences in salaries paid were primarily a function of SELI's international compensation practices and global labour markets, and were therefore not discriminatory. In this connection, they argued, relying on *Bitonti*, that CSWU could not establish a connection between the compensation paid to members of the Complainant Group and their place of origin. They also argued, relying on *Agduma-Silongan v. UBC*, 2003 BCHRT 22, that any distinctions were based, not on negative stereotypes or assumptions about employees' places of origin, but on objective facts about the countries in question.

[337] The Respondents also made some of their submissions about the significance of s. 12 of the *Code* in this context.

[338] The Respondents also submitted that any differences in treatment were, to a lesser extent, a function of other factors, in particular: exchange rates between different currencies over the course of the project; and the Europeans' superior experience and skills. The latter factor played a much more prominent role in the Respondents' evidence

than in their final argument, although they did continue to submit that most of the Europeans had greater skills and experience, and that that was part of the reason they were paid more.

[339] Finally, the Respondents submitted that CSWU was impermissibly attempting to overturn the collective agreement in place between the parties, when its attempts to do so before the LRB had been unsuccessful.

[340] CSWU's submissions with respect to the third element of the *prima facie* discrimination analysis focussed on differences in salaries and other terms and conditions of employment as between the Latin American and European workers. In addressing these issues, CSWU addressed the Respondents' evidence and arguments about the comparative skills and experience of the Latin American and European employees. They also made submissions with respect to the effect of the adverse treatment on the Latin American workers' human dignity.

[341] CSWU addressed the Respondents' other submissions with respect to why the Latin Americans were not discriminated against as potential justifications which should be considered in the context of a BFOR analysis. In this context, CSWU made some further submissions about the comparative skills and experience of members of the two groups, as well as submissions about the payment of overtime (which was not pursued in final argument by the Respondents), and SELI's international compensation practices.

[342] Neither party really addressed the question of why these various issues should be addressed either as part of the third element of the *prima facie* discrimination analysis or as part of a BFOR analysis. Clearly, all of the potentially relevant issues raised by the parties must be considered; the question is at what stage of the analysis. As the split decision of the Supreme Court of Canada in *McGill* illustrates, it can be difficult to decide whether particular issues and arguments should be addressed as part of the *prima facie* case analysis, or as part of a BFOR analysis. As the *McGill* decision also demonstrates, the decision where to address issues and arguments, while analytically challenging, may have no effect on the ultimate outcome in a given case.

[343] In considering the question of where the various issues raised by the parties before us should be placed in the analysis, we have found the *O'Malley* decision very helpful.

In that case, the Court decided where the burden of proof falls in complaints of discrimination. The Court stated:

> … at least in direct discrimination cases, where the complainant has shown a *prima facie* case of discrimination on a prohibited ground, the onus falls on the employer to justify if he can the discriminatory rule on a balance of probabilities. The question then is whether this rule should apply in cases of adverse effect discrimination.
>
> To begin with, experience has shown that in the resolution of disputes by the employment of the judicial process, the assignment of a burden of proof to one party or the other is an essential element. The burden need not in all cases be heavy – it will vary with particular cases – and it may not apply one party on all issues in the case; it may shift from one to the other. But as a practical expedient it has been found necessary, in order to ensure a clear result in any judicial proceeding, to have available as a "tie-breaker" the concept of onus of proof… To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under the *Etobicoke* rule as to burden of proof, the showing of a *prima facie* case of discrimination, I see no reason why it should not apply in cases of adverse effect discrimination. The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination: A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer… It seems evident to me that in this kind of case the onus should again rest on the employer, for it is the employer who will be in possession of the necessary information to show undue hardship, and the employee will rarely, if ever, be in a position to show its absence. The onus will not be a heavy one in all cases…. (paras. 27 – 28) (emphasis added)

[344] The passage from the concurring judgment in *McGill*, cited above at paragraph 216, is to the same effect: The burden is on the complainant to establish a link between group membership and the arbitrariness of the criterion or conduct, either on its face or in its disadvantaging impact. Once the complainant establishes that link, the burden shifts to the respondent to justify its *prima facie* discriminatory conduct.

[345] Taking these principles into account, we have concluded that the Respondents' submissions based on *Bitonti* and *Agduma-Silongan* relate to whether CSWU has established a nexus between the adverse treatment and the grounds of discrimination relied upon. Further, the parties' evidence and submissions about the comparative skills

and experience of the two groups of workers are relevant to the question of whether the prohibited grounds are a factor in the adverse treatment CSWU has established. We therefore consider these matters in the context of the third element of the *prima facie* case analysis.

[346] The Respondents' submissions about the significance of the parties' collective bargaining history are difficult to place within the analysis. For the purposes of this complaint, we have chosen to address them within the *prima facie* case analysis.

[347] The Respondents placed very little emphasis on the currency exchange rate factor, and led no reliable evidence about it, and, in our view, any difference attributable thereto is so minimal as to be insignificant. They did not pursue any submissions based on the significance of the payment or non-payment of overtime, other than noting whether particular employees were or were not paid overtime, a matter we have already addressed. We have also already addressed the Respondents' submissions about the significance of s. 12 of the *Code* in our analysis of whether members of the Complainant Group experienced adverse treatment. It is not necessary to consider any of these issues further.

[348] SELI's international compensation practices, and their place in the global labour market, formed the core of the Respondents' defence to this complaint, and the remaining question is whether those practices should be considered as part of the *prima facie* case analysis, or as part of the BFOR analysis.

[349] Applying the principles established in *O'Malley* and confirmed in *McGill*, it is evident that SELI's international compensation practices are a defence which the Respondents have put forward to justify the adverse treatment experienced by members of the Complainant Group. The Respondents have, as described by the Supreme Court of Canada in *O'Malley*, "for genuine business reasons adopt[ed] a rule or standard which is on its face neutral". Such a rule may, as in *O'Malley*, have an adverse effect on employees because of a prohibited ground. Where that is the case, there is a *prima facie* case of discrimination, and the burden shifts to the respondent to justify its conduct as a BFOR. We repeat the key passage from *O'Malley*:

> … On the other hand, there is the concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the *Code* I am of the opinion that this Court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the *Code*. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply…. (para. 18) (emphasis added)

[350] SELI's international compensation practices are a rule or standard upon which the Respondents rely to justify the adverse treatment experienced by the Latin American workers. These practices are clearly a matter within the Respondents' knowledge. Therefore, the burden of proving the practices as a justification lies upon the Respondents.

[351] To do otherwise and consider defences, such as SELI's international compensation practices, within the third element of the *prima facie* analysis could have the effect of rendering it difficult, if not impossible, for a complainant to establish a case of adverse effect discrimination. What the Respondents seek to establish is that they treated members of the Complainant Group adversely, not because of their race, colour, ancestry or place of origin, but because of SELI's compensation practices. If true, that does not negate the adverse effect of those practices, or show that that adverse effect was not because of the race, colour, ancestry or place of origin of the workers so affected.

[352] We therefore do not accept that SELI's alleged international compensation practices, if proven, could negate the adverse effect of those practices, or render them non-discriminatory. They could potentially, if proven, justify their *prima facie* discriminatory effects.

[353] As a result, the Respondents' main answer to the complaint, that any differences in compensation were the result of SELI's international compensation practices, will be

assessed, not within the context of the third element of the *prima facie* case analysis, but within the context of the BFOR analysis. Proceeding in this manner is consistent with the authorities, and helps the overall clarity of the analytical process. Further, it does not prejudice the Respondents in any way. That is because, even if SELI's international compensation practices had been considered within the *prima facie* case analysis, the evidentiary burden of proof would still have been on the Respondents, as those practices are within the Respondents' knowledge, and are put forward by them as an answer to the complaint. Further, as in *McGill*, our ultimate conclusions would have been the same regardless of whether we considered SELI's international compensation practices, in their entirety, within the *prima facie* case analysis.

B. Nexus and the Respondents' reliance on Bitonti and Agduma-Silongan

[354] As already stated, the Respondents relied upon the Tribunal's decisions in *Bitonti* and *Agduma-Silongan* in support of their submission that any differences in treatment were the result, not of discrimination, but of non-discriminatory factors related to the Latin American employees' places of origin.

[355] In *Bitonti*, the Tribunal held that some foreign-trained doctors were discriminated against on the basis of place of origin by the College of Physicians and Surgeons' requirement that they have an additional year of post-graduate training in order to be eligible for registration. This requirement was imposed on doctors who had been trained in countries that did not have a British educational system similar to the one in place in British Columbia. Relying on *Andrews*, the Tribunal held that this requirement had an adverse effect on some foreign-trained doctors, and that there was a sufficiently strong correlation between the place of origin and the place of training for that adverse effect to be on the basis of place of origin.

[356] *Agduma-Silongan* involved a doctor from the Philippines, who complained that UBC discriminated against her in assessing her Filipino academic credentials, in imposing conditions on her at admission, and in evaluating her academic performance. The Tribunal concluded that those allegations were not substantiated, for a number of reasons, including that, in treating international students differently from domestic ones,

UBC "does not do so based on assumptions about differences between educational systems around the world but based on actual information garnered from a large number of resources about the relative merits of worldwide educational systems": para. 200. In doing so, the Tribunal distinguished *Bitonti* on the basis that, unlike in that case, the distinction made by UBC was based not on assumptions, but on actual information.

[357] The Respondents submit that the present complaint is like *Agduma-Silongan*, in that the differences in issue here, as there, are not based upon negative stereotypes or assumptions about a person's place of origin, but rather on objective facts about the country in question. The Respondents submit that, here, the objective fact is that certain countries have higher wage rates than others, and that basing terms and conditions of employment upon that objective fact is not discriminatory.

[358] It is apparent that *Agduma-Silongan* bears no resemblance to the complaint before us. Differences between educational systems in different countries are objective facts which academic institutions need to take into account in order to fairly and accurately assess the academic credentials of international and domestic students: see *Agduma-Silongan*, para. 204. Doing so is not analogous to an international company using the fact that wage rates may be lower in a given country to pay workers from that country lower wages here in British Columbia. The lower wage rates in some countries may be an objective fact, albeit not one which the Respondents proved in evidence before us, but the use the Respondents made of those lower wage rates is not equivalent to the use UBC made of the objective facts about foreign educational systems.

[359] The Respondents did not use any objective facts about wage rates in various countries in order to assess their workers fairly and accurately; they used it, as we find below, in order to minimize their labour costs by paying the Latin Americans less than the Europeans. The goal of minimizing labour costs is a legitimate business objective; its legitimacy as a business objective, however, does not render any and all adverse effects some employees may suffer as a result while working in British Columbia non-discriminatory. Paying people, who performed similar work side by side in British Columbia for the almost two years it took to construct the Canada Line project, different amounts because they come from countries with different wage rates is arbitrary and

discriminatory. The fact it may be done to minimize labour costs does not make it any less arbitrary and discriminatory. Nor does the fact those workers may be working in British Columbia on a single, time-limited project. If it were otherwise, employers would be free to excuse any differences in pay the market will bear as non-discriminatory. The means chosen to achieve the goal of minimizing labour costs, where those means have an adverse effect on employees because of prohibited grounds, must be considered under a BFOR analysis.

C. Do differences in the skills, duties and experience of the employees account for the differences in the terms and conditions of employment?

[360] The Respondents relied on alleged differences in the skills, duties and experience of members of the Complainant Group and comparator group as part of the explanation for the differences in the terms and conditions of their employment, especially their salaries. We address the evidence relevant to that argument here.

[361] This argument was advanced by the Respondents both generally, as for example in Mr. Wates' claim, which we have already rejected, that all the Europeans were managers, and in specific instances, as for example, in comparing the TBM Pilots (Mirco Giannotti, German Dario Caro Fonseca, Antonio Fernando Barbedo Da Silva and Bruno Miguel Ferreira Ribeiro) and the Erector Operators (Ernesto de la Trinidad Camacho Cordero, Anthony Raul Gamboa Elizondo and Jorge Romero Berengena), among others.

[362] Considered at the general level, we find that the evidence does not substantiate that the European workers were more experienced or skilled or performed duties which would justify their higher rates of pay.

[363] In terms of experience, some Latin American workers were more experienced than Europeans performing the same or substantially similar work, while some Europeans were more experienced. For example, in considering Shift Foremen, the Latin Americans, Hector Manuel Sanchez Mahecha and Rogelio Cortes Huertas, had worked for SELI for 21 and 25 years, on five and seven previous SELI projects respectively, while Wilson De Carvalho, originally from Brazil but living in Europe for 17 years and

treated by the Respondents as if he were European, had worked for SELI for only five years on four projects.

[364] Other Latin Americans from Columbia and Ecuador had worked for SELI on between two and seven previous projects, for between three and sixteen years. The Latin Americans from Costa Rica had all worked for SELI on only one previous project, the one in La Joya, for periods, according to the immigration documents, of up to three years.

[365] Turning to the members of the European comparator group (*i.e.* non-managers or administrators), their previous experience with SELI ranged, according to documents submitted by the Respondents, from one to five projects, and three to twelve or so years.

[366] The respective experience level of the workers in the two groups, whether taken individually or collectively, does not explain the differences in their rates of pay.

[367] We have already addressed the circumstances of the Costa Ricans in considering the rebuttal evidence and making our findings about the work they performed in Costa Rica. Further, in that analysis, we found Mr. Ginanneschi, on whose evidence much of the Respondents' case about the comparative skills and duties of the members of the two groups rested, to be an unreliable witness. That is true not only of his evidence about his understanding of what the Costa Ricans did in Costa Rica, but also about his evidence about what the various workers did on the Canada Line project.

[368] We accept that, as with experience, there was variation among workers with respect to their skill-sets and the duties they were capable of performing on the Canada Line project. Such variation is a normal feature of human beings, not all of whom are identical in their skills and abilities. We are unable to accept, however, that any individual variation explains the differences in rates of pay paid by the Respondents to workers in these two groups.

[369] Two examples put forward by CSWU make the point in striking terms.

[370] First is the comparison between German Dario Caro Fonseca, originally from Columbia and now residing in Costa Rica, and Tiago Andre De Sousa Ribeiro, who is from Portugal. As such, Mr. Caro Fonseca is a Latin American, who while he has chosen

to opt out of the complaint, continues to share all of the characteristics that identify the Complainant Group, and Mr. De Sousa Ribeiro is part of the comparator group.

[371] German Dario Caro Fonseca is a TBM Pilot. The TBM Pilot position is universally recognized as the position requiring the most skill. Mr. Ciamei rated it as a 10 out of 10, like a doctor, with no room for error. Mr. Caro Fonseca's immigration documents indicate he had been employed with SELI for more than two years, more than one year of which was as a TBM Engineer/Operator. His Letter of Assignment indicates he was to be paid $20,000 US net; in fact, his net salary was $21,500 US.

[372] Tiago Andre De Sousa Ribeiro worked on the Canada Line project doing Rail and Cleaning. Rail and Cleaning is universally recognized as the position requiring the least skill. Mr. Ciamei rated it as 2 or 3 out of 10 in difficulty; Mr. Wates thought it was a 1. According to SELI's immigration documents, Mr. De Sousa Ribeiro had worked for it for five years. His Letter of Assignment indicates that he was to earn $90,000 Canadian a year; his T-4 for 2007 showed employment income of $45,000.34, earned between mid-February and sometime in August 2007. While the Respondents suggested that Mr. De Sousa Ribeiro was somehow "more" than a Rail and Cleaning worker, the fact is that that is what he was. This was made clear, not only by his position as indicated on the Organization Chart, Rail and Cleaning, but also by Mr. Huertas Cortes, who testified that he supervised him, just as he would any other worker on his shift.

[373] Payroll documents show that in a 16 week period between February and May 2007, Mr. Caro Fonseca was paid $11,952.14. In the same 16 week period, Mr. De Sousa Ribeiro was paid $19,713.22. This is a difference of 64.93% between him and Mr. Caro Fonseca.

[374] As CSWU submits, the same comparison could be made between Tiago Andre De Sousa Ribeiro and any of the members of the Complainant Group, all of whom earned far less than him, and all of whom, other than those also occupying the Rail and Cleaning position, performed work requiring greater skill.

[375] Second is the comparison between Rogelio Cortes Huertas, one of the two Columbian Shift Foremen, and Jose Antonio Collar Blanco, a Loco Operator from Spain. Mr. Cortes Huertas is a Latin American who, while he has also chosen to opt out, shares

all of the characteristics of the Complainant Group, and Mr. Collar Blanco is part of the comparator group.

[376] Rogelio Cortes Huertas was the most experienced SELI employee on the Canada Line project, with 25 years experience with the company on projects in seven different countries. As Shift Foreman, he was responsible for the direction of the employees on his shift. Mr. Antonini testified in cross-examination that Shift Foreman is, together with TBM Pilot, one of the two most important jobs. In 2007, Mr. Cortes Huertas was paid $58,452.08.

[377] Turning to Jose Antonio Collar Blanco, Mr. Ciamei rated his job, the Loco Operator, as 5 or 6 out of 10. He said it was not complicated, a matter of labour. Mr. Collar Blanco's immigration documents indicate that he has been employed with SELI since 2003, on two projects in Spain, where he worked as a pump operator. Those documents also indicate that he was to be employed as a TBM Superintendent on the Canada Line project, but Mr. Antonini and Mr. Collar Blanco both testified that this was a mistake, and he was employed as a Loco Operator, and not as a Superintendent. Mr. Collar Blanco was paid $90,134.13 in 2007.

[378] A similar comparison was made between Mr. Collar Blanco and Juan Jose Ruiz Mora. Both men were Loco Operators; the one a member of the comparator group, the other a member of the Complainant Group. In an eight and one half month period between September 2006, when Mr. Collar Blanco joined the project, and the beginning of June 2007, Mr. Ruiz Mora earned a net total of $25,229.07 and Mr. Collar Blanco earned a net total of $45,332.24, a total difference of $20,103.17 or 79.68%.

[379] In their evidence, the Respondents attempted to paint Mr. Collar Blanco as an exceptional employee, who was able to operate other machines and assist with mechanical work, unlike the Latin American employees. Much of this evidence came from Mr. Ginanneschi, and we do not find it reliable. In addition to the other factors which have led us to this conclusion, we mention here Mr. Ginanneschi's evidence about a locomotive derailment when Jose Luis Ruiz Mora was operating the Loco, which the Respondents led to suggest that Mr. Collar Blanco would not have had the same

difficulties. Mr. Ginanneschi appeared reluctant and uncomfortable in giving this evidence, which we found contrived.

[380] For his part, Mr. Collar Blanco testified that the experience shown on his immigration documents was correct, and that he was never employed as a TBM Superintendent, and was not a professional mechanic or welder, but that he could help when the TBM was stopped by operating other machines or assisting with mechanics. Mr. Collar Blanco was not alone in these respects, as the evidence showed that other workers, including the members of the Complainant Group, were able to and did operate machines other than the one to which they were primarily assigned, and could and did assist in performing some mechanical work.

[381] While we accept that Mr. Collar Blanco was likely a valuable worker, we do not accept that his skills and duties were sufficient to explain the wide disparity between what he earned and what others, including but not limited to Mr. Cortes Huertas and Mr. Ruiz Mora, earned.

[382] Overall, as we explained in detail above, there were substantial disparities in salaries paid, both to members of the Complainant Group and the comparator group on average, and as between individual members of the two groups performing what the parties, in the ASF, agreed to be "substantively the same work". It is sufficient to establish discrimination if the prohibited ground was a factor in the adverse effect; it need not be the sole or primary factor: *Kemess*, para. 30. Accepting, as a general proposition, that individual differences in experience, skills and duties could explain, in some instances, some differences in salary, they do not explain the substantial disparities which exist, including in instances where the experience, skills and duties of the Latin American employees are demonstrably greater than those of Europeans performing the same, or even less skilled, work.

[383] The evidence showed that, within the group of Latin American workers, workers with greater experience, and skill, and occupying positions of greater responsibility were sometimes paid more than those with less experience or skill, and occupying positions of greater responsibility. Thus, for example, the two Columbian Shift Foremen, who had long experience and occupied positions of substantial responsibility, were paid more than

the Costa Ricans. At the same time, all of the Costa Ricans, excepting only German Dario Caro Fonseca and Elian Duran Aguilar, were paid essentially the same base salary. While the Costa Ricans had all worked on one previous project, they occupied positions on the Canada Line project running the gamut of levels of difficulty and responsibility. Those differences were not reflected in their salaries. Within the group of European workers, it is difficult to discern any relationship between their experience, skills and positions and the amounts they were paid.

[384] Overall, the evidence did not establish that the rates of compensation paid by the Respondents to employees on the Canada Line project were a function of their experience, skills or positions.

D. Is the differential treatment rendered non-discriminatory because of the role of collective bargaining in the parties' relationships?

[385] The Respondents also relied on the collective bargaining relationship between them and CSWU and the proceedings at the LRB as part of the reason why any differential treatment was not discriminatory. As we have already said, it is difficult to know where these submissions fit into a human rights analysis; we have chosen to address them here.

[386] In this regard, the Respondents rely on the fact that the compensation paid to the Latin Americans, Filipinos and Canadian residents was agreed to by those employees in collective bargaining. The Respondents characterize the present complaint as another attempt by CSWU, akin to those before the LRB, to overturn the collective agreement that was in place until CSWU's recent decertification.

[387] The collective bargaining relationship between the Respondents and CSWU was fraught with conflict from the outset. We have set out some of the history of that relationship in Appendix B and in describing the collective bargaining context. They were unable to negotiate a collective agreement, and the Respondents put a final offer to the employees, which was voted upon. CSWU was unsuccessful in its attempts to have that final offer declared illegal, and the vote was counted, resulting in the collective agreement. Certain Employees later applied for decertification. CSWU was unsuccessful

in its attempts to have the LRB refuse to count the decertification vote on the basis of the Respondents' alleged unfair labour practices. Ultimately, the decertification vote was counted, and CSWU was decertified as a result, after the conclusion of the hearing before us.

[388] For a number of reasons, we have concluded that this labour relations history does not render the adverse treatment afforded the Latin Americans non-discriminatory. It does not negate the reasonable inference that the Latin Americans experienced adverse treatment because of prohibited grounds, nor does it form any other sort of defence to the complaint of discrimination.

[389] First, CSWU itself never agreed to the terms which made up the collective agreement; CSWU is not attempting to get out of a bargain it made. Second, while the Respondents tell us that over 75% of the employees in the bargaining unit voted in favour of the final offer which came to constitute the terms of the collective agreement, the bargaining unit was made up, not only of the Latin Americans, but also of the Canadian residents and Filipinos. We do not know what percentage of the Latin Americans voted in favour of the final offer or later the decertification, assuming that information would be relevant to the question of whether the Respondents discriminated against members of the Complainant Group.

[390] Third, and in any event, it is not open to parties to contract out of the *Human Rights Code* through collective bargaining. As long ago as 1982, in *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, the Supreme Court established this fundamental principle. There, the Court addressed a submission that where the parties had, in collective bargaining, agreed to a standard retirement age, the resulting requirement "must be considered '*bona fide*' in the absence of evidence that the limitation was inserted for an ulterior purpose": p. 7, QL version. McIntyre, J, speaking for the Court, unequivocally rejected this submission, in the following terms:

> While this submission is that the condition, being in a collective agreement, should be considered a *bona fide* occupational qualification and requirement, in my opinion to give it effect would be to permit the parties to contract out of the provisions of The Ontario *Human Rights Code*.

> Although the *Code* contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy.
>
> …
>
> … The Ontario *Human Rights Code* has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect. (pp. 7 – 8)

[391] The Court's statements are equally applicable to the British Columbia *Code*: parties cannot contract out of its provisions through collective bargaining. The Respondents cannot defend their conduct by reference to the fact that a majority of the employees in the bargaining unit voted in favour of the terms and conditions put to them in the final offer vote. Nor can they do so by reference to positions CSWU allegedly took in bargaining about who was properly included in or excluded from the bargaining unit. Nor can they rely upon the fact that CSWU unsuccessfully sought through the proceedings before the LRB not to have the final offer vote counted. The basis of CSWU's arguments before the LRB, and the matters in issue before the LRB, are entirely different from the basis of CSWU's arguments and, more importantly, the matters in issue before us.

E. Has CSWU established a prima facie case that the race, colour, ancestry and place of origin of members of the Complainant Group were a factor in the adverse treatment?

Salaries

[392] We have already found that there are substantial disparities, both on average and on an individual basis, between the salaries paid to members of the Complainant Group and the comparator group. We have already considered and rejected the Respondents' submissions that those differences can be explained by reference to the experience, skills

and duties of members of the two groups or that the collective bargaining relationships and history between the parties render those differences non-discriminatory.

[393] It is striking, as the table at paragraph 299 shows, that, in every case where the parties have specifically agreed that Latin American and European workers were performing substantively the same work, the European workers earn substantially more. This is true regardless of their comparative experience, skills and duties.

[394] It is reasonable to infer, on all of the evidence before us, that the differences in wages paid to members of the Complainant Group, as opposed to the comparator group, are the adverse effect, in whole or in part, of the Respondents' compensation practices, and that that adverse effect is related, in whole or in part, to the race, colour, ancestry and place of origin of the members of the Complainant Group.

[395] In the case of the Costa Ricans in particular, their net annual salary, as indicated on their Letters of Assignment, was essentially identical, at $20,000 or $20,500 US net, with only two exceptions, one of whom was German Dario Caro Fonseca, a TBM Pilot originally from Columbia, and the other of whom was Elian Duran Aguilar, a Crane Operator, both of whom were paid $21,000 US net. The fact that all of the Costa Ricans were paid the same amount, regardless of any variation in their individual experience, skills or duties, indicates that they were paid on an arbitrary basis, one clearly related to their place of origin, at a minimum.

[396] More generally, the adverse effect of the Respondents' compensation practices on the members of the Complainant Group is arbitrary in the sense used by the minority in *McGill*. We conclude that CSWU has established a *prima facie* case that the disparities in pay are the result, in whole or in part, of factors related to the race, colour, ancestry and place of origin of the Complainant Group.

Accommodation

[397] We have already found that a reasonable complainant would likely prefer to live in the False Creek apartments rather than at the 2400 Motel. Certainly, a reasonable complainant would prefer to be given a choice. All members of the Complainant Group were housed at the 2400 Motel, the only exceptions being those noted above in paragraph 311. All members of the comparator group that started work on the project before June

2007 were housed, either immediately or after stays of varying length at the Motel, in the False Creek apartments, the only exceptions being those noted above in paragraph 315. As a result, we have found that members of the Complainant Group were treated adversely in comparison with members of the comparator group in terms of where they were housed while working on the project.

[398] We now consider whether CSWU has established a *prima facie* case that the Respondents' decision to house all Latin American workers at the 2400 Motel, while housing the majority of the European workers, either for the duration or for the majority of their stay in Vancouver, at the False Creek apartments, was related to race, colour, ancestry and place of origin.

[399] The fact that the Respondents viewed the condos as preferable is indicated by the fact they chose to house their management and administrative staff there. The Respondents' position, as explained by Mr. Ciamei, was that they housed "key people" in the apartments, as they needed them close to worksite. We accept that it was useful to the Respondents to house their key people close to the worksite. This, however, does not explain why a Loco Operator, such as Jose Antonio Collar Blanco, or an Erector Operator, such as Jorge Romero Berengena, or a Segment Transport Beam Operator, such as Pedro Felipe Nascimiento, all from Europe, were housed in the apartments, while the two Latin American Shift Foremen, Rogelio Cortes Huertas and Hector Manuel Sanchez Mahecha, and the Latin American workers performing the same jobs as the Europeans just listed, such as Anthony Raul Gamboa Elizondo, Christian Leiton Calderon and Gabriel Esquivel Garcia, among others, continued to be housed in the 2400 Motel.

[400] To the contrary, the evidence about the accommodation issue reveals that the Respondents viewed the two groups of workers differently, and treated the members of the Complainant Group both differently and adversely, in comparison to the members of the comparator group, because, in whole or in part, of their race, colour, ancestry and place of origin. Those characteristics are not accidental to the Respondents' choice to house all of the Latin American workers together, in what a reasonable complainant would perceive as less favourable housing.

[401] Mr. Ciamei testified about not receiving any complaints from the Latin American workers about staying at the 2400 Motel. For his part, Rogelio Cortes Huertas also testified that he had no complaints, and was quite happy living there. Given the Respondents refusal to take any action when some Latin Americans complained about the meal tickets, it is unlikely that they would have been any more responsive had any Latin Americans complained to them about the 2400 Motel. Accepting that the Respondents received "no complaints" from the Latin Americans, the evidence did show that Wilson De Carvalho requested and received a transfer. It also showed that at least seven other Europeans – Jose Antonio Collar Blanco, Salvador Garcia Gonzalez, Jorge Romero Berengena, Antonio Barbedo Da Silva, Bruno Miguel Ferreira Ribeiro, Antonio Lopez Cozar Santiago and Publio Garcia Alvarez were moved from the 2400 Motel to the condos. It is reasonable to infer that this move was perceived favourably by these six, as it was by Wilson De Carvalho. It is also striking that the Respondents chose to move these workers, who had been on the project for one to six months at the time they were moved, rather than Latin American workers, such as Rogelio Cortes Huertas or Hector Manuel Sanchez Mahecha, who held more responsible positions and had been on the project from the outset, and also had much longer service with SELI.

[402] We find that the evidence with respect to the accommodation issue establishes that race, colour, ancestry and place of origin were factors in the Respondents' decisions about who to house in which venue, and who to move from the 2400 Motel to the apartments. The Respondents' decisions about accommodation were, at least in part, arbitrary. In particular, their decision to continue to house all Latin Americans at the 2400 Motel, while moving any Europeans for whom they could find an apartment to lease in the vicinity of the worksite, reflects arbitrary and even stereotypical thinking about the Latin Americans and the Europeans, and their respective needs, desires and value to the employer. CSWU has therefore established a *prima facie* case of discrimination in respect of the accommodation issue.

Meals and meal tickets

[403] We have already found that members of the Complainant Group were treated differently, and adversely, in comparison to members of the comparator group, in respect

of meals and meal tickets. The differential and adverse treatment consists both in being given meal tickets rather than money, and in the Respondents' refusal to make individual arrangements about these issues with the Latin Americans, while being prepared to make individual arrangements with the Europeans.

[404] In their evidence, the Respondents sought to defend this differential treatment on the basis that they had to fulfil their contractual obligation to purchase 60 meals per day from the two restaurants. There are four difficulties with this explanation. First, the nature of the alleged contractual obligations was unclear. In particular, it was not clear if the Respondents were contractually obligated to purchase 60 meals from each restaurant or both of them together. Second, there was no explanation why the burden of ensuring that the Respondents fulfilled their obligation to purchase 60 meals a day fell on the Latin American workers rather than the Europeans. Third, there was no written contract between the Respondents and the restaurants – the arrangement was verbal, and it was not established that it could not have been varied, or that any attempt was made by the Respondents to vary it in response to the Latin Americans' requests. Fourth, Ms. Fu's evidence was that her restaurant sold an average of 120 meals per day to the Respondents. Given that all workers, Latin American and European alike, were given tickets for lunch, and the evidence that some Canadian residents and SELI managers also ate at the restaurant, there is no reason to believe that the 60 meals a day purchase requirement could not have been met through lunches alone.

[405] In argument, the Respondents also sought to explain their refusal to deal individually with the Latin Americans on this issue, while being prepared to do so with the Europeans, on the basis that, after the collective agreement was entered into, they could not unilaterally change the Latin Americans' terms and conditions of employment. There are three difficulties with this explanation. First, it was never referred to by the Respondents' witnesses in explaining their actions, and it is therefore most unlikely that it was the actual reason for the differential treatment. Second, the relevant clauses of the collective agreement state that "non-resident employees shall continue to receive room and board in accordance with the practice in existence at the time of commencement of this Agreement": Article 13.01; and that "The Employer shall provide free room, board and local transportation to and from work to all non-resident employees": Schedule B.

Part of the Respondents' practice, at least when it came to the European non-resident employees, was a willingness to make individual arrangements for how board would be supplied. Third, and in any event, there was no evidence that the Respondents ever approached CSWU in response to the requests they admittedly received from some Latin American workers for a change in how board was provided to seek CSWU's consent to a variation, if such consent was required.

[406] The Respondents have not provided any explanation which would overcome the reasonable inference that race, colour, ancestry and place of origin were factors in the Respondents' differential and adverse treatment of the Latin American workers, in comparison to the European workers, in respect of meals and meal tickets.

[407] Considering the evidence as a whole, we conclude that race, colour, ancestry and place of origin were factors in the Respondents' differential and adverse treatment of the Latin American workers in respect of meals and meal tickets. As in the Respondents' treatment of accommodation arrangements, their decisions about how to deal with meals and meal tickets reflect arbitrary and stereotypical thinking about the Latin Americans and the Europeans, and their respective needs and desires and value to the employer. CSWU has therefore established *prima facie* discrimination against the Latin American workers in respect of this issue.

Expenses

[408] We have already found that the members of the Complainant Group received differential and adverse treatment, as compared to members of the comparator group, with respect to expenses.

[409] Little in the way of explanation for this differential treatment was adduced by the Respondents. There was some suggestion in the evidence that the Europeans incurred greater monthly expenses for things like cleaning supplies, but this was not substantiated. When asked in cross-examination why the two groups were treated differently, Mr. Ciamei testified that "I think it is fairer like this. The Europeans had different treatment before and they want to continue to be treated the same way." When asked why not pay the Latin Americans $300 too, he said "If they are content with the way we are and we are not in violation of anything, what, why don't I give them $1,000,000, would you be in

my position, would you give them $1,000,000 each?" Counsel for CSWU said he would give the Latin Americans what everyone else gets, to which Mr Ciamei responded, "Whatever is fair. It is fair, nobody is complaining, of course if you tell them, would you like to have $300, they would say yes, why not."

[410] On all of the evidence before us, we conclude that it is reasonable to infer that race, colour, ancestry and place of origin played a role in the Respondents' differential and adverse treatment of the Latin Americans as compared to the Europeans in respect of expenses. The Respondents' decision to treat the Latin Americans and the Europeans differently in respect of expenses is arbitrary in the *McGill* sense. CSWU has therefore established *prima facie* discrimination in respect of this issue.

3. Conclusion on the *prima facie* case

[411] To this point, we have considered separately the treatment afforded to members of the Complainant Group and the comparator group with respect to salaries, accommodation, meals and meal tickets, and expenses. We have concluded that, in respect of each, the Respondents treated members of the Complainant Group differently, and adversely, as compared to members of the comparator group. Further, we have concluded in respect of each that it is reasonable to infer that race, colour, ancestry and place of origin were factors in the different and adverse treatment experienced by the members of the Complainant Group.

[412] We now consider the Respondents' treatments of members of the Complainant Group on a global basis, to determine if discrimination, in the substantive sense, has been established.

[413] We have not considered it necessary to employ a *Law* analysis in deciding whether CSWU has established a *prima facie* case of discrimination. That said, the impact of the Respondents' actions on the human dignity of the members of the Complainant Group remains relevant to considering whether they were discriminated against. As stated in *Law*, this is to be assessed from the perspective of a reasonable person in circumstances similar to the complainant: para. 88.

[414] Work is closely connected with a person's sense of self-respect and dignity. As stated by Chief Justice Dickson in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect. (para. 91)

[415] The members of the Complainant Group were especially vulnerable during their work here in British Columbia on the Canada Line project. They lived and worked here for up to two years. During that time, they were far from home and their families, and dependent on their employer, not only for their work and wages, but for meals, accommodation, travel to and from work, and travel back to their homes. The effect of the Respondents' actions was to treat them differently from, and adversely in comparison to, their European colleagues performing the same or substantially similar work. They were paid less, they were housed in inferior accommodation, they were given less choice about where and what to eat, and were made to account for every expense incurred, rather than being given an allowance to do with as they wished. In every aspect of their relationship with the Respondents, members of the Complainant Group were treated worse than members of the comparator group, not because of any differences in their experience and skills, but because of who they are and where they are from, *i.e.* characteristics related to the prohibited grounds engaged by the complaint.

[416] On all of the evidence before us, it is apparent that members of the Complainant Group had their human dignity impaired as a result of the adverse treatment they experienced while working on the Canada Line project. The arbitrary and even stereotypical treatment of the members of the Complainant Group was most evident in respect of accommodation, meals and expenses. The differential rates of pay, especially when viewed in this larger context, were also arbitrary in the *McGill* sense. This is discrimination in the substantive sense required to contravene the *Code*.

[417] Considering the matter as a whole, we conclude that CSWU has established a *prima facie* case that members of the Complainant Group were discriminated against as compared to members of the comparator group. It has established the three elements necessary to make out such a case, in that members of the Complainant Group share characteristics related to the four grounds relied upon, they experienced adverse treatment as compared to members of the comparator group, and there is a connection between their shared characteristics and that adverse treatment. Further, the human dignity of the members of the Complainant Group was impaired by the effects of the Respondents' treatment. We find that CSWU has established a *prima facie* case of discrimination in the substantive sense required under the *Code*.

Bona fide **occupational requirement**

1. Introduction

[418] With the establishment of a *prima facie* case of discrimination by CSWU, the legal burden now shifts to the Respondents to justify their *prima facie* discriminatory conduct.

[419] For reasons we have already laid out, we consider that SELI's international compensation practices are properly considered as a potential justification for the Respondents' *prima facie* discriminatory conduct, and it is to that issue that we now turn.

[420] In *Meiorin*, the Supreme Court of Canada held that a respondent will be able to justify its conduct as a BFOR if it is able to establish that:

> i. The standard was adopted for a purpose rationally connected to the performance of the job;
>
> ii. That it was adopted in an honest and good faith belief that it was necessary to the fulfillment of a work-related purpose; and
>
> iii. That the standard was reasonably necessary to the accomplishment of that work-related purpose. (para. 54)

[421] The three-part *Meiorin* test was created in the context of a very different kind of case, where what was in issue was a physical fitness test which was found to discriminate

against women on the basis of sex. In such a case, there is a clear "standard" to be assessed.

[422] The justification put forward by the Respondents does not easily fit within a conventional *Meiorin* analysis. The difficulties associated with applying such an analysis in different contexts have been commented upon by both this Tribunal and the courts: see, for example, *Moore v. B.C. (Ministry of Education) and School District No. 44*, 2005 BCHRT 580, para. 907, referring to the analogous three-part test for a *bona fide* and reasonable justification in *Grismer v. British Columbia (Ministry of Attorney General, Motor Vehicle Branch)*, [1999] 3 S.C.R. 868.

[423] In *Quackenbush v. Purves Ritchie Equipment Ltd.*, 2006 BCSC 246, the Court alluded to these difficulties in rejecting an argument that the Tribunal had erred in not applying a rigid *Meiorin* analysis:

> It seems to me that slavish adherence to a formal analysis using the precise language of the test set out in *Meiorin* creates conceptual difficulties in cases that do not, like *Meiorin* and *Grismer*, involve the adoption and application of qualification standards.
>
> …
>
> The simple truth is that the circumstances of this case do not involve discrimination related to adoption of a standard and nothing is gained by going through the futile mental gymnastics necessary to identify some sort of standard so as to rigidly apply the *Meiorin* test…. (paras. 48 – 57)

[424] In what follows, we do not apply a rigid *Meiorin* analysis, but rather consider the principles underlying the *Meiorin* analysis, insofar as they are of assistance in determining if the Respondents have established a BFOR.

2. Is the *prima facie* discriminatory treatment justified because of SELI's international compensation practices?

The Respondents' assertions and submissions about SELI's international compensation practices

[425] The heart of the Respondents' case is that the adverse treatment experienced by members of the Complainant Group while working in British Columbia as compared to members of the comparator group is justified because of SELI's international

compensation practices. The focus of their argument was on the pay differential between the Complainant Group and the comparator group.

[426] SELI carries on specialized tunnelling projects all over the world. SELI employs workers from various locations who may move to projects wherever SELI works. SELI supplements those workers, as required, with local workers, who usually do not continue to work with SELI following completion of a given project.

[427] Thus, for example, on the Canada Line project, SELI brought in a few key European managers and specialists, and a much larger group of Latin American workers, to begin the project. They also hired some Canadian residents, who, with very limited exceptions, performed work different in kind from that performed by the international SELI workers. Later, the Latin American workers were joined by a second group of European workers, whom we have been considering as the comparator group for the purposes of this complaint.

[428] In their opening statement, and again in their written argument, the Respondents submitted that SELI's international compensation practices are as follows:

> 37. SELI's compensation structure is based on the international and project-oriented nature of its business. The compensation package offered to its mobile internationally-based labour force for a particular project is a function of three elements:
>
> a. the employee's actual compensation for work at the location of the project for which the employee is currently employed ("Current Project");
>
> b. the labour market rates for roughly comparable work at the location of the project for which the compensation package is being developed ("Next Project"); and
>
> c. the length of the employee's service at SELI or its affiliated companies and his/her particular skills and ability to operate particular equipment.
>
> 38. If the employee's compensation at the Current Project is less than the labour market rates for roughly comparable work on the Next Project, the employee will be offered a compensation package that is at least equivalent to the applicable labour market rates at the location of the Next Project.

39. If the employee's compensation on the Current Project is more than the labour market rates for roughly comparable work on the Next Project, the employee will be offered a compensation package that is at least equivalent to the employee's compensation on the Current Project.

40. Based on the labour needs for the Next Project, and its location relative to that of the locations of Current Projects that are finishing, SELI may increase the value of the compensation packages it offers to employees from particular locations in order to persuade them to choose to accept employment on the Next Project rather than to work elsewhere.

41. SELI's compensation structure ensures that each individual who, having worked on a Current Project, accepts employment on a Next Project, will receive an increase in pay. The amount of the compensation package offered will depend on the following factors:

    a. the employee's compensation on the Current Project

    b. whether labour market rates in the location of the Current project are higher or lower than they are in the location of the next Project;

    c. the experience and skills gained by the employee on the Current Project (as well as previous projects); and

    d. SELI's need for those skills and experience on the Next project.

42. All employees who comprise SELI's mobile international labour force know that their compensation will necessarily increase from project to project. Their starting compensation package will be a function of the labour market rates for roughly comparable work at the location of that project. Thus, starting compensation packages vary from project to project. Similarly, the rate at which an employee's compensation increases as he/she accepts employment on subsequent projects will depend on the labour market rates in the locations of those projects the employee agrees to work on.

[429] The Respondents submitted that these alleged international compensation practices meant that place of origin was not a factor in compensation, and more generally, that they had not discriminated in their compensation practices. As stated in their written submissions:

272. More generally, SELI's compensation practice of paying employees based on the higher of the labour rate in the project location and the location in which they previously worked for SELI means that place of origin is not a factor in compensation. The relevant factor is place of work (previous and current). This practice led to the Costa Rican employees obtaining significant raises, in the order of 300%, when they came to the Canada Line project.

273. The Union's suggestion that SELI has some animus against Latin Americans generally is belied by the fact that certain Colombian and Venezuelan employees who are working on a SELI project in Italy earn 20-25% more than the local Italians they supervise. And when these Latin Americans go to a project in another country, they will take their higher salary with them, as did the other employees who had been working in Europe for SELI prior to coming to the Vancouver project.

274. What the Union is really arguing in this case is that SELI is taking advantage of employees who come from countries with lower labour market rates by not paying them the same as employees who come from countries with high labour market rates. The Union says this is discrimination contrary to the *Code*, just as the differential treatment of persons from Category I and Category II countries was found to be in *Bitonti*.

275. It is true that employees will likely start working for SELI in their home countries and will be paid by SELI in accordance with its assessment of the labour market rates in those countries. If their home country labour market rates are low, then it follows that when they go to a SELI project in another country their previous SELI salary will be lower than a SELI employee who comes to that project after working for SELI in a high wage country. However, this is not discrimination contrary to the *Code*.

276. This situation is like that in *Agduma-Silongan v. UBC* (2003 BCHRT 22), where the distinction in issue was not based on negative stereotypes or assumptions about a person's place of origin but, rather, on objective facts about the country in question. In *Agduma-Silongan*, the objective fact was that certain countries had superior educational systems, and the distinctions that were drawn were based on this fact.

277. The Tribunal distinguished *Bitonti* on the basis that the difference between the value of education in Category I and II countries in that case was based on an assumption about the superiority of British-based educational systems and not on objective fact:

…

278. Here, it is a matter of the objective fact, not an assumption, that certain countries have higher wages than others. The distinction in the compensation paid to residents of Latin America and Europe is based on that objective fact.

279. In *Agduma-Silongan*, the Tribunal recognized the reality that different countries have different educational systems and, in an era of increasingly mobile educational markets, educational credentials must be compared such that individuals from some countries will be treated adversely as compared to others. It declined to conclude that according a graduate degree from the Philippines less weight than a graduate degree from Canada (or some other country) is *prima facie* discrimination based on place of origin, even though the consequence was adverse to the complainant and others from countries with comparatively disadvantaged educational systems.

280. The absence of any sufficient connection between place of origin and level of compensation in this case is reinforced by the evidence that numerous SELI employees whose places of origin are countries with poor labour market conditions, such as Costa Rica (who are included in the Union's complainant group) and the Philippines (who are excluded from the Union's Complainant group), receive significant increases in compensation when they work on SELI projects in countries where the cost of labour is more expensive. This is consistent with SELI's compensation practices that, in addition to rewarding employees for their skills and effort, and collective or individual bargaining, ensure that no employee is paid less than SELI's assessment of local market conditions.

281. The determination of compensation in an increasingly globalized labour market cannot be assessed from parochial perspectives. Compensation practices that reflect the reality of widely divergent local economies and labour markets and recognize that it will be more expensive to persuade an employee to leave an advantageous local labour market to work elsewhere than to persuade another employee to relocate from a comparatively disadvantageous one are no more discriminatory than the international credential equivalency scheme at issue in *Agduma-Silongan*.

282. The present case raises precisely the same issue as arose in *Agduma-Silongan* in the context of international labour markets and it should be decided in the same manner, a manner that recognizes and respects the reality of different educational, economic and other conditions in various parts of the world.

283. This was the approach taken by the British Court of Appeal (leave to appeal to the House of Lords denied) in *Wakeman & Ors v. Quick Corporation & Anor* [1999] E.W.C.A. Civ. 810 (18 February 1999) [E.W.C.A.]. There, three British employees working in England for a Japanese company alleged race discrimination because they were paid less than Japanese employees who had been transferred to the Company's office in England. The Japanese company was in the business of providing financial and other information and had offices around the world, with its head office in Tokyo. The employees occupied the same positions, but the Japanese employees were paid three times more than the Londoners.

284. The Employment Appeal Tribunal dismissed the complaint, and the Court of Appeal dismissed the appeal, on the basis that the difference in pay was not based on race, but on the fact that the higher-paid employees had been hired in Japan, a country with higher labour rates, and seconded to London (per Potter L.J.):

…

285. SELI submits that the same reasoning applies here.

286. The Union is insisting, through its carefully composed Complainant group, that SELI be required to pay these Latin American individuals the same as the individuals it hired from Europe. If this occurred, SELI would also have to pay all employees excluded from the Complainant group (Filipinos and Canadian residents) at European rates, as the same discrimination argument could be made by them. The result would be that SELI would have to pay European wage rates for all work in Canada. This is nonsensical.

287. Human rights laws do not require employers or universities to disregard the realities of different labour, educational and other markets around the world and to pay or offer services to everyone regardless of real differences in their situations. SELI has complied with the *Code* by ensuring that no employee from a country with poorer labour market conditions is paid less than its locally-hired Canadians. The Labour Board has held that there is no discrimination in compensation as between these two groups. The fact that it was necessary for SELI pay certain European employees more than local rates to convince them to come to work on the Canada Line project is not discrimination based on place of origin. It is not based on stereotypes or assumptions but on labour market reality, a reality recognized by the British Court of Appeal in *Wakeman*.

288. The Union is using this Complaint to try to raise the wages of the Latin Americans to the level it considers appropriate for work of this nature in Canada. That was the purpose of the Union leading evidence about the Bilfinger collective agreement. The Union sought, but was unable to achieve the Bilfinger rates in collective bargaining. If it had been able to negotiate the Bilfinger rates, the compensation of the Latin American residents would still be below that of the European residents. This shows that the Union accepts that it is not discriminatory to pay the European residents more than others, given that their compensation on previous SELI projects were higher than even what the Union considered to be the appropriate labour market rates for this work in British Columbia.

289. The fact that SELI pays all of its bargaining unit employees less than the Union considers appropriate does not mean that the Respondents are discriminating against certain members of the bargaining unit – the Latin American residents – on the basis of race, colour, ancestry or place of origin.

[430] Many of these submissions have already been addressed as part of the *prima facie* case analysis. We now address those we have not yet considered as part of a BFOR analysis.

The evidence and our findings about SELI's international compensation practices

[431] In order to assess whether SELI's international compensation practices constitute a BFOR, it is necessary to consider and assess the evidence relevant to those practices. The Respondents' evidence about SELI's international compensation practices, and the role of global labour markets, came from a number of witnesses, primarily Mr. Antonini, Mr. Ciamei, Marco Sem and Carlos Mestre. Evidence relevant to these submissions was also adduced from other witnesses, in so far as they spoke about their own employment history with SELI.

[432] In his evidence, Mr. Antonini distinguished between "Europeans" and "foreigners", the latter being SELI workers from places such as Columbia, Ecuador, Brazil, the Philippines, China, Costa Rica, New Zealand and South Africa. In total, SELI employs 350-400 employees, including 150-180 "foreigners". As a general rule, SELI's specialized technical or senior staff comes from Europe, although Mr. Antonini testified that they also look for such staff among the "foreigners".

[433] Mr. Antonini and Mr. Ciamei testified that the Costa Ricans were paid somewhere in range of $350-500 US net per month on the La Joya project in Costa Rica. While no documentary evidence about the salaries of any of the Latin Americans working on the La Joya project was introduced, with the exception of what little can be gleaned from the immigration documents on this issue, we accept that the Costa Ricans were paid $350-$500 US net per month on that project. Clearly, the Costa Ricans were given a significant raise to come to work on the Canada Line project in Vancouver; Mr. Ciamei estimated they were paid three to four times as much in Canada as in Costa Rica. The evidence does not show what the Ecuadorians and the Columbians were paid on the La Joya project, although Mr. Cortes Huertas testified that he earned $1000 a month (not clear if this was net or gross, likely in $US) more in Vancouver.

[434] According to Mr. Antonini, SELI's usual practice when hiring workers in a country with low wages rates, such as Costa Rica or Ethiopia, is to pay according to the local standard. Otherwise, SELI could not win the contract. Such employees are considered lucky to work with SELI as, having worked on one project, they may have the opportunity to work on another project elsewhere, where the rates of pay will be higher. He gave as examples moving to a project in Costa Rica, where the salary might be five times as much as in Ethiopia, or if the employee was even luckier, Hong Kong, which he said offers one of the highest salary levels.

[435] Mr. Antonini testified that, regardless of where an employee moves for their next project, they will always get a raise, as this is the "life code". This will be true even if an employee moves between projects in two countries paying similar compensation, *e.g.* between Spain and Portugal. If SELI is attempting to entice an employee to go a long distance, *e.g.* to Canada, or to what is perceived as an unfavourable location, *e.g.* Ethiopia, the raise will be even higher, perhaps 10-20%.

[436] Mr. Ciamei confirmed that SELI always gives workers a raise when they move from one project to another. He testified that the Europeans were given raises in the range of 3-5% when they came to Canada. Mr. Ciamei was not responsible for negotiating those increases, and did not remember what the Europeans' previous salaries

were, but testified that the increases were less than 5%, and that he knew that because he had seen documents showing their previous salaries.

[437] As we have indicated, the Respondents did not introduce any evidence of the previous salaries of the members of the Complainant Group, other than some oral evidence about what was earned on the La Joya project. They did introduce some evidence of the previous salaries of members of the comparator group. They did this through Mr. Sem, who is responsible for Human Resources in SELI's head office in Rome.

[438] Mr. Sem created a chart which lists 30 European employees, most of whom are members of the comparator group (some are true managers, and thus excluded from the comparator group). The chart includes each employee's name; their country of origin; the number of previous SELI projects on which they had worked; their salary, excluding bonuses and allowances, on their immediately previous project; the name of that project; their salary in Vancouver; and the percentage increase. Mr. Sem testified that he created the chart from payroll documents in Rome. Those source documents were not introduced, a fact which must be taken into account in considering the weight to be given to the information contained in the chart.

[439] The chart indicates that all 30 listed Europeans received a raise from their last project to their salary on the Canada Line project. The percentage increase ranges from 1.56% in Mirco Giannotti's case to 25% in the case of Guiseppe Scorzafava and Tommaso Buffa. The average percentage increase for all 30 Europeans is approximately 10.70%. This is significantly higher than the 3-5% increase Mr. Ciamei testified was given. Despite the fact that we do not have the source documents, we consider Mr. Sem's evidence on this point more reliable than Mr. Ciamei's.

[440] As Mr. Antonini testified, a worker who begins his employment with SELI in a country with low wages, such as Ecuador, will always be at a disadvantage because his initial wage rate will have been low. Europeans enjoy higher start-up salaries, and also have greater opportunities to increase their skills and their salaries by moving between the greater numbers of projects SELI has in Europe.

[441] Mr. Antonini testified about three Latin Americans who work for SELI in its workshop in Rome. He testified that they have "really good salaries", and supervise the Italians working under them.

[442] Mr. Antonini testified about the steps the Respondents took to determine the Canadian market rate. He testified that, when they prepared the tender and the budget for the Canada Line project, SNC Lavalin personnel analyzed the market and estimated the market rate for tunnelling work of this kind. Mr. Antonini was not involved in that analysis, was unaware of its details, and had never seen any written report.

[443] Mr. Ciamei also testified about this process. He testified that he came to Vancouver in May 2005 to prepare the bid for the project. The original plan was to use a few key SELI personnel, supplemented by locals, and the bid was prepared on that basis. No formal labour market analysis was conducted. Mr. Ciamei testified that, in order to determine the Canadian market rate to pay the necessary employees, he contacted local contractors to determine construction rates for this work. He named five companies that were suggested to him by a local Italian he knew, and that he contacted. However, none of these companies does specialized tunnelling work. Mr. Ciamei testified that, at the suggestion from someone with SNC Lavalin, he also contacted a couple of labour agencies to find labour rates. In cross-examination, he confirmed that he contacted only two agencies, Adecco, and one other.

[444] After Mr. Ciamei testified, the Respondents introduced two documents which they had since located as evidence of his efforts to determine Canadian labour market rates. One is a general sheet directed to construction contractors from ProActive Personnel.ca, indicating the rates at which they could supply tradespeople. The other is a May 27, 2005 letter from Adecco to Mr. Ciamei. It thanks him for providing Adecco with "the opportunity to provide you with pricing for various office positions", to be used in preparing the bid. It goes on to list a number of office staff positions. There is no reference to construction workers of any kind.

[445] The Respondents placed ads in newspapers looking for Canadian residents to perform the specialized tunnelling work. On the copies of those ads entered into evidence, one can see that they were placed in the *Vancouver Sun* on December 17, 2005

and February 4, 2006; there appear to be two others, the date and newspaper they appeared in cannot be determined from the photocopies. The ads indicate that the Respondents were seeking individuals with at least five years experience in the following categories, and at the following rates:

- TBM Operators – Knowledge of Spanish and English advantageous, at $25-28 an hour, plus production incentive;
- TBM Mechanics and Electricians, Erector Operators, Cutterhead Mechanics, and Grout Pump Operators – at $18-21 an hour an hour, plus production incentive; and
- Separately advertised – Segment Transport Beam Operators, Train Operators, Train Mechanics and Electronics; Muck Loader Operators – all with at least five years experience, knowledge of Spanish and Italian an asset, at $18-21 an hour, plus production incentives.

[446] Mr. Ciamei testified that the advertised wage rates were based on the information he received from local contractors and a lawyer who was assisting the Respondents.

[447] Both Mr. Ciamei, in his affidavit and his oral evidence, and Mr. Antonini testified that no qualified Canadian residents applied for the advertised positions. Mr. Ciamei said that he did not receive even one résumé, and that this was surprising to the Respondents. Mr. Ciamei testified that he had heard that there had been another project in Edmonton with a similar machine, and that they thought that someone from that or another project in Quebec would apply.

[448] Mr. Antonini testified that, when the Respondents could not find Canadian residents to perform the specialized tunnelling work, they hired Canadian residents mainly to perform work outside the tunnel, and brought in the Latin Americans to perform the specialized work inside the tunnel. The only exception is Peter Zhang, a Canadian resident from China, who over the course of the project moved from doing electrical work outside the tunnel to performing electrical maintenance work in the tunnel. According to his Letter of Assignment, he was paid $28 an hour. According to the Respondents' evidence, Mr. Zhang is the only Canadian resident (excepting Luis Alajandro Montanez Lara) who may have an opportunity to move to a SELI project elsewhere in the world. This indicates that Canadian residents were neither hired to perform nor learned specialized tunnelling skills during the course of the project.

[449] Given the lack of response from Canadian residents, the Respondents decided to bring the Latin American workers from the La Joya project to the Canada Line project. According to Mr. Ciamei, they calculated the Latin Americans' compensation by reference to the Canadian market rates they had established through the process already described. They did so just before the Latin Americans arrived in April 2006.

[450] The two Columbian Shift Foremen, Rogelio Cortes Huertas and Hector Manuel Sanchez Mahecha, have both worked on projects around the world. According to their immigration documents, in Mr. Cortes Huertas' case, this includes two projects in Europe, in Greece and in Portugal, the latter between 2000 and 2003. In both men's cases, this includes one project in Hong Kong, on which Mr. Sanchez Mahecha worked between 1999 and 2001, and which Mr. Antonini testified has one of the highest wage rates in the world. Mr. Cortes Huertas has been with SELI since 1982; Mr. Sanchez Mahecha since 1987.

[451] Nevertheless, Mr. Cortes Huertas and Mr. Sanchez Mahecha were paid far less than Europeans who had worked for SELI for much shorter periods of time, and on fewer projects. Mr. Cortes Huertas' Letter of Assignment indicated he was to be paid $24,625 US net; Mr. Sanchez Mahecha, $26,575 US net. Mr. Cortes Huertas' gross income in 2007 was $58,452.08; Mr. Sanchez Mahecha's was $60,910.38, the most of any Latin American. By way of contrast, Wilson De Carvalho, the comparator group Shift Foreman, who had worked with SELI on four projects, starting in 2001, had a gross income of $93,257.60 in 2007.

[452] Given the Respondents' evidence about SELI's international compensation, Mr. Cortes Huertas and Mr. Sanchez Mahecha should have received a raise every time they moved to a new project. They should always have earned at least the market rate in the country in which they were working. That market rate would be high in Europe and Hong Kong. Further, once having earned that high rate, they should have maintained it, with an increase each time they moved to another project.

[453] Mr. Sanchez Mahecha's and Mr. Cortes Huertas' salaries on the Canada Line project were not consistent with what the Respondents said constituted SELI's international compensation practices. Having worked in Europe alongside Europeans,

they should have received raises bringing them up to a European rate and, having done so, should have taken those European salaries with them as they moved elsewhere. It is clear that did not happen. No witness for the Respondents was able to explain why the salaries of workers such as Mr. Cortes Huertas and Mr. Sanchez Mahecha on the Canada Line project did not reflect SELI's alleged practices. Nor were any documents introduced by the Respondents which would show the salaries paid to Mr. Cortes and Mr. Sanchez, or any other Latin American worker on their previous projects, documents which would likely have assisted us in determining the veracity of the Respondents' claims about their compensation practices.

[454] Immigration documents also show that other long-term Ecuadorian and Columbian workers had worked on a number of projects, including, in some cases, ones in Europe and Hong Kong, but their rates of pay on the Canada Line project did not reflect the high rates of pay working on those projects ought to have produced, according to SELI's alleged international compensation practices.

[455] For example, SELI's immigration documents for Jose Anselmo Lopez Salguero indicate he had worked for it as a TBM Locomotive Mechanic for 15 years, and has over 29 years of professional experience in mechanics. They also indicate that he had worked for SELI on projects all over the world, including Columbia, Hong Kong, Greece, the Philippines, Italy, Lesotho and Costa Rica. Mr. Lopez Salguero's Letter of Assignment indicates that he was to be paid $24,300 US net, far less than European employees with fewer years experience on fewer projects than him. His gross income in 2007 was $58,623.78. When cross-examined about Mr. Lopez Salguero's circumstances, Mr. Antonini was unable to provide any explanation for why his salary on the Canada Line project would not reflect his experience, in accordance with SELI's alleged international compensation practices.

[456] Henry Builes Tamayo is stated in SELI's immigration documents to have 23 years experience as an electrician, to have worked for SELI as a TBM Electrician since 1999, and to have worked on SELI projects in Columbia, the Philippines, Italy, Spain and Costa Rica. His Letter of Assignment indicates he was to earn $21,700 US net on the Canada Line project. His gross income in 2007 was $54,257.11.

[457] The 2007 gross salary for Jose Paulo Da Silva Tavares, the comparator group TBM Electrician, was $95,660.82. The immigration documents for Mr. Tavares indicate he has been with SELI since November 2003, and has worked on projects in Spain and Portugal.

[458] Given that Mr. Builes Tamayo has worked for SELI longer than Mr. Tavares, and on more projects, including two in Europe, the substantial disparity in their earnings on the Canada Line project is striking. If the Respondents' assertions about SELI's international compensation practices were accurate, Mr. Builes Tamayo, whatever his starting wage might have been in his home country of Columbia, should have been raised to a European rate of pay in Italy in 2000, and he should have received another raise when he went to Spain in 2002. He should then have received another raise to go to Costa Rica, and yet another to come to Vancouver. Yet in Vancouver, Mr. Builes Tamayo earned only approximately 56% of what Mr. Tavares, who had worked on only two previous projects, both in Europe, earned. This disparity in earnings is entirely inconsistent with the Respondents' assertions about SELI's international compensation practices.

[459] Raul Otoniel Rozo Munoz is stated in SELI's immigration documents to have 30 years of professional experience as a welder, and 20 years as a TBM Chief Mechanic. He has been with SELI since 1984, working on projects in Colombia, Ecuador, Hong Kong, Italy and Costa Rica. His Letter of Assignment indicates he was to earn $25,275 US net on the Canada Line project. His gross income in 2007 was not provided.

[460] Jose Maria Martinez Peña is stated in SELI's immigration documents to have over 19 years professional experience in bored and excavated tunnels, and to have been with SELI for 10 years as a TBM Foreman. He has worked on projects in Columbia, Ecuador, the Philippines, Portugal and Costa Rica. His Letter of Assignment indicates he was to earn $27,225 US net on the Canada Line project. His gross income in 2007 was $5,735.39, which indicates he did not work the whole year.

[461] Carlos Elidio Picon Alarcon is stated in SELI's immigration documents to have over 27 years of professional experience, and over 20 years in TBM Maintenance. He has been with SELI since 2000, working on projects in Ecuador and Costa Rica. His

Letter of Assignment indicates he was to earn $21,000 US net on the Canada Line project. His gross income in 2007 was $49,214.93.

[462] Yandry Eugenio Tuarez Fortis is stated to have over 10 years professional experience with TBM, and over six years in TBM Maintenance. He has been with SELI since 2000, and has worked on projects in Ecuador and Costa Rica. His Letter of Assignment indicates he was to earn $20,000 US net on the Canada Line project, the same as the Costa Ricans, the lowest paid members of the Complainant Group. His gross income in 2007 was $47,107.18.

[463] By comparison, as indicated above at paragraph 299, the Europeans who worked a full year, or close to it, in 2007, earned between $79,000 and $96,000.

[464] The evidence about Wilson De Carvalho's salary was also revealing. Mr. Ciamei testified that the Respondents had to give him an increase to come to Vancouver, and that he would not have come for less. Yet Mr. De Carvalho testified that he had made more money on other SELI projects than he earned on the Canada Line project. Mr. De Carvalho's evidence about this matter must be preferred. Mr. De Carvalho's salary was likely to be of much more significance to him than to Mr. Ciamei, and Mr. Ciamei's evidence was not substantiated by any documentary evidence.

[465] Mr. Antonini's and Mr. Ciamei's evidence about SELI's international compensation practices was very general in nature. It was not backed up by documentary evidence. The experience of some Latin American employees, including but not limited to Rogelio Cortes Huertas, Hector Manuel Sanchez Mahecha, Jose Anselmo Lopez Salguero, and Henry Tamayo Builes, is inconsistent with it. So is Wilson De Carvalho's experience of being paid less in Vancouver than on previous SELI projects.

[466] The evidence does not substantiate the Respondents' assertions that SELI's workers always receive a raise when they move between projects. Nor does it substantiate the Respondents' assertions that, when workers move to a location with a higher wage rate, they always receive a raise to that higher wage rate, and once they have received that higher wage rate, they retain it wherever they move. The Latin American workers' compensation history, so far as it is revealed in the evidence before us, and as

compared to the compensation history of members of the comparator group, is to the contrary.

[467] We also consider the evidence about the Respondents' efforts to determine the Canadian market rate for the specialized tunnelling work required on the Canada Line project. The Respondents argued that CSWU was seeking, through this evidence and evidence about the Bilfinger Berger (Canada) Inc. collective agreement, which covered work performed by Bilfinger on a tunnelling project on the North Shore, impermissibly to establish discrimination by showing the Respondents paid the Latin Americans less than the Canadian market rate.

[468] As we set out below, the extent and adequacy of the Respondents' efforts to determine the Canadian market rate for the specialized tunnelling work are relevant to our assessment of SELI's international compensation practices, as applied on the Canada Line project.

[469] We agree with the Respondents that the Bilfinger collective agreement and Richard Gee's evidence about it are of little assistance to us in determining the extent and adequacy of the Respondents' efforts to determine Canadian market rates. The same can be said about the evidence introduced through Mr. Wates about the RSL Joint Venture collective agreement, which covered work, not tunnelling work, performed for another employer on another part of the Canada Line project. That said, the fact that Bilfinger was doing tunnelling work in the Lower Mainland with Canadian workers does indicate that there are some Canadian residents with the skills to perform specialized tunnelling work.

[470] The complaint before us is not that the Latin Americans were discriminated against by being paid less than the Canadian market rate. But evidence about the Respondents' efforts to establish the Canadian market rate is relevant, as they led evidence about those efforts, and submitted that the determination of the local market rate is an integral part of SELI's international compensation practices. Specifically, they argued that the compensation paid to members of SELI's "mobile internationally-based labour force" on a given project is a function of three elements, one of which is "the labour market rates for roughly comparable work at the location of the project for which

the compensation package is being developed ('Next Project')", with employees being offered compensation "at least equivalent to the applicable labour market rates at the location of the Next Project".

[471] Thus, the Respondents have squarely put in issue their efforts to determine the Canadian market rate, and the extent of those efforts goes to whether SELI's international compensation practices constitute a BFOR to justify the *prima facie* discriminatory compensation paid to the Latin American workers on the Canada Line project.

[472] Mr. Ciamei testified that he negotiated with three local contractors for the excavation of the station from which the TBM operated. He named two of those contractors. He asked them and was informed about the rates they were paying for general labourers in 2005, and he did not dispute, when it was put to him in cross-examination, that in March 2005 a general labourer at one of the named contractors earned $22.70, 12.5% holiday pay, and $5.68 in benefits per hour. Mr. Ciamei said that he did not discuss compensation in detail but asked for general ranges. The Respondents did not refute the rates put to Mr. Ciamei in cross-examination, nor did they put in evidence the bids made to it for station excavation.

[473] If Mr. Ciamei was aware of these two contractors' labour rates when the Respondents advertised in Canadian newspapers for Canadian residents to perform specialized tunnelling work, he failed to take that information into account in setting the advertised rates.

[474] That the Canadian market rates the Respondents arrived at were likely not accurate is reflected in the fact that they did not receive a single résumé in response to the newspaper ads they placed in December 2005 and February 2006. It is also noteworthy that they were required to pay Mr. Zhang $28 an hour as a maintenance electrician, work that Mr. Ciamei acknowledged was less complicated that the work of a TBM Electrician which they had advertised at $18-21 an hour.

[475] On all of the evidence, we conclude that the Respondents did not conduct any reasonable assessment of Canadian market rates for specialized tunnelling work. Their evidence about the steps they took to determine Canadian market rates was very limited, and did not establish that they conducted a reasonably diligent assessment of those rates.

[476] The Respondents sought to rely on Mr. Antonini's evidence about three Latin Americans working in Rome as evidence that their compensation practices are not discriminatory. They submitted that those employees earn 20-25% more than the local Italians they supervise, and that "when these Latin Americans go to a project in another country, they will take their higher salary with them, as did the other employees who had been working in Europe for SELI prior to coming to the Vancouver project".

[477] There are a number of difficulties with these submissions. First, Mr. Antonini's evidence was not quite as unequivocal as suggested by the Respondents. He testified that these employees earn "something about" 20-25% more than the Italians they supervise. Second, no documentary evidence was offered to substantiate that testimony. Third, and most importantly, the evidence before us did not substantiate that other Latin American workers who had worked in Europe "took their higher salary with them", as the evidence about Rogelio Cortes Huertas, Hector Manuel Sanchez Mahecha, Jose Anselmo Lopez Salguero and Henry Tamayo Builes demonstrates.

[478] Mr. Antonini's evidence about the three Latin Americans working in SELI's workshop in Rome does not assist the Respondents in establishing SELI's international compensation practices, or, more generally, in establishing that the Latin American workers on the Canada Line project were not discriminated against.

[479] Finally in this area, we note that, in support of their submissions about SELI's international compensation practices, the Respondents entered a report produced by Mercer Human Resources Consulting, entitled International Assignments Survey 2005/2006 (the "Mercer Report"). As we have explained earlier, they also sought to call Rebecca Powers, an employee of Mercer, to testify about the Mercer Report. CSWU objected, on the basis, *inter alia*, that Ms. Powers' evidence, and the Mercer Report, would be expert evidence, introduced contrary to Rule 33. In *CSWU No. 6*, we held that:

> Ms. Powers' proposed evidence is expert opinion evidence. The panel has also decided that the Report is an expert report. Ms. Powers is not the proper witness to call to speak to the Report as she was not involved in its writing, editing, or peer review. Despite the fact that the Employer failed to comply with Rule 33, the panel is prepared to exercise its discretion to permit the Employer to introduce the Report, provided that it calls as a

> witness one of its author/editors or peer reviewers. Further, the Union will be permitted to call expert evidence in rebuttal. (para. 6)

[480] The Respondents chose to call Carlos Mestre, the head of Mercer's global mobility business unit, in charge of producing all of the surveys and reports on global mobility, to testify about the Report. CSWU cross-examined Mr. Mestre, but did not seek to call any expert evidence in rebuttal.

[481] Mr. Mestre's evidence and the Mercer Report were of little assistance in determining the issues before us. This is reflected in that fact that they were not referred to by the Respondents in their final submissions. The Mercer Report is a survey of some Mercer clients about their compensation practices; SELI is not among them. The Mercer Report is not, and Mr. Mestre did not hold it out to be, scientific in nature. It is primarily concerned with executives or professionals being transferred between the offices of large international companies. It is not concerned with construction workers like the members of the Complainant Group. It does not describe, nor does it purport to describe, SELI's international compensation practices.

[482] We conclude that the evidence before us does not substantiate the Respondents' assertions and submissions about SELI's international compensation practices. There was a significant disconnection between the Respondents' submissions and the actual evidence about these practices.

[483] Like any business, the Respondents seek to minimize their labour costs, while at the same time ensuring that employees are able to perform the work safely and productively. While not nearly so elaborate or sophisticated as the compensation practices the Respondents asserted SELI employs, the Respondents' practices are still, in the words of *O'Malley*, "an employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply". The point was made by Mr. Ciamei in response to a question about the fact that the Respondents had to pay $28 an hour to Mr. Zhang to perform electrical maintenance work:

> Yes, this is the deal with him, if he is happy with that we can't get anything cheaper than this, what can we do? We have to pay the minimum standard required by law. If we cannot find anyone who is accepting this, then we have to find someone that is getting higher salary… Maybe you

> don't find any electrician who [is] willing to work for minimum. If you find willing to be paid less, then you do.

[484] The reality of SELI's international compensation practices, as revealed in the evidence before us, is that SELI has found that it is able to pay workers from countries with low wage rates less money than workers from countries, in particular European countries, with high wage rates, and that it is able to continue to pay workers from such countries lower wages as they move them to different projects around the world.

Do SELI's international compensation practices as applied in British Columbia justify the adverse treatment?

[485] On the evidence before us, SELI's international compensation practices do not justify the adverse treatment of members of the Complainant Group working in British Columbia. These reasons, while we have chosen to include them as part of a BFOR analysis, could also have formed part of our analysis of the *prima facie* case. Our ultimate conclusion, that the Respondents violated the *Code*, would have remained the same had we done so.

[486] We begin by observing that SELI's international compensation practices could only possibly justify the differences in salaries paid to members of the Complainant Group and comparator group. Those compensation practices could not possibly justify the other adverse differential treatment established on the evidence before us, in terms of expenses, meals and accommodation, as they bear no rational connection to those terms and conditions of employment.

[487] Considering only the *prima facie* discriminatory rates of pay, the evidence, as we have already said, does not substantiate the Respondents' submissions, made in both their opening statement and final written argument, about SELI's international compensation practices. In the end, the evidence showed that employees from poorer countries with presumably lower rates of pay are paid less than employees from wealthier countries with presumably higher rates of pay, and that those disparities continue regardless of how long the employees remain with SELI, or the number or locations of the projects on which they work.

[488] We agree with CSWU that SELI's international compensation practices, as applied to the workers employed by them on the Canada Line project, are inconsistent with the purposes of the *Code*, as set out in s. 3, in particular:

> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> …
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code….

[489] In effect, the application of SELI's actual international compensation practices to the Latin Americans employed by them on the Canada Line project was to take advantage of the existing disadvantaged position of these workers, who are from poorer countries, and to perpetuate that disadvantage, and to do so while they were living and working within the province of British Columbia. As such, the application of those practices in British Columbia perpetuated, compounded and entrenched existing patterns of inequality. This occurred, not during a temporary secondment of a few weeks or months, but in what the LRB, in a finding with which we concur, held was a new employment relationship. That employment relationship lasted up to two years, after which the employees had no guarantee of continued employment elsewhere with SELI. This is contrary to the fundamental purposes of the *Code*, and cannot be justified, on the evidence before us, as a BFOR.

[490] SELI's actual compensation practices, as applied on the Canada Line project, have not been shown to have been established in an honest and good faith belief that they were reasonably necessary. Nor have they been established to be, in fact, reasonably necessary. The inconsistency between the Respondents' submissions and assertions about those practices, and the actual practices and their effects on the Latin American workers, as established in the evidence before us, brings into question the *bona fides* of the application of SELI's compensation practices. So too does the Respondents' failure to conduct a reasonable labour market analysis to determine the Canadian market rate for the work to be performed. The point here is not that the Respondents were, as a matter of

human rights law, obligated to pay the Latin Americans the Canadian market rate. It is that the Respondents claimed that they determined the Canadian market rate, as part of their international compensation practices, and that they paid the Latin Americans an amount at least equivalent to that rate.

[491] Reasonable necessity is usually shown by establishing that it would have caused a respondent undue hardship not to engage in the *prima facie* discriminatory conduct in question. Here, the Respondents did not argue that it would have caused them undue hardship not to discriminate against the Latin Americans; rather, they argued that they did not discriminate. It is perhaps for this reason that the Respondents chose not to introduce any bid or tender or contractual documents or any other documents from which the financial impact on them of not discriminating against the Latin Americans could have been assessed.

[492] A respondent seeking to justify a *prima facie* discriminatory practice bears the burden of doing so by evidence that proves its assertions; vague and impressionistic evidence will not suffice: *Grismer*, paras. 31 and 41 – 43. The evidence before us did not bear out the Respondents' assertions about their practices generally, or their efforts to determine the Canadian market rate in particular, nor that it would have caused them undue hardship not to discriminate against the Latin Americans.

[493] The Respondents relied on the decision of the English Court of Appeal in *Wakeman & Ors v. Quick Corporation & Anor*, [1999] E.W.C.A. Civ. 810 (18 February 1999) [E.W.C.A.]. That case involved a complaint under the *Race Relations Act 1976* that the employer, a Japanese company, had discriminated against three English employees in its London branch by paying them less than employees seconded from Japan. The Court of Appeal denied the employees' appeal of the Employment Appeal Tribunal's (the "EAT") decision that they had not been discriminated against on the basis of race.

[494] There are number of factors which distinguish *Wakeman & Ors* from the present complaint. First, that complaint was framed solely as one of direct discrimination. It was not framed, as the present complaint is, as primarily one of adverse effect discrimination. Second, that complaint was based solely on the ground of race; significantly, there was

no allegation of discrimination on the basis of place of origin. Third, the employees framed their case before the EAT on the basis that the employer was "intent *as a matter of policy* on favouring their Japanese employees and that such deliberate intent was the reason for the pay differential in the case of the secondees". The complaint before us was not framed in that manner. Fourth, and closely related to the manner in which the employees framed their case, the EAT was satisfied, on the evidence before it, that it was the fact or status of the secondment of the Japanese employees which was the genuine reason for the remuneration provided, not the race of the secondees. Fifth, and perhaps most important for our purposes, the EAT found the circumstances of the secondees were materially different from those of the local employees, and that this accounted for the differences in remuneration.

[495] Thus, *Wakeman & Ors* might be of some assistance if the present complaint alleged discrimination as between the Latin American employees and the Canadian residents; it is not of assistance in considering whether the Latin Americans experienced adverse effect discrimination as compared to the Europeans, all of whom were temporarily resident in British Columbia, and whose circumstances were therefore analogous.

[496] The Respondents submit that differences in rates of pay paid to workers in the Complainant and comparator groups working on the Canada Line project were based on "real differences in their situations", and therefore were not in breach of the *Code*. This is reminiscent of the statement in *Andrews* that "distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed": para. 37.

[497] The Respondents' actual pay practices primarily relate to their own objective of minimizing labour costs as an international company operating in a global economy. Insofar as they relate to the situations of their employees, those practices are based on the assumption that, because they come from poorer countries, the Latin Americans, when working in British Columbia, do not need or want, or are not entitled, to make as high a wage as the Europeans.

[498] It is for this reason the Respondents led evidence from Wilson De Carvalho and Rogelio Cortes Huertas about the costs of maintaining their homes in Portugal and Columbia, respectively. It was also the reason why the Respondents led evidence from Mr. Cortes Huertas regarding how he felt about the fact that Mr. De Carvalho made more money than him. Mr. Cortes Huertas testified that he was quite happy with his salary, and that he guessed that salaries depended on the economic situation in each country. While he did not know how much Mr. De Carvalho earned, Mr. Cortes Huertas testified that it depended on the salaries and costs of living in each country. This evidence was less than convincing as a genuine and spontaneous expression of Mr. Cortes Huertas' true thoughts and feelings on the subject.

[499] The suggestion that workers from poorer countries do not need or want to make as much money as workers from richer countries is essentially the same as the long since discredited argument that women do not need or want to make as much money as men. CSWU referred in this connection to *Beckett v. City of Sault Ste. Marie Police Commissioners* (1968), 67 D.L.R. (2d) 286 (Ont. H.C.), in which the Court considered whether a female police officer was entitled to the same pay as a male police officer who performed the same duties. The Court found that "he, being a married man with a family to maintain and support, was paid at a rate somewhat higher than Miss Beckett who was single and had no family obligations", and went on to hold:

> I think that she was and still is a police constable, designated a policewoman constable to distinguish her from the male members, but this fact does not of itself entitle her to the same pay as the male constables and in no way invalidates an agreement with her for a special wage, *i.e.*, a wage different from that being paid to the male constables, nor does it prevent the Board designating her by any name – clerk-typist or what not. She is not being discriminated against by the fact that she received a different wage, different from male constables, for the fact of difference is in accord with every rule of economics, civilization, family life and common sense. (p. 7 of Lexisnexis version)

[500] Similarly, the Respondents, in effect, submit that "the fact of difference" in the prevailing wage rates in poorer and richer countries is in accord with "every rule of economics", with the result that perpetuating that difference in wages paid to workers in British Columbia is not discriminatory.

[501] While the Respondents submit that discrimination under the *Code* is about negative assumptions and stereotypes, and that such assumptions and stereotypes played no role in the differential compensation and other treatment accorded members of the Complainant Group, those submissions were not borne out in the evidence before us. In fact, the pay practices at the heart of this complaint are based upon negative stereotypes and assumptions about the needs, desires and abilities of the Latin American workers. Because they come from countries with lower wage rates, they do not need, want or merit the same wages as employees from countries with higher wage rates while performing substantially the same work in British Columbia.

[502] In their evidence before us, the Respondents systematically attempted to devalue the experience and work performed by the Latin American workers. While there will always be variation in the experience, skills and duties of individual workers, their efforts to paint the Latin Americans, as a group, as less skilled and valuable than the Europeans, were unpersuasive. In this connection, of note are the assertions that all Europeans are managers, or are key people who need to be housed closer to the worksite to deal with emergencies, and Mr. Gencarelli's and Mr. Ginanneschi's unreliable evidence devaluing the work performed by the Costa Ricans on the La Joya project.

[503] The evidence showed the Respondents did not treat the Latin Americans as equally deserving of respect and equal in human dignity as the Europeans. For example, the requirement that, for the Latin Americans to have a change in their meal arrangements, they would all have to make the request, while the Respondents were quite prepared to deal with Europeans on an individual basis, showed this tendency, as did choosing to house all of the Latin Americans at the 2400 Motel, while housing the majority of the Europeans, even those who arrived after the Latin Americans, in the preferable apartments close to the worksite.

[504] We conclude that neither SELI's international compensation practices, as shown in the evidence before us, nor any other defence put forward by the Respondents, justifies the Respondents' *prima facie* discriminatory conduct in paying members of the Complainant Group less than members of the comparator group, and in otherwise treating

members of the Complainant Group adversely as compared to members of the comparator group.

[505] This conclusion would not change had we considered SELI's compensation practices, in their entirety, within the context of the *prima facie* case analysis. In either event, the evidentiary burden would have been upon the Respondents, as the party putting forth SELI's compensation practices as a defence to the complaint, to establish both what those practices in fact are, and that they render non-discriminatory the admittedly unequal rates of pay paid to members of the two groups. The Respondents did not meet that evidentiary burden.

Conclusion on discrimination

[506] For these reasons, we conclude that CSWU has established that members of the Complainant Group were discriminated against by the Respondents on the grounds of race, colour, ancestry and place of origin, contrary to s. 13 of the *Code*, and that the Respondents have not provided a persuasive defence of their conduct, whether their defences are considered in the context of the *prima facie* case analysis or as a BFOR.

Certain Employees' Application to Opt Out

[507] Prior to dealing with remedy, we consider the application made on behalf of some Latin American workers to opt out of the complaint.

1. Background

[508] On January 28, 2008, counsel for a group of unidentified "Certain Employees" filed an application for a declaration that they could opt out of the complaint or, in the alternative, a request that they be granted intervenor status. After receiving written submissions from the parties and Certain Employees, we issued a decision on February 29, 2008, in which we held that members of the Complainant Group would be permitted to apply to opt out, subject to certain conditions which we imposed in order to ensure that they did so of their own free will and with full knowledge of the consequences of that choice: *CSWU No. 7.*

[509] On March 14, 2008, in accordance with the directions set out in *CSWU No. 7*, counsel for Certain Employees filed an application for the following five members of the Complainant Group to opt out: German Dario Caro Fonseca, Henry Builes Tamayo, Jose Anselmo Lopez Salguero, Hector Manuel Sanchez Mahecha, and Rogelio Cortes Huertas. In counsel's accompanying submissions, strong exception was taken to the directions made by the panel in *CSWU No. 7*, with counsel asserting a unilateral right to opt out, and submitting that the Tribunal had exceeded its jurisdiction in imposing any conditions on the exercise of that right.

[510] Despite these submissions, the application filed on behalf of the five named employees complied with the directions made in *CSWU No. 7*. In particular, a "Statement of Opting Out" was filed on behalf of each employee, signed by them, indicating that they thereby opted out of the complaint and the Complainant Group, had received independent legal advice, and understood that by opting out they gave up any remedy the Tribunal might order if the complaint were found to be justified.

[511] Also in accordance with the panel's directions, the parties made written submissions about the application to opt out. The Respondents supported the positions taken by Certain Employees. CSWU submitted, wrongly in our view, that the application did not comply with the panel's directions. It also submitted that the Tribunal had not exceeded its jurisdiction in making those directions. Finally, CSWU referred to certain "particulars" received by it, indicating that it had received the following information from unnamed sources: that Certain Employees did not approach counsel, one of them received unsolicited calls from counsel, and that employee subsequently contacted the others; that that employee advised the others that they would keep good relations with SELI and a clean record with the Canadian government by removing themselves from the complaint; that Certain Employees had not been and did not expect to be required to pay for counsel's services; and that Certain Employees had been advised by someone other than counsel that SELI can offer a bonus for completing the project. CSWU submitted that this information brought into question the voluntariness of Certain Employees' application, and that they should be required to give evidence about the circumstances leading to the application.

[512] Counsel for Certain Employees replied to CSWU's submissions. Counsel took exception to the hearsay allegations made about his conduct, and submitted that CSWU's submissions amounted to an impermissible attack on solicitor-client privilege. He submitted that there was no basis for an evidentiary hearing.

[513] The Tribunal then received a letter in Spanish, dated March 31, 2008, and signed by Jose Anselmo Lopez Salguero, translated by Joe Barrett, an employee of the British Columbia and Yukon Territory Building and Construction Trades Council, and CSWU's primary contact with the Complainant Group. It states:

> …
>
> I have realized that the union and the Human Rights Tribunal have an action against the company SELI regarding the salaries that are paid to the workers.
>
> When the company pays any readjustment to the workers for time worked, I, Jose Anselmo Lopez Salguero, I too claim these rights as this is money from my work.
>
> I signed a paper where it says I don't want any pressure against the SELI company, but if it is the case that SELI pays these readjustments in salaries, I too claim these because it is money from my work, for this reason I claim this money. I apologize to the Human Rights authorities for having signed that paper.
>
> I realized that the Human Rights are considering a complaint by us, the workers regarding the salaries….

[514] The Tribunal provided the parties with copies of Mr. Lopez Salguero's letter, and asked for their submissions. Counsel for Certain Employees submitted that it had no effect, other than removing Mr. Lopez Salguero from the application. CSWU submitted that, in light of the letter, the panel could not be satisfied that any of Certain Employees had opted out with full understanding of the consequences of their choice, and reiterated its request for an evidentiary hearing. It also sought directions from the panel about counsel for CSWU's ability to speak with the employees in question. Counsel for Certain Employees filed a final reply, opposing the submission that counsel for CSWU had a solicitor-client relationship with Certain Employees.

[515] On May 8, 2008, we wrote the parties and counsel for Certain Employees, indicating that we did not need to hear any evidence from the four remaining applicants, that we saw no need to give any further directions, and would provide a final decision on this issue as soon as time permitted. We now provide that decision.

2. Reasons and Decision

[516] In their submissions, Certain Employees made a number of arguments by which they effectively sought to reargue the decision and directions made by the panel in *CSWU No. 7*. This was inappropriate, and we do not consider those submissions here.

[517] We are satisfied that the four remaining applicants to opt out, Mr. Caro Fonseca, Mr. Builes Tamayo, Mr. Sanchez Mahecha, and Mr. Cortes Huertas, have complied with the directions set out in *CSWU No. 7*. Mr. Lopez Salguero has clearly withdrawn his application to opt out, and Certain Employees accept that he has thereby removed himself from the application.

[518] CSWU made a number of serious allegations about the process leading up to the application to opt out, but it has not substantiated those allegations. It has not, for example, filed an affidavit from the person or persons who allegedly received this information, naming the sources of the hearsay allegations contained in its submissions.

[519] The Tribunal is an adjudicative body, not an investigative one. It acts on the basis of evidence brought before it. It was up to CSWU to bring evidence before the Tribunal, if it had it, to create a sufficient basis for holding a hearing. The unsworn and unsubstantiated hearsay allegations contained in CSWU's submissions are not a sufficient basis for the Tribunal to order that an evidentiary hearing be held to test the voluntariness of the four remaining applications. This is consistent with the panel's earlier denial of the Respondents' application to re-open the representative status application on the basis of unreliable hearsay evidence, and which sought information the disclosure of which would have violated solicitor-client privilege.

[520] Nor is the fact that Mr. Lopez Salguero reconsidered his decision to apply to opt out a basis for holding an evidentiary hearing into the voluntariness of the other four applications to opt out. If anything, the fact that he was able to reconsider his decision,

and to notify the Tribunal of that, tends to indicate that other members of Certain Employees would have been able to do the same, had they wished to.

[521] We therefore declare that Mr. Caro Fonseca, Mr. Builes Tamayo, Mr. Sanchez Mahecha and Mr. Cortes Huertas have opted out of the complaint. As such, they are no longer members of the Complainant Group. As stated in *CSWU No. 7*, referring to *CSWU No. 3*, para. 96:

> "should any members of the Complainant Group wish not to receive any monetary remedy the Tribunal might order in the event the complaint is found to be justified, they will be free to elect not to do so." In the particular circumstances of this case, including the timing of the application and the few remaining scheduled hearing days, there may be little difference between allowing Certain Employees who wish to opt out now to do so and their electing not to receive any monetary remedy which might be ordered if the complaint is found to be justified. (para. 40)

[522] The effect of this declaration is that the four opted-out workers will not be entitled to the remedies ordered for the discrimination we have found. Further, as submitted by their counsel, they have thereby given up any claim to any compensation in a different forum flowing from a similar discrimination claim. Their relationships with the Respondents, insofar as they continue to be within the jurisdiction of the province of British Columbia, are governed by the general law of the province, including, without limitation, the *Human Rights Code*.

[523] No party argued that, because of these employees' decision to opt out of the complaint, evidence about them was rendered irrelevant to the complaint. The Respondents did submit that these employees' decision to opt out was significant because CSWU had relied upon their situations in advancing the complaint.

[524] It is true that CSWU relied upon these employees' situations, among others, in advancing the complaint. We too have relied upon them in the course of our findings of fact and analysis. As we have said, no party argued that it was inappropriate for us to do so. These employees' choice to opt out of the complaint and decline any remedy does not render evidence about them irrelevant to the complaint. It is common for evidence about persons other than the complainant to be considered in assessing whether the complainant was discriminated against. An example is *Espinoza*, in which the Board of Inquiry

considered and relied upon extensive evidence about other Latin American workers' experience in the workplace in coming to the conclusion that the sole complainant, Mr. Espinoza, was discriminated against. An example from this Tribunal is *Radek*, in which the Tribunal considered and relied upon evidence of how Aboriginal and disabled persons other than the complainant, Ms. Radek, had been discriminated against by the respondents. In group and systemic complaints it is often essential to consider the experience of persons other than the complainant or complainants to determine if discrimination has been established; that is what we have done here.

[525] Further, and in any event, to the extent anything can be derived from the fact that four members of the Complainant Group decided to opt out, it is significant that only four Latin American workers made that choice. The Respondents argued before us in *CSWU No. 3* that CSWU was not an appropriate representative of the Complainant Group, and did not represent their interests and wishes. In the end, only four members of the Complainant Group decided that CSWU did not represent them in this complaint.

Remedy

1. Introduction

[526] CSWU sought the following remedies:

> c. A declaration that the Respondents violated the *Code*;
>
> d. An order that the Respondents cease and desist from any further violations of the *Code;*
>
> e. Compensation for differences in salaries;
>
> f. Compensation for differences in accommodation;
>
> g. Compensation for differences in expenses paid;
>
> h. Compensation for injury to dignity, feelings and self-respect; and
>
> i. Such further orders as the Tribunal deems just.

[527] The Respondents made no submissions on remedy.

[528] Section 37(2) sets out the statutory basis for the Tribunal's remedial authority. It reads:

> If the member or panel determines that the complaint is justified, the member or panel
>
> (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
>
> (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,
>
> (c) may order the person that contravened this Code to do one or both of the following:
>
> (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice;
>
> (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, and
>
> (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
>
> (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;
>
> (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
>
> (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.

2. Analysis and remedial orders

Section 37(2)(a) – Cease and refrain order

[529] Under s. 37(2)(a), where a complaint is found to be justified, the Tribunal must make an order that the respondent cease and refrain from committing the same or a similar contravention. We so order.

Section 37(2)(b) – Declaration

[530] Under s. 37(2)(b), where a complaint is found to be justified, the Tribunal may make a declaration that the conduct complained of is discrimination contrary to the *Code*. Such an order was requested by CSWU, and we consider it appropriate. We so order.

Section 37(2)(d) – Compensatory orders for financial loss

[531] Under s. 37(2)(d)(i), the Tribunal may order the person who contravened the *Code* to make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to the *Code*. Under s. 37(2)(d)(ii), the Tribunal may order the person who contravened the *Code* to compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention.

[532] CSWU seeks compensation for differences in salaries paid to members of the Complainant Group as compared to members of the comparator group. Its also seeks compensation for differences in expenses paid to members of the Complainant Group, as compared to members of the comparator group. Both of these requests for remedial relief clearly fall under s. 37(2)(d)(ii).

[533] CSWU also seeks compensation for differences in accommodation provided to members of the Complainant Group as compared to members of the comparator group. This request for relief arguably falls under either s. 37(2)(d)(ii) or (iii). Distinct issues arise with respect to this request, and we will deal with it separately.

[534] In terms of salary, CSWU seeks damages amounting to the difference in salaries between the Europeans and Latin American workers, for each member of the

Complainant Group, being all of the Latin American workers who have worked on the Canada Line project, except any who have opted out. In its written submissions, CSWU addressed the Respondents' position that only those Latin Americans occupying positions for which there was an exact European counterpart had a claim for damages.

[535] We have already effectively addressed the Respondents' position on this issue in our analysis of the comparator group. For essentially the same reasons, we conclude that damages for salary differential are not limited to those Latin Americans working in positions for which there is an exact European counterpart. Based on the evidence before us, we were satisfied that the workers performed multiple functions. Some workers were transferred to different positions in the course of the project. Further, salary levels were not tied to particular positions, experience or skills.

[536] For example, all of the Costa Ricans, save German Dario Caro Fonseca and Elian Duran Aguilar, were paid essentially the same base salary, regardless of job title, functions, experience or skills. Another example is the striking disparity between what Tiago Andre De Sousa Ribeiro, from Portugal, who performed Rail and Cleaning work, was paid in comparison to all Latin Americans, including those with much greater experience and performing more highly skilled or responsible work. It was the race, colour, ancestry and place of origin of the various workers, more than any other factor or factors, which determined their salary levels. Considering the evidence and our findings, it would be inappropriate to limit the persons to whom compensation for salary differential is payable in the manner suggested by the Respondents.

[537] CSWU submitted that the appropriate measure of damages for salary differential is the difference between the gross salary of each member of the Complainant Group, and either the average or median gross salary of the comparator group, for each month worked by each member of the Complainant Group on the Canada Line project, from the outset of the project to its completion.

[538] We conclude that it is appropriate for each member of the Complainant Group to be paid the difference between their gross salary and the average gross salary of the comparator group for each month that each member of the Complainant Group worked on the Canada Line project. Given that the evidence did not establish that individual

rates of pay were based on individual experience, skills and duties on the Canada Line project, using the average gross salary paid to members of the comparator group is a fair and reasonable method of determining the remedy for the discriminatory salary differential. If a member of the Complainant Group worked for only part of a month, the remedy should be pro-rated accordingly. We do not agree that damages should go back to the outset of the project, as members of the comparator group did not start working on the project, at least in any numbers, until in or about August or September 2006.

[539] Under s. 37(2)(d)(ii), we have discretion to award "all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention". We consider it appropriate to order compensation for salary differential, calculated in the manner indicated, starting in September 2006 and continuing until the completion of the project.

[540] CSWU did not provide calculations of this or other remedies it sought. The calculation should be relatively straightforward, requiring only: the identity of each Latin American worker; the dates they worked on the project; their gross salary for each month worked; and the average salary earned by members of the comparator group for each month.

[541] Some of this information is in evidence before us. To the extent it is not, the additional necessary information is in the possession of the Respondents. We therefore direct the Respondents to calculate the compensation for salary differential in the manner we have described, and to provide those calculations, and all supporting documentation, to CSWU for its review within 30 days of the date of this decision. CSWU is directed to review the calculations and documents provided by the Respondents, and to identify any concerns to the Respondents, within 30 days of receipt of that information. CSWU may request any further information or documents from the Respondents necessary to confirm the calculations.

[542] We will remain seized with respect to this and all other remedies ordered. In the event the parties are unable to agree on the compensation for salary differential, they are to write the panel within 60 days of the date this decision is issued, providing all documents and calculations exchanged, and identifying any areas of disagreement. In

that event, the panel will determine an appropriate process for the calculation of this and all other remedies ordered.

[543] In terms of expenses, CSWU seeks damages amounting to the difference between the $300 per month received by the vast majority of the Europeans and the $76 average reimbursement for expenses received by the Latin Americans, equalling $224 for each month that each member of the Complainant Group worked on the Canada Line project.

[544] We consider the amount sought for expenses differential appropriate, and order compensation for expenses differential, starting in September 2006 and continuing until the completion of the project for each month that each member of the Complainant Group worked in British Columbia on the Canada Line project.

[545] In terms of accommodation, CSWU seeks the difference in cost between the accommodations provided to the Complainant Group and the comparator group. CSWU provided calculations of this difference as of June 2007 and February 2008.

[546] We do not find this remedial request to be appropriate. Remedial orders under the *Code* are compensatory in nature. The measure of the loss suffered by members of the Complainant Group in being required to live at the 2400 Motel instead of the False Creek apartments is not the difference between what it cost the Respondents to house employees in the two venues.

[547] In our view, the loss suffered by members of the Complainant Group being required to live at the 2400 Motel, rather than the apartments, is not capable of being quantified in the manner suggested. Rather, compensation for that loss is properly addressed in terms of the injury to dignity, feelings and self-respect suffered by members of the Complainant Group, and we consider the accommodation issue in that context.

Section 37(2)(d)(iii) – Injury to dignity, feelings and self-respect

[548] CSWU sought compensation for each member of the Complainant Group for injury to their dignity, feelings and self-respect in the amount of $10,000. In oral argument, CSWU submitted that this figure included compensation for injury to dignity suffered as a result of the meal issue, but did not include compensation for injury to dignity as a result of the accommodation issue.

[549] As noted by CSWU in its submissions, we did not hear from every member of the Complainant Group. In our view, in a representative complaint of this kind, it is not necessary to call every member of a complainant group in order to establish the basis for compensation for injury to dignity for each member of the group. Such a requirement would be unnecessarily cumbersome and inefficient. There is a strong presumption that a breach of one's rights under the *Code* gives rise to a compensable injury under s. 37(2)(d)(iii), and such injury may be inferred, even in the absence of direct evidence: *Ingenthron v. Overwaitea Food Group and Van Pelt (No. 2)*, 2006 BCHRT 556, paras. 78 – 82.

[550] It was apparent that many members of the Complainant Group who did testify found the experience difficult. Some of them expressed frustration; others a desire for it to be over. These proceedings were lengthy, and were conducted under the pressure of the knowledge that the project would soon be coming to an end. In all of these circumstances, it would be unreasonable to require CSWU to call every member of the Complainant Group to testify about the impact of the discrimination on them.

[551] We did, however, hear from a number of members of the Complainant Group.

[552] For example, Anthony Raul Gamboa Elizondo testified about receiving the meal tickets, and not liking having to eat at the restaurants provided, but, as he stated – what could he do, it is what the Respondents gave them. He also spoke about being required to stay at the 2400 Motel, while Europeans who arrived later were put up in the condos. Mr. Gamboa Elizondo had never stepped foot inside those condos. He testified about having been to the doorstep when he had accompanied another co-worker there. Mr. Gamboa Elizondo testified that "I have coworkers who tell me that they are quite pretty. The way they speak they said they are fucking beautiful". While evidence about the specific attributes of the 2400 Motel was somewhat sparse, no one described it in those terms.

[553] When Mr. Gamboa Elizondo was asked how he felt about the fact that a Spanish Erector Operator was making more than him, he testified that he did not think it was fair, as they did the same work. When he was asked if he thought that SELI treated the Latin American workers the same as the Europeans, he said no, because if they treated them equally, they would pay them the same and give them apartments close to the worksite.

He testified that this unequal treatment made him feel "bad because one tells oneself that just because one is Latin American you have to be under those conditions."

[554] Jojans Sanchez Chavez also testified about not liking the food provided at the restaurants at which the Latin Americans could use the meal tickets, and his unsuccessful request to receive money instead of the tickets. He also testified about feeling badly about the unequal treatment afforded the Latin American and European workers, referring not only to the way in which meals were provided, but also to differences in accommodation and wages.

[555] German Dario Caro Fonseca, a Latin American who was called by the Respondents, was cross-examined regarding how he felt about the fact that Antonio Fernando Barbedo Da Silva, a European, earned twice as much as him for performing the identical position – TBM Pilot. From his stunned reaction, it was apparent that he had not been aware of this information. He testified that he did not think it was fair.

[556] Four members of the Complainant Group, including Mr. Caro Fonseca, opted out of the complaint. In Rogelio Cortes Huertas' case, we have his testimony that he felt he was treated fairly by SELI.

[557] It is reasonable to infer that other members of the Complainant Group who, unlike Mr. Cortes, did not choose to opt out of the complaint, did not feel fairly treated and suffered injury to their dignity similar to those members of the Complainant Group who testified about the subject.

[558] Dignity, feelings and self-respect are sometimes treated comprehensively in assessing damages. In other cases, one or more of those three types of injury is more prominent than others. While the feelings and the self-respect of the Latin Americans were impacted, this case is primarily about dignity. As submitted by CSWU, for two years the Respondents' treatment of the members of the Complainant Group conveyed to them the message that they were worth less, and were less worthy, than other employees, because they are Latin American. They were given inferior accommodation, denied any choice about where to eat, and made to account for any reimbursements received, rather than receiving a monthly allowance to do with as they pleased. They worked side by side with Europeans who were paid substantially more than they were for performing

substantially the same work. As foreign workers in Canada on temporary work permits, who did not speak English, and were wholly dependent on their employer, not only for their wages, but also their accommodation, food and transportation back to their homes and families, they were uniquely vulnerable. So long as they continued to work on the Canada Line project, they were unable to escape the discriminatory treatment which pervaded every aspect of the working and leisure lives.

[559] Taking all of these factors into account, we find the $10,000 award requested by CSWU reasonable. We order the Respondents to pay every member of the Complainant Group the sum of $10,000 as compensation for injury to dignity, feelings, and self-respect.

Interest

[560] Pre-judgment interest is payable in accordance with the *Court Order Interest Act* for compensation for the salary differential and expenses until such time as the compensation is paid. Post-judgment interest is payable for all amounts ordered, including compensation for injury to dignity, until such time as the compensation is paid.

Panel remains seized

[561] As indicated above, we remain seized with respect to the calculation of all amounts ordered in this decision, and, in the event the parties are unable to agree on the calculation, we will determine appropriate processes to resolve any areas of disagreement.

[562] The only other issue arising out these proceedings which remains outstanding is the assessment of the scope and quantum of costs ordered in *CSWU No. 3*, in respect of which we also remain seized. In earlier submissions, the parties indicated that they were unable to agree on this issue. We have concluded that we require further submissions about the scope and quantum of costs ordered in *CSWU No. 3*, and will write to the parties separately on that matter.

Heather M. MacNaughton, Tribunal Chair

Barbara Humphreys, Tribunal Member

Lindsay M. Lyster, Tribunal Member

APPENDIX A

CHRONOLOGY OF PROCEEDINGS BEFORE THE TRIBUNAL

In this table we list, in date order, all significant events in the proceedings before the Tribunal. This includes applications, submissions and letters filed by the parties; Tribunal letters and decisions, both oral and written; pre-hearing conferences and memoranda; hearing dates; and witnesses.

Excluded are minor housekeeping matters such as requests for orders to attend, correspondence about interpreter requirements, and the provision of recordings of the proceedings.

DATE	**MATTER OR WITNESS**
August 3, 2006	Complaint and Representative Complaint filed.
August 9, 2006	Tribunal's letter advising parties that complaint is accepted for filing, and giving Respondents until September 13, 2006 to file their Response.
September 11, 2006	Respondents' letter advising they have sought and obtained CSWU's consent to an extension to file Response to September 20.
September 12, 2006	Tribunal letter granting extension to the Respondents.
September 20, 2006	Respondents file Response to Complaint.
September 20, 2006	Respondents file application to dismiss complaint.
October 12, 2006	CSWU files response to application to dismiss complaint.
October 12, 2006	CSWU files amendment to complaint, adding allegations relating to comparisons with European workers.
October 17, 2006	Pre-hearing conference and memorandum. Notice of Hearing issued scheduling hearing for September 24–28, and October 1–5, 2007. Respondents given until November 2, 2006 to file amended response. Respondents never filed an amended response.
October 27, 2006	Respondents withdraw application to dismiss.

May 22, 2007	Pre-hearing conference chaired by Tribunal Chair, who was to case manage the complaint. Memorandum providing directions follows on May 23, 2007. Noted in the PHC memorandum is that the Respondents will provide CSWU with documentation in support of their position that SNC Lavalin Constructors (Pacific) Ltd. is not a proper party to the complaint, and that if CSWU did not wish to proceed with the complaint against SNC Lavalin, it would withdraw the complaint against it. The complaint proceeded as against SNC Lavalin, and the Respondents withdrew their objection with respect to SNC Lavalin's party status on December 6, 2007 during the hearing.
August 22, 2007	Tribunal's letter reminding parties of direction to advise if interpreters are required for the hearing. Advises parties that, if they intend to file any pre-hearing applications, must do so before the end of August. Also advises hearing will be before a panel of three members.
August 28, 2007	Respondents apply to adjourn hearing pending the Labour Relations Board ("LRB") decision on the outstanding application to decertify CSWU as the bargaining agent for Respondents' employees on the Canada Line project.
August 31, 2007	Pre-hearing conference with panel member, and memorandum providing directions, including setting a schedule for written submissions on the Respondents adjournment application, and stating that the panel will hear the adjournment application on September 24, 2007. Counsel advise that they are close to completing an Agreed Statement of Facts, and that they may not require the two weeks currently scheduled for the hearing. Respondents' counsel advises that reductions in the labour force are expected to commence after Christmas, with the result that, if the hearing is adjourned, the hearing would need to complete before Christmas in order for workers to be available to testify.
September 11, 2007	CSWU files response, opposing application to adjourn.

September 17, 2007	Respondents file reply on application to adjourn.
September 18, 2007	CSWU's letter advising Tribunal that parties agree that two weeks are not required for hearing. Agree to make submissions on Respondents' adjournment application on September 24, and if it is denied, proceed to the hearing on the merits on October 1-5, 2007.
September 19, 2007	Respondents' letter advising of intention to make an application to have the Tribunal determine the adequacy of CSWU as a representative before proceeding further with complaint.
September 19, 2007	Tribunal's letter in response to Respondents' letter, directing that they may raise their request to make an application about the adequacy of CSWU as a representative on September 24, 2007.
September 24, 2007	Hearing commences.
September 24, 2007	Parties make oral submissions on the Respondents' application to dismiss the complaint on the basis of CSWU's status as representative.
September 24, 2007	Parties make oral submissions on Respondents' application for an adjournment on the basis of outstanding decertification application before the LRB.
September 24, 2007	Oral decisions on two Respondents' applications. Panel declines to adjourn hearing because it is not persuaded that the LRB decision on decertification will be determinative of the issue regarding CSWU's representative status, and because prejudice to Complainant Group arising as a result of an adjournment may be irreparable. Panel rules that questions relating to CSWU's adequacy as representative complainant may be considered in the course of the hearing on the merits of the complaint.
September 25, 2007	Respondents' letter requesting that Tribunal provide a court reporter to record proceedings.
September 26, 2007	Tribunal's letter in response to Respondents' request for a court reporter advising that the Tribunal does not, as a general rule, provide court reporters, and that if the Respondents

	believe a court reporter is necessary, Rule 35(5)(b) provides that a participant may record the hearing at their own expense, on consent of the Tribunal and the other participants, and on agreeing to providing copies to the Tribunal and the other participants.
September 26, 2007	Respondents' letter again requesting that the Tribunal record the proceedings.
September 26, 2007	Tribunal issues Notice of Continuation of Hearing, indicating the hearing will continue on October 1-4, 23-25, and November 5-6, 2007.
September 27, 2007	Tribunal's letter in response to Respondents' second request that the proceedings be recorded, advising that the panel is not inclined to exercise its discretion to record the hearing, but directing that the Respondents may make submissions on the issue on October 1, 2007.
September 28, 2007	CSWU files s. 43 retaliation complaint. Asks to have it heard together with the merits, and requests interim relief.
October 1, 2007	Respondents file written submission with respect to retaliation complaint. Submit that the complaint does not comply with Tribunal requirements, and should not be considered. Further submit that issue about CSWU's representative status needs to be determined in advance of the retaliation complaint.
October 1, 2007	Hearing resumes.
October 1, 2007	Respondents' application to record hearing – oral submissions from both parties.
October 1, 2007	Oral decision: Respondents allowed to record hearing, on condition tapes provided daily to CSWU and the panel, and that any transcripts are also provided forthwith. Recording does not constitute official record of the proceedings.
October 1, 2007	Oral submissions with respect to how retaliation complaint should be addressed.
October 1, 2007	Oral decision: Retaliation complaint will be treated as an amendment to the complaint; denying interim relief; directing that retaliation issues will be dealt with at the same time as the merits; and giving the Respondents until the next day to prepare their cross-examination.

October 1, 2007	CSWU's opening statement.
October 1, 2007	Respondents reserve opening, but advise they will argue that the complaint is estopped by virtue of previous LRB ruling with respect to claim of discrimination as compared to Canadian resident workers, *i.e*. the last offer vote decision.
October 1, 2007	CSWU's witness – Anthony Raul Gamboa Elizondo (through an interpreter). Direct. Testifies about merits and retaliation.
October 1 and 2, 2007	Respondents object to questions to Gamboa Elizondo, giving rise to oral submissions from both parties about the scope of the complaint and the relevance of evidence about the terms and conditions of employment set out in various documents, and allegations about the Respondents changing those terms and conditions. Parties ultimately agree to leave the issue for the time being.
October 2, 2007	Respondents bring own interpreter, and raise objections to the interpretation being provided by the Tribunal's interpreter.
October 2, 2007	Gamboa Elizondo direct evidence continued. Cross-examination.
October 2, 2007	Further oral submissions with respect to how retaliation complaint should be addressed.
October 2, 2007	Oral submissions with respect to whether Gamboa Elizondo should be required to "name names".
October 2, 2007	Respondents' letter stating "hearing has become bogged down over the representative status issue", and requesting panel to deal with CSWU representative status and retaliation issues in advance of the hearing on the merits.
October 3, 2007	Respondents' letter raising concerns about interpreter.
October 3, 2007	Further oral submissions with respect to how CSWU representative status and retaliation issues should be addressed.
October 3, 2007	Oral submissions about interpreter issues.
October 3, 2007	Oral decision, based on parties' agreement and an undertaking given by the Respondents, panel will hear evidence and argument with respect to the representative status and

	retaliation issues in advance of the majority of the evidence on the merits of the complaint.
October 3, 2007	Parties agree and panel directs that they will file written submissions with respect to the Respondents' application that CSWU is estopped from relitigating its allegation that the Respondents discriminated against the Latin American workers as compared to Canadian workers.
October 3, 2007	Panel directs parties how any further concerns with respect to interpretation are to be addressed.
October 3, 2007	Panel directs parties to provide written submissions on the question raised the previous day about whether witness should be required to "name names".
October 3, 2007	Cross-examination of Gamboa Elizondo continued and completed.
October 4, 2007	Further oral submissions with respect to Respondents' recordings of hearing. Oral order reiterating that recordings are to be provided daily to Tribunal and CSWU.
October 4, 2007	CSWU's witness – Douglas Barboza Cedeno (through an interpreter). Testifies about retaliation and representative status issues only. Direct and cross-examination.
October 4, 2007	CSWU's witness – Joseph Barrett. Testifies about retaliation and representative issues only. Direct, cross-examination, and re-examination.
October 5, 2007	Tribunal issues Notice of Continuation of Hearing, indicating hearing will continue on October 23-25, November 5-6, and December 6-7, 2007.
October 10, 2007	Respondents file written submission on estoppel application. Advise are not pursuing application to have witness "name names".
October 15, 2007	CSWU files response on estoppel application.
October 16, 2007	Respondents file reply on estoppel application.
October 23, 2007	Panel issues written decision granting Respondents' application, deciding that CSWU is estopped from pursuing its allegation that the Respondents discriminated against Latin

	American workers in comparison to Canadian workers: *C.S.W.U. Local 1611 v. SELI Canada and others*, 2007 BCHRT 404 ("*CSWU No. 1*" or the "Estoppel decision").
October 23, 2007	Hearing resumes.
October 23, 2007	Close of CSWU's case on retaliation and representative issues.
October 23, 2007	Respondents' witness – Fabrizio Antonini. Testifies about representative and retaliation issues. Some evidence also goes to merits. Direct, cross-examination and re-examination.
October 23, 2007	Respondents' witness – Piero Angioni (with occasional interpreter assistance). Testifies about representative and retaliation issues only. Direct and cross-examination.
October 23, 2007	Respondents' witness – German Dario Caro Fonseca (through an interpreter). Testifies about representative and retaliation issues. Some evidence also goes to merits. Direct, cross-examination and re-examination.
October 24, 2007	Respondents' witness – Marvin Enrique Vasquez Moya (through an interpreter). Testifies about representative and retaliation issues only. Direct and cross-examination.
October 24, 2007	Respondents' witness – Roberto Ginanneschi. Testifies about representative and retaliation issues only. Direct, cross-examination and re-examination.
October 24, 2007	Close of Respondents' case on retaliation and representative issues.
October 25, 2007	Oral and written submissions on representative and retaliation issues.
October 29, 2007	Letter from Tribunal Registrar to parties, advising that certain correspondence from both parties will not be provided to the panel. Confirms that Respondents have advised they wish to apply to re-open the representation application, and provides directions about how they may apply, and a schedule for written submissions.
October 31, 2007	Letter from Tribunal Registrar providing directions with respect to the Respondents' application to re-open.

November 1, 2007	CSWU files response to Respondents' application to re-open.
November 2, 2007	Respondents file reply on re-opening application.
November 5, 2007	Panel issues written decision, denying Respondents' application to re-open the representation application: *C.S.W.U. Local 1611 v. SELI Canada and others (No. 2),* 2007 BCHRT 419 ("*CSWU No. 2*" or the "Re-opening decision").
November 5, 2007	Hearing resumes.
November 5, 2007	CSWU's witness – Jojans Sanchez Chaves (through an interpreter). First witness exclusively on the merits, as are all remaining witnesses. Direct and cross-examination.
November 5, 2007	CSWU's witness – Martin Alonso Serrano Gutierrez (through an interpreter). Direct, cross-examination and re-examination.
November 5, 2007	Oral submissions from both parties with respect to whether CSWU can lead evidence about the collective agreement of another employer, Bilfinger Berger (Canada) Inc. ("Bilfinger").
November 5, 2007	Oral decision allowing CSWU to introduce evidence about the Bilfinger collective agreement. Potential relevance not clear due to lack of opening from Respondents. Relevance to be determined at a later date.
November 5, 2007	CSWU's witness – Richard Gee. Direct and cross-examination.
November 6, 2007	CSWU's witness – Cristhian Leiton Calderon (through an interpreter). Direct and cross-examination.
November 6, 2007	CSWU's witness – Luis Alajandro Montanez Lara (through an interpreter). Direct and cross-examination.
November 6, 2007	CSWU's witness – Jose Antonio Collar Blanco (through an interpreter). Direct, cross-examination, and re-examination.
November 7, 2007	Tribunal issues Notice of Continuation of Hearing indicating hearing will continue on December 5-7, 2007.

November 9, 2007	Panel issues written decision denying Respondents' application with respect to the representative status of CSWU, and finding CSWU's complaint that the Respondents retaliated against members of the Complainant Group contrary to s. 43 of the *Code* justified: C*.S.W.U. Local 1611 v. SELI Canada and others (No. 3)*, 2007 BCHRT 423 ("*CSWU No. 3*" or "Representative Status and Retaliation decision").
November 13, 2007	Respondents' letter advising of its intention to seek judicial review of *CSWU No. 3* and applying for a stay of the Tribunal's proceedings pending resolution of the Respondents' application for judicial review.
November 14, 2007	Respondents file application in British Columbia Supreme Court for judicial review of *CSWU No. 3*.
November 15, 2007	Respondents' letter, applying for an adjournment of the Tribunal's hearing on the basis that the Court had made December 6 and 7, two of the days on which the Tribunal's hearing was scheduled to proceed, available for the purpose of hearing its judicial review application. Also requests clarification with respect to panel's order about communicating with members of the Complainant Group.
November 16, 2007	CSWU applies for production of recordings and transcripts made by and not previously produced by the Respondents.
November 16, 2007	Respondents file response to CSWU's application for production of recordings and transcripts.
November 16, 2007	Letter from Tribunal Registrar requesting written submissions on applications to stay or adjourn.
November 19, 2007	CSWU files two responses to Respondents' applications to stay or adjourn.
November 20, 2007	CSWU files reply with respect to its application for production of recordings and transcripts.
November 20, 2007	Respondents file two replies on their applications to stay or adjourn.
November 20, 2007	CSWU applies to file sur-reply on applications to stay or adjourn.

November 21, 2007	Letter from Tribunal Registrar communicating panel's decision that CSWU may file sur-reply requested, and providing directions on various issues related to applications for production and for a stay or adjournment.
November 23, 2007	CSWU files letter in response to Registrar's letter, and provides sur-reply. Confirms has now received transcripts which it had asked to be produced. Advises that it seeks no further orders on this issue at this time. Issue not raised again.
November 23, 2007	Respondents' letter in response to Registrar's letter.
November 23, 2007	Respondents' letter, asking if they can file sur-sur-reply.
November 23, 2007	Letter from Tribunal counsel in response to Respondents' request to file sur-sur-reply.
November 24, 2007	Respondents file sur-sur-reply.
November 27, 2007	Panel issues written decision denying Respondents' application for a stay or adjournment of the Tribunal's proceedings pending their application for judicial review of the panel's decision in *CSWU No. 3*: *C.S.W.U. Local 1611 v. SELI Canada and others (No. 4)*, 2007 BCHRT 442 ("*CSWU No. 4*" or the "Stay or Adjournment decision").
November 27, 2007	CSWU's letter correcting error in its letter of November 23.
November 27, 2007	Letter from Tribunal Registrar providing panel's clarification with respect to order on communicating with members of the Complainant Group, in response to Respondents' letter of November 15. (re-sent after Respondents' letter of next day)
November 28, 2007	Respondents' letter requesting confirmation they may speak to employees for the purposes of obtaining affidavits.
November 30, 2007	Respondents' letter advising they intend to make an application for panel to recuse itself on the basis of bias.
December 2, 2007	Respondents' letter indicating intention to have court reporter with them on December 5, 2007.
December 3, 2007	CSWU's letter objecting to Respondents having court reporter with them for the remainder of the proceedings.

December 3 and 4, 2007	Hearing in British Columbia Supreme Court on Respondents' application for an interim stay of the Tribunal's proceedings and CSWU's cross-application for the judicial review proceedings, scheduled to commence on December 6, to be adjourned. Court denies Respondents' application, and grants CSWU's application to adjourn the judicial review of *CSWU No. 3*: Oral reasons for judgment, December 4, 2007. That judicial review is later rescheduled for February 20 – 22, 2008, and is then adjourned.
December 5, 2007	Hearing resumes.
December 5, 2007	Respondents apply to have the panel recuse itself on the basis that its decision in *CSWU No. 3* raises a reasonable apprehension of bias.
December 5, 2007	Both parties make oral, and the Respondents written, submissions on the Respondents' bias application.
December 5, 2007	Both parties make oral submissions with respect to whether Respondents may have court reporter present.
December 5, 2007	Panel issues written decision denying Respondents' application for it to recuse itself on the basis of bias: *C.S.W.U. Local 1611 v. SELI Canada and others (No. 5)*, 2007 BCHRT 451 ("*CSWU No. 5*" or the "Bias decision").
December 5, 2007	Panel issues oral decision that Respondents may not have court reporter present for remainder of hearing.
December 5, 2007	CSWU raises issues, including with respect to late production of documents and new witnesses to be called by Respondents. Oral submissions from both parties, in course of which CSWU raises possibility of calling rebuttal evidence and Respondents indicate they will object to any attempt by CSWU to split its case.
December 6, 2007	Oral submissions about a variety of issues including settling of costs award on retaliation complaint, communication protocol, evidence Respondents intend to call, and setting additional hearing dates. Written submission schedule set on CSWU's objection to the Respondents calling Rebecca Powers. Parties stipulate one fact and agree to enter one piece of

	evidence. CSWU closes case.
December 6, 2007	Respondents' opening statement.
December 6, 2007	Respondents' witness – Fabrizio Antonini (with the assistance of an interpreter). Direct and cross-examination.
December 7, 2007	Continuation of cross-examination of Antonini and re-examination.
December 7, 2007	Respondents' witness – Roberto Ginanneschi (through an interpreter, for the most part). Direct.
December 7, 2007	Oral submissions with respect to Respondents' submission that more time is necessary for hearing.
December 20, 2007	Tribunal's letter to Respondents reiterating its request for available dates for continuation of hearing.
December 21, 2007	CSWU files submission objecting to Respondents calling Rebecca Powers and the introduction of the Mercer Report on the basis that Powers' evidence and the Mercer Report are expert opinion evidence, not provided in accordance with Rule 33.
December 27, 2007	Respondents' letter with respect to availability for further hearing dates.
December 27, 2007	CSWU letter with respect to availability for further hearing dates, foreseeing the possibility of rebuttal evidence, and expressing concerns about witness availability given that the project is expected to come to a close in mid-February 2008.
December 28, 2007	Respondents' letter indicating foreign workers will not be leaving until about March 20, 2008, so scheduling of hearing should not pose a problem.
January 4, 2008	CSWU's letter asking that hearing be completed by mid-February.
January 6, 2008	Respondents' letter in response to CSWU's letter with respect to scheduling further hearing dates.

January 7, 2008	CSWU's letter in reply to Respondents' letter.
January 7, 2008	Tribunal issues Notice of Continuation of Hearing, setting January 21 and 28, February 13-15, and March 12-14, 2008.
January 8, 2008	Respondents file response to CSWU's submission on Powers/Mercer Report issue.
January 9, 2008	Respondents' letter with respect to availability for hearing dates.
January 15, 2008	CSWU files reply submission on Powers/Mercer Report issue.
January 18, 2008	Respondents' letter objecting to panel considering CSWU's reply submission and providing sur-reply to it.
January 18, 2008	Panel letter with respect to Powers/Mercer Report issue, including clarifying miscommunications about the submission schedule, stating that CSWU's reply and the Respondents' sur-reply will be considered by the panel, directing the Respondents to provide it with a copy of the Mercer Report, and seeking clarification of CSWU's position with respect to the introduction of the Mercer Report.
January 18, 2008	Respondents' letter objecting to the contents of the panel's letter of the same date.
January 18, 2008	Respondents' letters providing summary of Powers' evidence, and copies of the Mercer Report, the latter as directed by Tribunal.
January 18, 2008	CSWU letter requesting order with respect to costs award made in *CSWU No. 3*.
January 18, 2008	Respondents' letter in response to CSWU's letter on costs.
January 18, 2008	Respondents' letter advising of possible additional witnesses and documents.
January 19, 2008	CSWU's letter in reply on costs.
January 21, 2008	Respondents' letter in sur-reply on costs.
January 21, 2008	Respondents' letter requesting panel to take a view of the worksite.

January 21, 2008	Hearing resumes.
January 21, 2008	Oral submissions with respect to Powers/Mercer Report issue.
January 21, 2008	Oral submissions from both parties with respect to taking a view.
January 21, 2008	Continuation of direct of Ginanneschi, in midst of which Respondents raise concerns with respect to quality of interpretation. Oral submissions from both parties.
January 21, 2008	Oral decision adjourning examination of Ginanneschi until a different interpreter is obtained. Hearing adjourns for the day.
January 22, 2008	Respondents' letter indicating availability on January 25.
January 22, 2008	Letter from Tribunal Chair communicating panel's decision denying Respondents' request that the panel take a view.
January 23, 2008	Tribunal issues Notice of Rescheduled Hearing, adding January 25, 2008 to the previously scheduled hearing dates.
January 24, 2008	Panel issues written decision, allowing Respondents to enter the Mercer Report, through one of its authors, editors or peer reviewers, and not through Powers: *C.S.W.U. Local 1611 v. SELI Canada and others (No. 6)*, 2008 BCHRT 31 ("*CSWU No. 6*" or "Powers/Mercer Report decision").
January 25, 2008	Respondents' letter requesting Tribunal not destroy decision it had the advised parties it would release, but did not, after Tribunal learned of the miscommunication regarding the submission schedule, permitted CSWU to file reply submission, and made other directions, as set out in panel's letter of January 18, 2008.
January 25, 2008	Hearing resumes.
January 25, 2008	Ginanneschi direct continued with a different interpreter.
January 28, 2008	Hearing resumes.
January 28, 2008	Ginanneschi direct continued.
January 28, 2008	Counsel appears on behalf of "Certain Employees". Indicates has filed written application for intervenor status and for right to opt out of complaint. Panel sets schedule for written

	submissions on application.
January 28, 2008	Ginanneschi direct resumes. Cross-examination begins.
February 1, 2008	Certain Employees file written submissions in support of their application to opt out of the complaint.
February 5, 2008	Respondents file response to Certain Employees' application.
February 8, 2008	CSWU's letter with respect to hearing scheduling, advising it will be applying to court to adjourn the judicial review scheduled for February 20-22, on the grounds of prematurity.
February 11, 2008	CSWU's files response to Certain Employees' application and Respondents' submission.
February 12, 2008	Telephone conference with Tribunal Chair and parties with respect to scheduling further hearing dates. Memorandum issued with respect to anticipated schedule for remaining evidence.
February 12, 2008	Respondents file reply to CSWU's submission on Certain Employee's application.
February 13, 2008	Certain Employees file reply submission.
February 13, 2008	Hearing resumes.
February 13, 2008	Oral submissions with respect to further hearing dates.
February 13, 2008	Ginanneschi cross-examination resumed and concluded, re-examination.
February 13, 2008	Respondents' witness – Piero Angioni (through an interpreter, for the most part). Direct examination.
February 14, 2008	Tribunal issues Notice of Rescheduled Hearing, indicating hearing will continue on February 15 and 29, March 10, 12 and 13, and April 10, 2008.
February 14, 2008	Angioni direct continued and concluded. Cross-examination and re-examination.
February 14, 2008	Respondents' witness – Gabrielle Dell'Ava (through an interpreter). Direct, cross-examination and re-examination.

February 15, 2008	Certain Employees' letter requesting expedited decision on their application.
February 15, 2008	Respondents' witness – Romeo Gencarelli (through an interpreter). Direct, cross-examination, re-examination, and further cross-examination due to nature of re-examination.
February 15, 2008	Oral submissions with respect to CSWU's application to call rebuttal evidence about nature of work performed by workers in Costa Rica. Panel determines written submissions will be required on rebuttal issue. Panel advises will deal with costs issue after final decision rendered.
February 18, 2008	Certain Employees' letter reiterating request for an expedited decision on their application.
February 25, 2008	CSWU files written application to call rebuttal evidence.
February 26, 2008	Respondents' letter requesting further information about CSWU's application to call rebuttal evidence.
February 26, 2008	CSWU's letter providing further information about proposed rebuttal evidence.
February 26, 2008	CSWU's letter providing names of proposed rebuttal witnesses, and asking for orders to attend.
February 26, 2008	Respondents' letter asking for yet further information about proposed rebuttal evidence.
February 29, 2008	Hearing resumes.
February 29, 2008	Panel issues written decision on Certain Employees' application, deciding it will consider applications by members of the Complainant Group to opt out, in accordance with the directions set out in the decision: *C.S.W.U. Local 1611 v. SELI Canada and others (No. 7)*, 2008 BCHRT 80 ("*CSWU No. 7*" or the "Opting Out decision").
February 29, 2008	Further oral submissions with respect to CSWU's application to call rebuttal evidence. Concerns expressed by CSWU about project completing and employees leaving.

	Respondents provide assurance that accommodation will be made for rebuttal witnesses, and suggest March 10 may be best day for evidence. Respondents indicate they can comfortably finish their remaining evidence in two days, leaving one day for rebuttal evidence. CSWU agrees to Pietro Favaretto and Lorenzo Pellegrini testifying by teleconference. Parties advise they are still discussing whether the witness to testify about Mercer Report will be by teleconference.
February 29, 2008	Respondents' witness – Andrea Ciamei. Direct, cross-examination and re-examination.
March 3, 2008	CSWU files further submission with respect to its application to call rebuttal evidence, and asks panel to reconvene hearing to hear evidence before witnesses leave the country, which it says will happen on March 6.
March 4, 2008	Respondents' letter responding to CSWU's allegations in its March 3 letter. They say witnesses may stay until March 13 if they want.
March 4, 2008	Panel writes to the parties with respect to preceding two letters, providing suggestions and directions.
March 4, 2008	Respondents file response submission with respect to rebuttal evidence.
March 4, 2008	CSWU files reply submission on rebuttal evidence.
March 4, 2008	CSWU's letter advising that parties have agreed to have Latin American workers who will be leaving the country on March 6 give evidence before a court reporter on March 5.
March 5, 2008	In order to preserve evidence, parties meet without panel to examine some of the proposed rebuttal witnesses. Evidence recorded.
March 5, 2008	Respondents' letter objecting to the scope of questioning of the proposed rebuttal witnesses.
March 5, 2008	Letter decision from panel granting CSWU's application to call rebuttal evidence, and providing directions in response to Respondents' letter of same date about the scope of questioning. Reasons to follow in final decision.

March 6, 2008	CSWU files submission in response to direction about the scope of questioning in panel's March 5 letter.
March 6, 2008	CSWU's letter requesting orders to attend for remaining rebuttal witnesses.
March 6, 2008	Respondents' letter in reply to CSWU's letter on the scope of questioning.
March 7, 2008	Panel's letter decision providing directions with respect to how the scope of the rebuttal evidence will be determined.
March 10, 2008	Hearing resumes.
March 10, 2008	CSWU's rebuttal witness – Anthony Raul Gamboa Elizondo (through an interpreter). Direct and cross-examination.
March 10, 2008	Issue raised by Respondents about scope of rebuttal evidence in midst of Gamboa Elizondo. Oral ruling reiterating the directions contained in panel's March 7 letter.
March 10, 2008	CSWU's rebuttal witness – Yandry Eugenio Tuarez Fortis (through an interpreter). Direct, cross-examination and re-examination.
March 10, 2008	CSWU's rebuttal witness – Luis Alberto Retes Anderson (through an interpreter). Direct and cross-examination.
March 10, 2008	Respondents' witness – Eileen Fu. Direct and cross-examination.
March 10, 2008	Respondents' witness – Chris Wates. Direct examination.
March 10, 2008	CSWU objection to chart prepared by Wates – oral submissions from both parties. Panel delivers oral ruling that the Respondents may introduce the chart. The Union will have the opportunity to seek production of any supporting documents and to cross-examine any witnesses put forward by the Respondents with respect to the salaries paid to the European workers, both in Vancouver, and previously. Panel directs that the question of who forms the proper

	comparator group is one to be addressed in final argument.
March 12, 2008	Hearing resumes. Ongoing discussions about late production of payroll and other documents by the Respondents, and the absence of documents with respect to the previous salaries of employees on previous projects.
March 12, 2008	Respondents' witness – Pietro Favaretto (by teleconference). Direct and cross-examination.
March 12, 2008	Wates direct examination resumed. Cross-examination begins.
March 12, 2008	Respondents' witness – Lorenzo Pellegrini (by teleconference). Direct examination. No cross-examination.
March 12, 2008	Wates cross-examination resumed. Re-examination.
March 13, 2008	Respondents' witness – Carlos Mestre (by teleconference). Direct, cross-examination and re-examination.
March 13, 2008	Respondents' witness – Marco Sem (by teleconference). Direct and cross-examination.
March 13, 2008	Respondents' witness – Wilson De Carvalho (through an interpreter). Direct and cross-examination.
March 13, 2008	Respondents' witness – Rogelio Cortes Huertas (through an interpreter). Direct and cross-examination.
March 14, 2008	Application to opt out filed on behalf of five Latin American workers.
March 17, 2008	Respondents' letter in response to Tribunal request for their position in respect of CSWU's request for an extension to respond to opting out application.
March 25, 2008	CSWU files response to opting out application.
March 25, 2008	Respondents file response to opting out application.
April 1, 2008	Certain Employees file reply on opting out application.

April 3, 2008	Jose Anselmo Lopez Salguero, one of the five employees included in the opting out application, writes Tribunal indicating he no longer wishes to opt out.
April 3, 2008	Panel's letter providing parties and Certain Employees with a copy of Lopez Salguero's letter, and requesting their submissions.
April 9, 2008	Certain Employees file submission in response.
April 9, 2008	CSWU files submission in response, requesting directions.
April 9, 2008	Certain Employees' letter in reply to CSWU's submission.
April 9, 2008	CSWU files transcripts of March 5, 2008 video depositions of Johan Sanchez, Ernesto de la Trinidad Camacho Cordero and Juan Jose Luis Mora. Transcripts have been redacted in accordance with counsels' agreements. Counsel agree that transcripts, as redacted, are in evidence.
April 10, 2008	Hearing resumes for final oral and written submissions.
April 22, 2008	Respondents file written submissions with respect to case referred to by CSWU in oral argument.
May 8, 2008	Panel's letter with respect to Lopez Salguero issue. No further evidence or directions necessary. Will provide decision with respect to opting out application in its final decision.
July 10, 2008	Respondents' letter advising of decertification of CSWU.

APPENDIX B

CHRONOLOGY OF LRB PROCEEDINGS

June 30, 2006	CSWU is certified for a bargaining unit described as "employees engaged in tunnelling operations in British Columbia, except office, sales, engineering and surveying" employed by Seli Canada Inc. and SLCP-SELI Joint Venture (referred to as "Employer" in this Appendix).
August 2006	Parties commence collective bargaining.
September 19, 2006	Employer applies under s. 78 of the *Labour Relations Code* for the LRB to conduct a final offer vote. CSWU files unfair labour practice complaints with the LRB. Also files complaint that the Employer failed to comply with ss. 78 and 11 of the *Labour Relations Code*.
September 26, 2006	Employer applies to withdraw its final offer vote application. CSWU opposes the application, on the basis that the Employer "sweetened the pot" after communicating the last offer to it. LRB permits the Employer to withdraw its final offer vote application: BCLRB No. B238/2006 (Leave for reconsideration denied in a decision dated November 24, 2006: BCLRB No. B290/2006).
September 26, 2006	Employer reapplies for final offer vote.
September 29, 2006	LRB grants CSWU's application for an order requiring the Employer to provide the names and addresses of all employees in the bargaining unit pursuant to s. 16 of the *Labour Relations Regulation*: BCLRB No. B239/2006.
October 2, 2006	Final offer vote conducted. Ballots sealed.
November 1, 2006	LRB denies CSWU's application for interim relief in the form of an order prohibiting the Employer from making any further changes to terms and conditions of employment of its members until a collective agreement is concluded, job action is commenced, or the Board makes an order authorizing a proposed change: BCLRB

	No. B270/2006.
February 16, 2007	LRB issues decision dismissing CSWU's objections to the Employer's second final offer vote application: BCLRB No. B36/2007. One of CSWU's objections was that the Employer's final offer contained an illegal provision, because it was contrary to the *Human Rights Code*. The LRB refused to consider CSWU's argument based on a comparison between employees covered by the proposed collective agreement, and those not covered, *i.e.* between the Latin American and European employees, on the basis that that issue was properly before the Tribunal. The LRB considered and rejected CSWU's argument based on a comparison between two groups of employees covered by the proposed collective agreement, *i.e.* between the Latin American and resident Canadian employees. The LRB held that the compensation package provided to those two groups was within the same range. The LRB dismissed CSWU's objection that the final offer vote contained a provision that is contrary to the *Human Rights Code*.
February 21, 2007	CSWU applies for a stay, pending its reconsideration application, of the decision dismissing its objection to the final offer vote being counted. The LRB denies the stay application: BCLRB No. B40/2007. As a result of this decision, the ballots cast in final offer vote counted on February 23, 2007, resulting in the Employer's final offer constituting the collective agreement.
March 29, 2007	CSWU applies pursuant to s. 142 of the *Labour Relations Code* for the LRB to conduct an inquiry into allegations that the Employer committed a fraud on the LRB by deliberately altering documents produced by it in a hearing into the Union's unfair labour practice complaints. The LRB denies the application, saying CSWU's recourse is through its application for reconsideration of the original panel's decision on the unfair labour practice complaints: BCLRB No. B54/2007.

June 1, 2007	Certain Employees apply under s. 33(3) of the *Labour Relations Code* to decertify CSWU as their representative.
June 11, 2007	Decertification vote held. Ballots sealed.
August 1, 2007	LRB denies CSWU's application for reconsideration of decision dismissing its objections to the final offer vote: BCLRB No. B173/2007.
October 12, 2007	LRB grants CSWU's application to hold the decertification application in abeyance pending the LRB's decision on its outstanding unfair labour practice complaints: BCLRB No. B232/2007.
April 3, 2008	LRB issues its decision on CSWU's unfair labour practice complaints, the first of which had been filed on July 4, 2006: BCLRB No. B40/2008. The majority of the complaints, including the fraud allegations, are dismissed. Some, relating to alterations in terms and conditions of employment contrary to s. 45 of the *Labour Relations Code*, are upheld. An application for reconsideration of this decision remains outstanding.
June 24, 2008	LRB decides to hold a hearing on CSWU's objections to certain votes being counted: BCLRB No. B100/2008.
July 7, 2008	Decertification vote counted. CSWU decertified.

APPENDIX C

LIST OF EXHIBITS

In this appendix, we list the exhibits entered in the course of the hearing.

Exhibit #	**Nature of Document**	**Identified by or Introduced Through**
Exhibit 1	Complaint Form, filed August 3, 2006	Tribunal
Exhibit 2	Representative Complaint Form, filed August 3, 2006	Tribunal
Exhibit 3	Response to Complaint Form, filed September 20, 2006	Tribunal
Exhibit 4	Amendment to Complaint Form, filed October 12, 2006	Tribunal
Exhibit 5	Notice of Hearing, issued October 17, 2006	Tribunal
Exhibit 6	Application to Dismiss, filed September 20, 2006, including affidavit of Andrea Ciamei, sworn that day	Tribunal
Exhibit 7	CSWU's response to application to dismiss, filed October 12, 2006, including affidavits of Joseph Barrett, sworn October 11, 2006; Manuel Alvernaz, sworn October 11, 2006; and Brent Gurski, sworn October 12, 2006	Tribunal
Exhibit 8	Tribunal's letter to the parties, dated August 22, 2007	Tribunal
Exhibit 9	Agreed Statement of Facts	By agreement
Exhibit 10	Three Books of Documents, referred to in and included as part of the Agreed Statement of Facts	By agreement
Exhibit 11	CSWU Bulletins in English and Spanish (Tab 2 of Further Documents of the Complainant)	By agreement
Exhibit 12	Spanish translation of Complaint Form	Identified by Gamboa Elizondo

Exhibit 13	October 19, 2006 petition	Identified by Gamboa Elizondo
Exhibit 14	Undated petition	Identified by Gamboa Elizondo
Exhibit 15	SELI Canada Inc. document, in Spanish, dated September 18, 2007, signed by Gamboa	Identified by Gamboa Elizondo
Exhibit 16	*Globe and Mail* article, dated August 4, 2006 (Tab 5 of the Further Documents of the Complainant)	Identified by Barrett
Exhibit 17	Spanish translation of Bulletin No. 1, dated July 29, 2006	Identified by Barrett
Exhibit 18	CSWU Bulletins Nos. 1 – 6, in English and certified Spanish translation	By agreement
Exhibit 19	CSWU Bulletins Nos. 7 – 12, in English and certified Spanish translation	By agreement
Exhibit 20	List of Latin American workers	By agreement
Exhibit 21	Collective Agreement between Bilfinger Berger (Canada) Inc. and Construction and Specialized Workers Union, Local 1611, International Union of Operating Engineers, Local 115, and International Brotherhood of Electrical Workers, Local 213, October 1, 2004 – September 30, 2010 (Tab 3 of Further Documents of the Complainant)	Identified by Gee
Exhibit 22	Gross Salary Calculations for Latin American employees, prepared by CSWU	By agreement
Exhibit 23	Complainant's Brief of Documents (re payroll)	By agreement
Exhibit 24	Mendoza Magusig Pandino Letter of Assignment, signed by Andrea Ciamei	Identified by Antonini
Exhibit 25	Villajuan Alex, Letter of Assignment, signed by Andrea Ciamei	Identified by Antonini

Exhibit 26	Spreadsheet showing Expenses for Latin American workers, October 2007, prepared by Respondents	Identified by Antonini
Exhibit 27	Spreadsheet showing employees living in the 2400 Motel as of December 5, 2007, prepared by Respondents	Identified by Antonini
Exhibit 28	Organization Chart (Tab 1 of Further Documents of the Complainant)	Identified by Ginanneschi
Exhibit 29	Printout of SELI website, showing SELI projects, printed January 19, 2008	By agreement
Exhibit 30	Printout of Herrenknecht website, showing Herrenknecht projects, printed February 12, 2008	By agreement
Exhibit 31	List of "Europeans working in the Tunnel who have always lived in the 2400 Motel", prepared by Respondents	Identified by Angioni
Exhibit 32	List of "European residents working in the tunnel currently living on Moberly", prepared by Respondents	Identified by Angioni
Exhibit 33	2400 Motel invoices for the months of February 2008, December 2007, and January 2007 [*sic*]	Identified by Angioni
Exhibit 34	Lists of "Allowances and Meal Tickets for the European Residents", "Allowances, Meal Tickets and Reimbursements for Latin American Residents", and "Allowances, Meal Tickets and Reimbursements for Filipino Residents", prepared by Respondents	Identified by Angioni
Exhibit 35	Spreadsheets showing "Houses rent or paid by SELI CANADA Inc." for months of December 2006, January 2007, June 2007, January 2008, and February 2008, prepared by Respondents	Identified by Angioni
Exhibit 36	"Europeans working in the tunnel living on Moberly", prepared by Respondents	Identified by Angioni

Exhibit 37	"Latin Americans in 2400 Motel, January 2007", "Europeans in 2400 Motel, January 2007" both prepared by Respondents, invoice for 2400 Motel for January 2007, and two spreadsheets prepared by Respondents for 2400 Motel, January 2007	Identified by Angioni
Exhibit 38	"Latin Americans in 2400 Motel, June 2007", "Europeans in 2400 Motel, June 2007", both prepared by Respondents, 2400 Motel invoice for June 2007, and spreadsheet prepared by the Respondents for 2400 Motel, June 2007	Identified by Angioni
Exhibit 39	"Latin Americans Living in the 2400 Motel December 2007", "Europeans Living in the 2400 Motel December 2007", spreadsheet for the 2400 Motel for December 2007, all prepared by Respondents, and 2400 Motel invoice for December 2007	Identified by Angioni
Exhibit 40	"Latin Americans Living in the 2400 Motel February 2008", "Europeans who work in the tunnel living in the 2400 Motel February 2008", spreadsheet about 2400 Motel for February 2008, all prepared by the Respondents	Identified by Angioni
Exhibit 41	Organization Chart, as of December 2007	Identified by Dell'Ava
Exhibit 42	"SLCP-SELI Joint Venture Employee Information"	Identified by Dell'Ava
Exhibit 43	Luis Diego Brenes Perez passport photograph	Identified by Gencarelli
Exhibit 44	Juan Jose Ruiz Mora passport photograph and work permit	Identified by Gencarelli
Exhibit 45	Large schematic diagram of TBM	Identified by Ciamei
Exhibit 46	Spreadsheets showing monthly reimbursements for Latin American workers for months of February – June, and August – December 2007, prepared by Respondents	Identified by Ciamei
Exhibit 47	Four menus from Capricorn Rotisserie and Grill	Identified by Fu

Exhibit 48	"Europeans Who Always Lived in the Motel", prepared by Respondents	Identified by Wates
Exhibit 49	ProActive document headed: "Attention: Construction Contractors" re rates for construction tradespeople	Identified by Wates
Exhibit 50	Letter dated May 27, 2005 from Adecco to Ciamei re pricing for office positions	Earlier referred to by Ciamei
Exhibit 51	Spreadsheet "Salary Calculations – Base Pay plus OT and Bonuses Latin American SELI employees", prepared by Respondents	Identified by Wates
Exhibit 52	Tommaso Buffa Letter of Assignment, signed by Buffa and Ciamei	Identified by Wates
Exhibit 53	Giuseppe Folino Letter of Assignment, signed by Folino and Ciamei	Identified by Wates
Exhibit 54	Marco Gressani Letter of Assignment, signed by Gressani and Ciamei	Identified by Wates
Exhibit 55	Pere Salellas Payrot Letter of Assignment, signed by Salellas and Ciamei	Identified by Wates
Exhibit 56	Giuseppe Scorzafava Letter of Assignment, signed by Scorzafava and Ciamei	Identified by Wates
Exhibit 57	Alessandro Zangari Letter of Assignment, signed by Zangari and Ciamei	Identified by Wates
Exhibit 58	Giuseppe Felice Lopez Letter of Assignment, signed by Lopez and Ciamei	Identified by Wates
Exhibit 59	Julio Vitor Soares Pereira Letter of Assignment, signed by Soares Pereira and Ciamei	Identified by Wates
Exhibit 60	"SELI: Current Canadian Resident Workers", as of December 2007, prepared by Respondents	Identified by Wates
Exhibit 61	RAV Rapid Transit Project All Employee Collective Agreement between RSL Joint Venture and Canadian Association of Skilled Trades, June 1, 2005 – May 31, 2010	Identified by Wates

Exhibit 62	"Employee Earnings Under CAST Agreement", prepared by Respondents	Identified by Wates
Exhibit 63	SELI Canada Inc. T-4s for 2007	Identified by Wates
Exhibit 64	BCLRB No. B36/2007	Marked portion used in cross-examination of Wates
Exhibit 65	Extract from transcript of proceedings before LRB, dated November 16, 2007	Used in cross-examination of Wates
Exhibit 66	Citizenship and Immigration Canada papers for 26 listed employees	By agreement
Exhibit 67	"Europeans working in tunnel living on Moberly", prepared by Respondents	By agreement
Exhibit 68	"2007 Pre-Tax Incomes for Europeans from T4s", prepared by Respondents	By agreement
Exhibit 69	Extract from transcript of proceedings before the LRB, dated October 13, 2006	Used in cross-examination of Wates
Exhibit 70	Extract from transcript of proceedings before the LRB, dated October 11, 2006	Used in cross-examination of Wates
Exhibit 71	"Salary comparison between Juan Ruiz and Jose Collar", spreadsheet prepared by CSWU	Used in cross-examination of Wates
Exhibit 72	"Salary comparison between Tiago Ribeiro and German Caro", prepared by CSWU	Used in cross-examination of Wates
Exhibit 73	"Salary comparison between German Caro and Antonio Barbedo", prepared by CSWU	Used in cross-examination of Wates
Exhibit 74	Mercer Report "International Assignments Survey 2005/2006"	By agreement
Exhibit 75	"International Assignments Benchmark Survey 2005"	By agreement
Exhibit 76	Spreadsheet prepared by Respondents showing European employees, previous projects and pay	Identified by Sem

APPENDIX D

LIST OF WITNESSES

In this appendix we list the persons who testified, who called them, any special circumstances relating to their testimony, the dates they testified, and their title or job.

Witness	**Called by**	**Any special circumstances**	**Dates testified**	**Title or job**
Anthony Raul Gamboa Elizondo	CSWU	Through an English-Spanish interpreter	October 1-3, 2007	Employed by SELI in Costa Rica and by Respondents in Vancouver, where he worked as an Erector Operator (this and all Vancouver jobs of workers taken from Organization Chart – Appendix E)
Douglas Barboza Cedeno	CSWU	Through an English-Spanish interpreter	October 4, 2007	Employed by SELI in Costa Rica and by Respondents in Vancouver, where he worked as an Erector Operator Helper
Joseph Barrett	CSWU	None	October 4, 2007	Employed by the British Columbia and Yukon Territory Building and Construction Trades Council
Fabrizio Antonini	Respondents	None – said he was comfortable in English (Italian-English interpreter available)	October 23, 2007	SELI SPA General Director and Shareholder

Piero Angioni	Respondents	Occasional assistance of English-Italian interpreter	October 23, 2007	Employed by SELI Canada as General Administrator on this project
German Dario Caro Fonseca	Respondents	Through English-Spanish interpreter	October 23, 2007	Employed by SELI in Costa Rica and by Respondents in Vancouver, where he worked as TBM Pilot
Marvin Enrique Vasquez Moya	Respondents	Through English-Spanish interpreter	October 24, 2007	Employed by SELI in Costa Rica and by Respondents in Vancouver, where he worked as Batching Plant Operator
Roberto Ginanneschi	Respondents	In English with an English-Italian interpreter available to assist	October 24, 2007	Employed by SELI Canada as TBM Site or Tunnel Manager. Employed by SELI elsewhere previously.
Jojans Sanchez Chaves	CSWU	Through English-Spanish interpreter	November 5, 2007	Employed by SELI in Costa Rica and by Respondents in Vancouver, where he worked in Rail and Cleaning
Martin Alonso Serrano Gutierrez	CSWU	Through an English-Spanish interpreter	November 5, 2007	Employed by SELI in Costa Rica and by Respondents in Vancouver, where he worked as Yard Labour
Richard Gee	CSWU	None	November 5, 2007	Employed by Bilfinger Berger Canada Inc. on project building tunnel between reservoirs in North Vancouver

Cristhian Leiton Calderon	CSWU	Through English-Spanish interpreter	November 6, 2007	Employed by SELI in Costa Rica and by Respondents in Vancouver, where he worked as Segment Transport Beam Operator
Luis Alajandro Montanez Lara	CSWU	Through English-Spanish interpreter	November 6, 2007	Employed by Respondents in Vancouver as TBM Mechanic. Worked for SELI elsewhere previously
Jose Antonio Collar Blanco	CSWU	Through an English-Spanish interpreter	November 6, 2007	Employed by Respondents in Vancouver as a Loco Operator. Employed by SELI elsewhere previously.
Fabrizio Antonini (recalled)	Respondents	Occasional assistance from English-Italian interpreter	December 6-7, 2007	See above
Roberto Ginanneschi (recalled)	Respondents	Through an English-Italian interpreter with occasional use of English. Testimony adjourned on January 21 to provide a different interpreter	December 7, 2007, January 21, 25, 28, February 13, 2008	See above
Piero Angioni (recalled)	Respondents	Through an English-Italian interpreter, for the most part	February 13-14, 2008	See above

Gabriele Dell'Ava	Respondents	Through an English-Italian interpreter	February 14, 2008	Employed by Respondents in Vancouver as Supervisor of work external to the tunnel
Romeo Gencarelli	Respondents	Through an English-Italian interpreter	February 15, 2008	Employed by SELI as Production Manager on Costa Rica project
Andrea Ciamei	Respondents	In English, with occasional assistance of English-Italian interpreter	February 29, 2008	Employed by Joint Venture as Project Manager of Canada Line project
Jojans Sanchez Chaves (recalled) (rebuttal)	CSWU	Video deposition, through an English-Spanish interpreter	March 5, 2008	See above
Ernesto de la Trinidad Camacho Cordero (rebuttal)	CSWU	Video deposition, through an English-Spanish interpreter	March 5, 2008	Employed by SELI in Costa Rica and by the Respondents in Vancouver, where he worked as Erector Operator
Juan Jose Ruiz Mora (rebuttal)	CSWU	Video deposition, through English-Spanish interpreter	March 5, 2008	Employed by SELI in Costa Rica and by the Respondents in Vancouver, where he worked as a Locomotive Operator
Anthony Raul Gamboa Elizondo (recalled) (rebuttal)	CSWU	Through English-Spanish interpreter	March 10, 2008	See above

Yandry Tuarez Fortis (rebuttal)	CSWU	Through English-Spanish interpreter	March 10, 2008	Employed by SELI in Costa Rica and by the Respondents in Vancouver, where he worked as TBM Mechanic
Luis Alberto Retes Anderson (rebuttal)	CSWU	Through an English-Spanish interpreter	March 10, 2008	Employed by the SELI in Costa Rica and by the Respondents in Vancouver, where he worked as the TBM Maintenance Mechanic
Eileen Fu	Respondents	None	March 10, 2008	Owner and manager of Capricorn Rotisserie and Grill
Christopher Wates	Respondents	Testimony interrupted on consent on a number of occasions to accommodate other Respondents witnesses	March 10 and 12, 2008	Employed by the Joint Venture as Human Resources Manager, also assists with SNC Lavalin and SELI employees seconded to project
Pietro Favaretto	Respondents	By teleconference	March 12, 2008	Employed by SELI as Administrator and Financial Manager of Costa Rica project
Lorenzo Pellegrini	Respondents	By teleconference	March 12, 2008	Employed by SELI as Project Manager of Costa Rica project
Carlos Mestre	Respondents	By teleconference	March 13, 2008	Head of Global Mobility Business Unit for Mercer
Marco Sem	Respondents	By teleconference	March 13, 2008	Responsible for Human Resources for SELI

Wilson De Carvalho	Respondents	Through English-Portuguese interpreter	March 13, 2008	Employed by Respondents on the Canada Line project as a Shift Foreman. Employed by SELI previously elsewhere.
Rogelio Cortes Huertas	Respondents	Through English-Spanish interpreter	March 13, 2008	Employed by Respondents on the Canada Line project as a Shift Foreman. Employed by SELI elsewhere previously, including on the Costa Rican project.

APPENDIX E

CANADA LINE - TBM BORED TUNNEL -
TBM BORED TUNNEL ORGANIZATION CHART

*** TBM TUNNEL MANAGER**	Roberto Ginanneschi
*** MAINTENANCE PLAN MANAGER**	Leonardo Pia
*** TUNNEL SUPERINTENDENT**	
*** SHIFT ENGINEER**	Carlo Giri
*** SHIFT ENGINEER**	Edoardo Lanfranchi

*** Management**

MECHANIC MAINTENANCE

*** MECHANIC RESPONSIBLE**	Ferruccio Rotella
TBM MECHANIC RESPONSIBLE	
TBM MAINTENANCE MECHANIC	Luis Alberto Retes Anderson
MECHANIC HELPER	Victorino Ribeiro
DIESEL MECHANIC	Lopez Salguero
WELDER	Josef Kap Hu
WELDER	Gioacchino Randazzo
CHD MECHANIC	Salvador Garcia
CHD MECHANIC HELPER	

ELECTRICAL MAINTENANCE

*** ELECTRICAL RESPONSIBLE**	Giuseppe Imbesi
*** ELECTRONIC ENGINEER**	Miguel Rosinha
ELECTRIC MAINTENANCE	Peter Y Zang
ELECTRIC MAINTENANCE	Cracium Mitica
ELECTRIC MAINTENANCE	Chris Power

SHIFT A	
SHIFT FOREMAN	Wilson Carvalho
PILOT	Mirko Giannotti
ERECTOR OPERATOR	Ernesto de la T. Cordero Camacho
ERECTOR OPERATOR HELPER	German Cordero Camacho
CONVEYOR OPERATOR	Guiseppe Scorzafava
SEGMENT TRANSPORT BEAM	Cristian Leiton Calderon
TBM MECHANIC	Alejandro Montanez
TBM ELECTRICIAN	Henry Builes Tamayo
GROUTING PUMP OPERATOR	Bruno Miguel Ferreira Ribeiro
LOCO OPERATOR	Gabriel Esquivel Garcia
RAIL & CLEANING	Tamalia Liam Suai
RAIL & CLEANING	David Bonilla Granados

YARD LABOUR	Ignacio Sancez Alvarado
YARD LABOUR	
YARD LABOUR	Martin Serrano
BATCHING PLANT OPERATOR	Jovi Rio Pomarang
GANTRY CRANE OPERATOR	Franklin Mora Gamboa

SHIFT B	
SHIFT FOREMAN	Hector Sancez
PILOT	Antonio Barbedo Silva
ERECTOR OPERATOR	Jorge Romero Barenghena
ERECTOR OPERATOR HELPER	Douglas Barbosa Cedeno
CONVEYOR OPERATOR	Guiseppe Lopez
SEGMENT TRANSPORT BEAM	Pedro Felipe Nascimiento Morais
TBM MECHANIC	Carlos Edilio Picon
TBM ELECTRICIAN	Pinto Rodrigues Neves
GROUTING PUMP OPERATOR	Walter Quiroz
LOCO OPERATOR	Jose Ruiz Mora
RAIL & CLEANING	Jojans Sancez
RAIL & CLEANING	

YARD LABOUR	Gilberto Martinez Cordero
YARD LABOUR	
YARD LABOUR	Felipe Zuniga Perez
BATCHING PLANT OPERATOR	Marvin Erique Vasquez Moya
GANTRY CRANE OPERATOR	Jose Luis Barbosa Cedeno

SHIFT C	
SHIFT FOREMAN	Rogelio Cortes
PILOT	German Caro
ERECTOR OPERATOR	Antony Raul Gamboa
ERECTOR OPERATOR HELPER	Mario Alberto Alvarado
CONVEYOR OPERATOR	Efrain Calderon Araia
SEGMENT TRANSPORT BEAM	Guerino Mellea
TBM MECHANIC	Yandry Tuarez Fortis
TBM ELECTRICIAN	Jose Tavarez
GROUTING PUMP OPERATOR	Antonio Cozar Santiago
LOCO OPERATOR	Jose Antonio Collar Bianco
RAIL & CLEANING	Jose Antonio Barbosa
RAIL & CLEANING	Tiago Ribeiro

YARD LABOUR	Mario Flores Brenes
YARD LABOUR	
YARD LABOUR	Nelson Novelas
BATCHING PLANT OPERATOR	Gregorio Huguete
GANTRY CRANE OPERATOR	David Noguera Lopez

YARD WORKERS

YARD FOREMAN	Guiseppe Biason
MUCK ESCAVATOR	Claudio Velenosi
FORKLIFT OPERATOR	Anastasios Liakouras
FORKLIFT OPERATOR	Stavro Stafanopoulus
CRANE OPERATOR	Elian Duran Aguilar
GENERAL LABOUR	Giusseppe Mete
GENERAL LABOUR	Willison Cory
GENERAL LABOUR	Patrik Mete
GENERAL LABOUR	Joselito Sayat
GENERAL LABOUR	Reza Jarollahi

GENERAL LABOUR	Biak Hlei Thang
GENERAL LABOUR	Cung Boe Thong
GENERAL LABOUR	Randy Madland
GENERAL LABOUR	Sandro Lachimea
GENERAL LABOUR	Jim Dick
GENERAL LABOUR	Ariel Palma
GENERAL LABOUR	Ferdinand Linobhot
GENERAL LABOUR	Joe Wu