

Welcoming the World to Vancouver: Temporary Foreign Workers on the Canada Line Construction Project

Janine Benedet
University of British Columbia Faculty of Law
Vancouver, Canada

Introduction

In the past two decades Canada has seen an increase in the use of temporary foreign workers in sectors of the labour market other than the traditional fields of agricultural labour and domestic work. Government programs have been adapted and extended to facilitate the importation of both “low skill” workers to work in entry-level jobs in the service sector as well as more skilled workers to work in construction and related industries. The decision in 2003 to grant the 2010 Winter Olympic and Paralympic Games to Vancouver put considerable pressure on the domestic labour market for skilled construction workers to complete massive infrastructure projects earmarked as part of the “legacy” of the Games.

This paper focuses on a series of discrimination complaints arising out of one of these employment settings – the boring of a tunnel for a major expansion of rapid transit in the city of Vancouver. These complaints, which are still proceeding through the appeal process, succeeded, but only in part. This short paper considers the interaction between Canada’s laws on discrimination and collective bargaining and reflects on the meaning of discrimination based on national origin in a globalized labour market.

Background to the Complaints

As part of a program of infrastructure improvements in advance of the 2010 Winter Olympic and Paralympic Games, the Canada Line rapid transit line was constructed to link downtown Vancouver with the Vancouver International Airport. The completion of the Canada Line posed construction challenges, as its path through populated urban areas meant that much of the line would have to run underground through bored tunnels.

Construction of a major portion of tunnel that passed under the city centre and across a body of water known as False Creek was contracted to SELI Canada Inc., a wholly owned subsidiary of an Italian company, SELI SPA, and SNC Lavalin Constructors (Pacific Inc.), a subsidiary of a Canadian company based in Quebec. This joint venture brought approximately 40 Latin American workers from Costa Rica, Colombia and Ecuador to Canada in April 2006 to work on the Canada Line tunnel. These workers had previously been employed by SELI on a project in Costa Rica. The Latin American workers worked with Canadian workers and, beginning in September 2006, alongside workers brought from European countries such as Italy, Portugal and Spain. The Canadian workers were described as carrying out non-specialized tasks while the foreign workers from Europe and Latin America performed the specialized tunnel boring work.¹

¹ The factual summary is taken from the decision of the British Columbia Human Rights Tribunal in *CSWU Local 1611 v. SELI Canada and others (No. 8)*, 2008 BCHRT 436 (“Decision of the Tribunal”).

The Labour Board Complaint – Canadian Workers

In the summer of 2006, the Construction and Specialized Workers' Union (the Union) filed an application for certification to represent a bargaining unit composed of the Canadian and Latin American workers. The British Columbia Labour Relations Board, a quasi-judicial tribunal with the authority to interpret and apply the *Labour Relations Code*, certified the union after a secret ballot vote. When bargaining proved unsuccessful, the Employer got an order permitting it to put its last contract offer directly to the workers for a vote. The workers voted in favour of accepting the Employer's offer. The collective agreement contained a clause setting out different rates of pay for Canadian and Non-Resident workers. The Union challenged this part of the agreement as invalid, because it contained a clause that discriminated against foreign workers based on their place of origin and therefore violated the British Columbia *Human Rights Code*.²

The Labour Board disagreed, and found no discrimination. The Board noted that in valuing the compensation of the non-Canadian employees, it was important to account for the fact that they received accommodation, meals, transportation and two annual flights between Canada and their home country, none of which were provided to Canadian workers. When those benefits were added to the base salary, the earnings of the two groups were comparable.³

The Human Rights Complaint – European Workers

The Union then filed a complaint with the British Columbia Human Rights Tribunal alleging that the tunnel workers were being discriminated against on the basis of their race, nationality or place of origin as compared to both the Canadian and the European workers. The Union alleged discrimination with respect to wages, housing, meals and expenses, contrary to the provisions of the *Human Rights Code*. The Tribunal is an independent, quasi-judicial, direct access administrative decision-maker charged with the task of applying the anti-discrimination provisions of the *Human Rights Code* in the context of areas such as employment, accommodation, public services and education.

In a preliminary ruling, the Tribunal found that the issue of discrimination vis-à-vis the Canadian workers had already been conclusively litigated before the Labour Board and the doctrine of issue estoppel ought to apply.⁴ On the issue of the European workers, the Tribunal found that the Union had made out a *prima facie* case of discrimination. The Tribunal rejected the Employer's argument that the European workers had greater levels of skill with respect to the tunnel boring equipment.⁵

The Tribunal found that the Europeans were paid nearly twice the base salaries of the Latin Americans. The Tribunal also found discrimination in the Employer's treatment of its employees in other respects. While the European employees were typically housed in modern

² It is accepted in Canadian labour law that human rights laws are incorporated by reference into every collective agreement and that collective agreements must not contain discriminatory provisions.

³ *SELI Canada v. CSWU Local 1611*, BCLRBD B36/2007 ("Decision of the Labour Board"). Leave for reconsideration was denied: *SELI Canada v. CSWU Local 1611*, BCLRBD No. B173/2007.

⁴ *CSWU Local 1611 v. SELI Canada and others* 2007 BCHRT 404.

⁵ *CSWU Local 1611 v. SELI Canada and others* 2008 BCHRT 436 ("Tribunal decision")

condominiums close to the job site and given a meal allowance that they could spend at will, the Latin American employees were housed in an old motel in a neighbouring suburb and given meal vouchers redeemable at one of two restaurants. When a few employees asked for a meal allowance, they were told that all of the Latin American employees would have to agree to that before the policy would be changed. They were not offered a choice of living in the condominiums; when one of them moved out of the motel, the employer offered a rent subsidy far below the cost of rent at the condominiums. The Europeans were also given an automatic \$300 per month for expenses while the Latin Americans were reimbursed on receipts an average of \$75, mostly for laundry. The tribunal found these differences to be *prima facie* discriminatory.

The Tribunal also rejected the employer's main defence that the difference in wages, namely that they reflected Employer policy consistent with accepted practices in the industry. This argument asserted that where construction workers were moved from a low wage country (Costa Rica or Ecuador) to a high wage country (Canada), their wages would be increased to the accepted level in the high wage country, a practice that the Labour Board in its earlier ruling found had been followed. For workers coming from another high wage country (Italy or Spain) the expectation was instead that their existing wages would increase if they accepted a position at the new job site, bumping the wages of European workers above prevailing Canadian rates.

Discrimination and Skilled Temporary Foreign Workers in Canada

The Labour Board's method of measuring discrimination as compared to the Canadian workers is problematic. The Board adopts a formal equality approach which assumes both groups of workers to be similarly situated and merely quantifies the benefits that the foreign workers received in dollar terms.

A substantive equality analysis should ask other questions. For example, beyond the dollar value of the room and board provided, what quality of accommodations were provided to foreign workers? Were they comparable to the living conditions experienced by the average Canadian worker at this project? The inclusion of flight costs is also worth reconsidering. Airfare is not provided to Canadian workers because they do not need it. It is an additional cost to the employer, to be sure, but one that is required because of the asserted shortage of domestic labour and the globalized nature of the employer's business. Where the employer has a longstanding practice of offering its employees work in countries all around the world as projects end in one country and begin in another, transportation to the job site is just part of the reality of this type of employment relationship and not a monetary benefit in lieu of wages.

The Labour Board's decision also failed to deal with the Union's argument that employees should be given the choice about how to spend the sums allocated for food, housing and travel. For example, the parties agreed that the 3 restaurant meals cost the employer \$25/day, or \$750/month. Some employees would likely have preferred to receive this sum outright and to see if they could achieve some savings by purchasing their own food. They might have declined the mid-year trip home in exchange for the opportunity to send another \$1500 to their families. Depriving employees of the ability to make these choices is an adverse impact that undermines their recognition as autonomous persons.

In addition, the Labour Board's decision only considered wage rates offered by the Employer after the union had been certified. There was some evidence that the difference in wage rates prior to certification was substantially higher. This possibility was not canvassed by the Labour Board since its jurisdiction extended only to the consideration of whether the collective agreement that the employer had put forward violated the Labour Code. The Labour Board also declined to consider the situation of the Europeans because they were not covered by the collective agreement.

There was certainly evidence before the Human Rights Tribunal that the Employer considered the Latin American workers to be less valuable than its other workers on the project. In rejecting the claim of one of the Employer's witnesses that the Europeans were paid more because they were all considered to be managers, the Tribunal noted:

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.⁶

It is ironic that the Canadian decision-makers found collectively that a Canadian-Italian joint venture treated Latin American workers worse than European foreign workers, but just as well as Canadian workers. On this logic, Canadian workers could have brought a discrimination claim against the European workers as well, a point noted by the Employer before the Tribunal. This ends up as a case of discrimination between groups of foreign workers, obscuring the intersecting hierarchies that revealed themselves in different ways.

In reality, the race or national origin of the Latin American workers intersected with their vulnerability as temporary foreign workers to produce an opportunity for exploitation. The discrimination claim could not but succeed at the Human Rights Tribunal, because of the differences in the way the employee groups were treated with respect to their living conditions. The Latin American workers – including one who had attained permanent resident status in Canada – were commodified and treated as an indistinguishable mass of manpower. The Employer's evidence about its prevailing practices with respect to wage rates for its international and mobile workforce rang hollow in that context.

Nonetheless, the argument that foreign workers might be paid at different rates, depending on their place of origin as part of the realities of a globalized labour market, merits some consideration. On the one hand, this can be understood as a variation on the common justification for the race to the bottom attributed to globalization – that while conditions for workers from developing countries may be less than ideal, they are still better than what they could hope to get otherwise. In this context, so long as local minimum standards are respected, paying workers what they are willing to accept, for better or worse, is a matter of negotiation.

⁶ Tribunal decision, para. 268. It is interesting that the Italian workers came out on top in this hierarchy, given the lengthy history of discrimination against Italian immigrants in Canada. Italians have variously been considered to be “non-white”, suitable only for manual labour, and connected to both organized and petty crime.

One of the Employer's witnesses confirmed this when asked why the Latin American's were not paid the \$300 monthly expense allowance:

I think it is fairer like this. The Europeans had different treatment before and they want to continue to be treated the same way. [. . .] If [the Latin Americans] are content with the way we are and we are not in violation of anything. . . It is fair, nobody is complaining, of course if you tell them, would you like to have \$300, they would say yes, why not.⁷

National origin, on the employer's argument, is not a proxy for race or racism but rather a legitimate benchmark for wage expectations in the sense that the previous labour market acts a wage floor. The Employer in this case went further, arguing that its wage rates are set not according to place of origin but previous place of work. The alternative would be a "race to the top" that would make SELI uncompetitive in its project bids. The Employer's approach could be seen as giving the company an incentive to hire and train workers from developing countries.

On the other hand, it can be argued that this is exactly why domestic anti-discrimination law is so valuable in a globalized labour market. While we may not typically be able to use domestic laws to influence working conditions in other countries, we can insist on their application to foreign workers within our borders. Anti-discrimination law has always understood that it is no answer to a sex discrimination claim, for example, to say that a woman worker agreed to work for less money than her male colleagues because it still amounts to more than she was getting at her last job. The Human Rights Tribunal explicitly made such a comparison in its reasons. Nor is there much evidence to suggest that the possibility of lower wages ever encouraged employers to hire more women for traditionally male occupations.

A final question is whether the human rights tribunal decision was different in outcome merely because the Union had better facts to offer in that complaint. Arguably, something else is going on that sheds light on the relative suitability of human rights tribunals and labour boards to hear discrimination complaints. Discrimination is a collateral, rather than a central, issue for labour boards in a way that can sometimes be reflected in the depth of analysis brought to bear on human rights issues.

Both of these decisions have been subject to a variety of applications for judicial review to the courts. The judicial review of the human rights tribunal decision has not been decided. Parts of the Labour Board decision have been reversed as displaying actual bias, but the finding that there was no discrimination in the collective agreement as compared to Canadian workers remains.⁸ These cases are far from concluded, and it may be some time before the foreign workers can even contemplate the possibility of recovering the estimated CAD\$ 2.4 million awarded to them, including wage and benefit differentials and the sum of \$10,000 per worker for injuries to dignity.⁹ In the meantime, the completed Canada Line carries thousands of Vancouverites to their jobs every day.

⁷ Tribunal decision, para. 409 [evidence of Mr. Ciamei]

⁸ *SELI Canada Inc. v. C.S.W.U. Local 1611*, 2010 BCSC 243.

⁹ "Canada Line foreign workers treated unfairly, tribunal rules", CBC News Online, 3 December 2008, available at <http://www.cbc.ca/canada/british-columbia/story/2008/12/03/bc-canada-line-workers.html>