CHAPTER 21 – The Canada Line

THE EXTENT TO which the Labour Relations Board and the entire labour relations process in British Columbia have become corrupted by the BC Liberal Party government's anti-union bias and appointees is best and most graphically illustrated by the Canada Line case. Not that the particulars of the case as far as the organizing drive goes are especially remarkable or unusual in the province's current labour relations climate. Even the neglect of their responsibilities by other government agencies such as the provincial Employment Standards Branch and the federal Department of Human Resources was not in any way abnormal. Two things made the Canada Line case unique, the first being that for the first time in Canadian history, a bargaining unit comprised almost entirely of Temporary Foreign Workers was organized. The second is that two independent judicial bodies, the BC Human Rights Tribunal and the BC Supreme Court, having examined the same evidence which was presented to the Labour Relations Board, arrived at conclusions diametrically opposed to the LRB's. The result was the largest Human Rights award in Canadian history.

THE PROJECT

The Canada Line project (originally known as the RAV Line) was a $2.1 billion project built as part of the province's 2010 Olympics transportation infrastructure upgrading. Linking downtown Vancouver to downtown Richmond and, via a four kilometre spur, to the Vancouver International Airport, the 19.5 kilometre light rail transit (LRT) project was Canada's first P3 (public-private partnership) LRT project and the first to link a major city's downtown with its airport. A $1.64 billion design-build contract for the project was awarded to SNC-Lavalin (a CLAC-certified contractor in BC) in August 2005 and construction began that October. The Line's design involved a total of 9,080 metres of tunnels, the work for which was subcontracted by SNC-Lavalin to a joint venture, SNCP-SELI JV, consisting of its subsidiary, SNC-Lavalin Constructors (Pacific) Inc and SELI Canada Inc, a subsidiary of the Italian tunnelling contractor SELI S.p.A., with SELI being responsible for the actual tunnelling work. The project was completed and opened to the public on August 7, 2009.

Although there was no shortage of experienced tunnellers in the Lower Mainland in the fall of 2005, SELI preferred to use its own crew of tunnellers, mostly recruited from Latin America. SELI was able to bring these workers into the country using the federal government's Temporary Foreign Worker (TFW) program, a program which permitted employers to bring workers into the country on two-year work permits for the purpose, according to the Government of Canada's TFW Program *Fact Sheet,* of filling "temporary labour and skill shortages when qualified Canadian citizens or permanent residents are not available." Under the program, the federal government issued work permits to TFWs, but these permits were valid for two years only and only so long as the TFW was working for the sponsoring employer: TFWs were not allowed to change employers. There were in principle certain restrictions on how employers treated their TFW employees: for example a TFW's wage rate was supposed to match

the "prevailing wage" in the industry and region where they were employed. But the program was poorly policed and by 2006 was increasingly being used by employers as a source of short-term, low-wage, indentured labour, in short, as a cheap alternative to hiring Canadian workers. This was certainly the case on the Canada Line, as Richard Gilbert observes in his paper on *The Impact of the Temporary Foreign Worker Program on the Construction Workforce in Western Canada (2003-2015):*

> "The wages issues on the Canada Line project revealed the failure of federal and provincial authorities to enforce the labour code, employment standards, human rights laws, as well as deal with the displacement of Canadian workers."

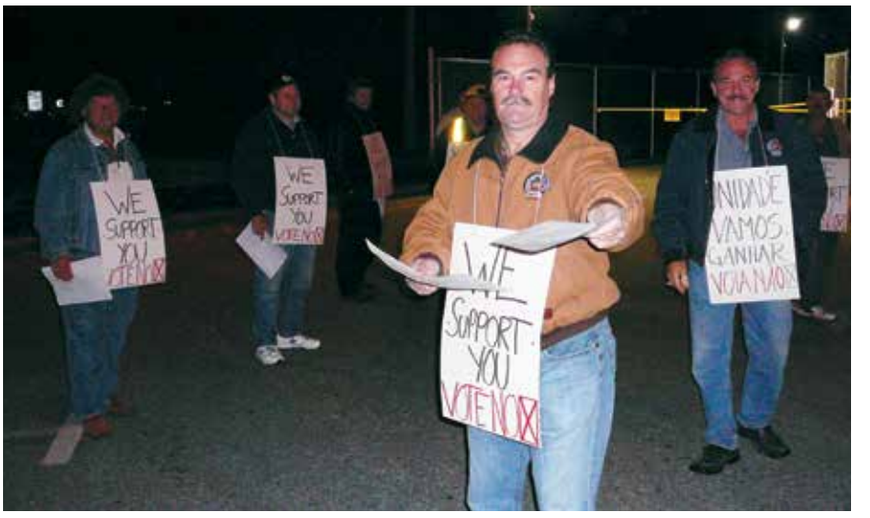
THE ORGANIZING DRIVE

The Canada Line organizing drive started before the first TFWs began arriving in the spring of 2006. In *The Canada Line Story,* his manuscript account of the Latin American tunnellers' struggle with SELI and SNC-Lavalin, Joe Barrett, who was working for the BC Building Trades Council at the time, says that after the Building Trades first learned of the presence of TFWs on the project, he went to see Mark Olsen, Local 1611's Business Manager. Bro. Olsen told him that Local 1611 was aware of the problem and had been negotiating with SNC-Lavalin for the tunnel work before it was awarded to SELI. Bro. Olsen also told him that Local 1611 "had a stack of resumes of experienced TBM workers from across the province that I could draw on to do the work." But SNC-Lavalin broke off the talks and decided to go with SELI because, or so they told Bro. Olsen, they "couldn't get good value from Canadian workers." According to Bro. Barrett's account, the decision to break off talks triggered Bro. Olsen's decision to start organizing the project: "That's when I asked Brent [Gurski] and Danny [Klein] to go down and ask for jobs."

Danny Klein, now a Service Representative for Local 1611, and Brent Gurski were both experienced tunnellers and both needed the work, but their primary reason for working on the Canada Line was to act as SALTS, union members who work on an organizing campaign from the inside. In a 2011 interview Bro. Klein described what happened as the first TFWs arrived:

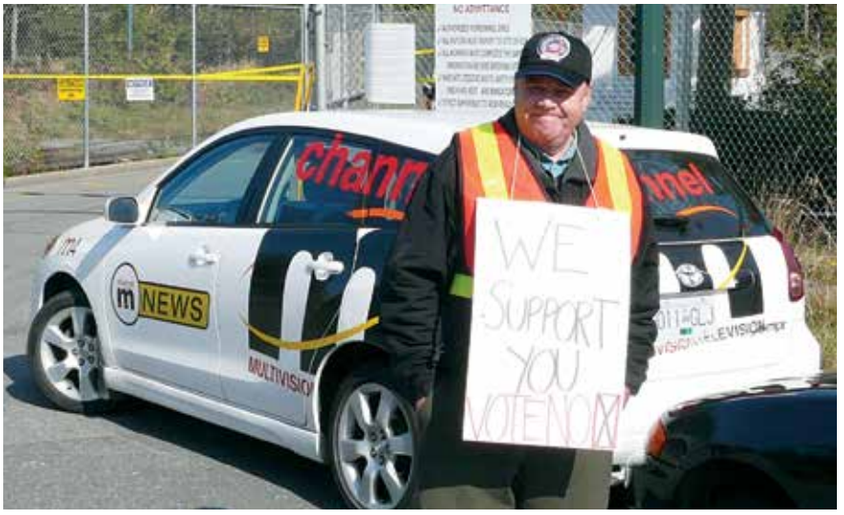
> "The first to arrive was a mechanic, because, you know, you have to set things up. None of them could speak very good English, but they could kind of figure out what we were talking about. After a couple of weeks, I asked him what he was making and stuff like that. He told me he was making about $2,500 a month. Well then, they were working almost seven days a week, ten to twelve hours a day sometimes. It just didn't make sense what he was saying. I thought maybe I'd misunderstood him.
>
> "So I waited until he got paid and I got paid and then we went and showed each other our cheques and, of course, my cheque was almost $1,000 more than his. And he asked me, 'Is that a one-month cheque?' And I said, 'No. That's a one-week cheque.' And he was saying, 'What?' And I think that's when they realized,

heh, heh, what the hell was going on. But as they started to come in, Brent and I, we started doing that to pretty much everybody, to let them know what the hell was going on. By the time they'd brought in fifteen, twenty guys, well SELI, I think they knew what was going on. Anyway, I quit because they were going to fire me sooner or later."

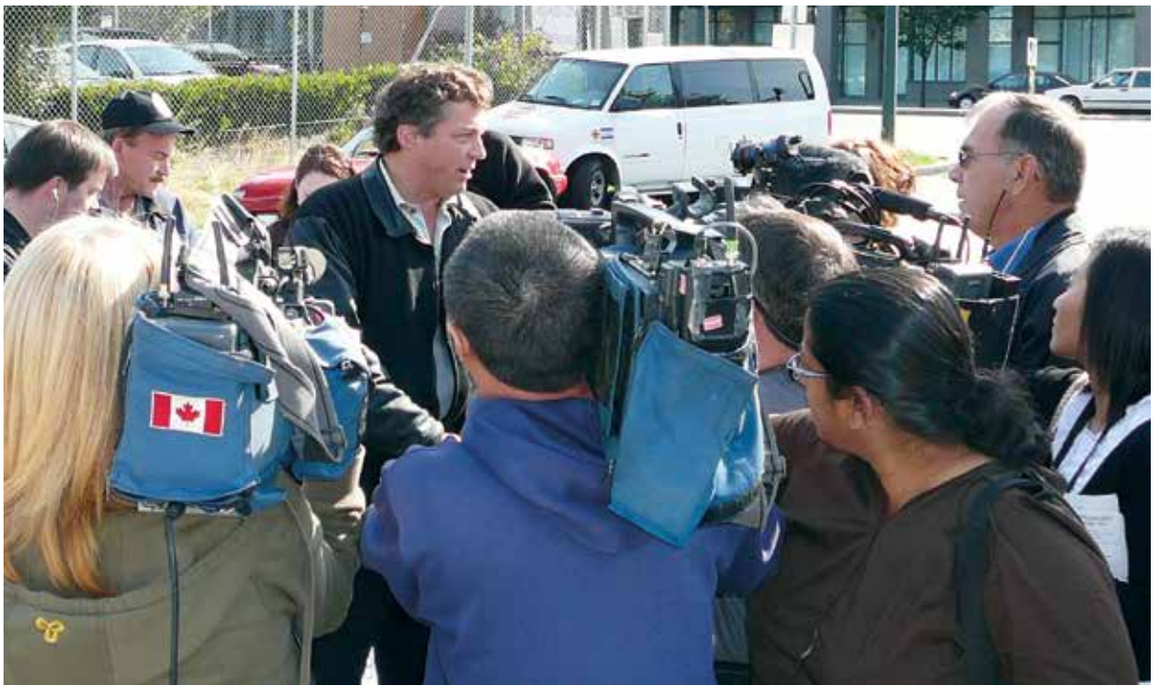


When Bro. Klein thought that the wages being paid to the TFWs on the project didn't make sense, he was right. Non-managerial European employees on the project were being paid at least three times as much as the Latin American workers, were better housed, and received better living-out allowances. Meanwhile, the minimum wage in BC was $8.00 an hour. Even if the TFW tunnellers (contrary to the *Employment Standards Act*) were being paid straight time for all hours worked over forty in a week, they should have been earning $2,000 a month if being paid minimum wage, $2,500 if being paid properly for overtime. Pay stubs given to union by the tunnellers showed that they were in fact working between sixty and sixty-six hours a week for $1,100 a month—$3.47 an hour.
A subsequent Employment Standards Branch investigation examined the Joint Venture's payroll and found that the TFWs' complaint was valid. The SNCL-SELI JV was paying its TFW tunnellers $4.53 *less* than the provincial minimum wage.

Yet despite the fact that Local 1611 was organizing grossly underpaid workers who would not be allowed to remain in Canada once the tunnelling work ended, in most respects the Canada Line organizing drive was a fairly typical campaign. Aware of the employer's decision to keep the project non-union, LiUNA Local 1611 took steps to frustrate this intention by placing SALTS on the job even before the first TFW arrived. Assisted by the Building Trades, in particular by Bro. Barrett acting as both a translator and an organizer, Local 1611 was then able to mount a successful organizing drive which culminated in an application for certification filed on June 12, 2006. The union had thirty-two cards signed out of a bargaining unit it believed to number around forty to forty-five—70 to 80 per cent support.



SELI's response to the application during the ten day period before the vote was also fairly typical: it attempted to intimidate the workers and sabotage the vote at the LRB. It spread rumours about the union such as one claiming that the union dues were 10 per cent of wages. Workers were called into one-on-one meetings with management and asked to give the names of anyone they knew who had signed. Supervisors were assigned to try to spy on meetings



held at the union office and get names that way. A senior manager, Fabrizio Antonini, was flown in directly from Italy to hold a compulsory meeting of the entire crew at which he ordered them not to vote for the union, adding they had a great future with SELI and not to throw it all away. Meanwhile, at the LRB SELI challenged the signatures on the union cards, arguing that the cards were in English and so the workers couldn't possibly have understood what they were signing. (The workers had also signed Spanish versions of the cards.) And in order to inflate the number entitled to vote, SELI added a dozen names, mostly of Italian managers, to the list of bargaining unit employees.

The vote was held on June 22: fifty-nine ballots were cast, ten of which the union's scrutineer, Joe Barrett, challenged on the grounds that they were cast by managers, not bargaining unit members. Because of this challenge, the vote had to be counted at the LRB where the validity of each challenged ballot would be decided by a Board panel. This process, involving legal arguments, challenges, and counter challenges, could often take weeks or even months, in the meantime leaving the crew in limbo as to their status.

The day after the vote, Mr. Antonini held another crew meeting at which he threatened to fire fifteen of the twenty-eight Costa Rican tunnellers, saying he could easily replace them with workers from other SELI projects. He also claimed that if the union won the vote, it would replace all the TFWs with its own unemployed Canadian members. Threats to fire workers and outright lies about the union, though certainly intimidating and illegal, are not an unusual feature of an organizing drive. But they are effective: they created a climate of fear and uncertainty among the Canada Line tunnellers which prompted the union to drop its challenge of the ten managers' ballots and proceed on June 30 with the count. The result was thirty-seven votes for the union, twenty against, and two ballots spoiled because they were marked "si"—65 per cent in the union's favour despite the ten dicey ballots. It was the first time in Canadian history that a unit comprised almost entirely of Temporary Foreign Workers had been organized.

NEGOTIATING A COLLECTIVE AGREEMENT

Once SNC-Lavalin and SELI learned they had lost the vote, they began implementing step two of the union-buster's manual: if you should lose the certification vote, ensure it is impossible for the union to negotiate a satisfactory first collective agreement. In order to do this, you should use a carrot and stick approach: continue to intimidate the workers but also take steps to undermine their trust in the union.

SELI displayed the stick within three days of the vote's result being announced. On July 3 it told five workers, three of whom had been active in the organizing drive, that it had received transfer requests for them and was sending them to Brazil. Fortunately, the three union activists refused to leave because it soon became clear that they were not needed in Brazil—the machinery required for SELI's Brazilian project was still on the dock in Germany. Furthermore, even when the machinery did leave Germany, it would take four months to transport it to the project site. Since there was no legitimate need for the five workers in Brazil, Local 1611 argued that the transfer requests were fraudulent and, as Richard Gilbert puts it, that:

> "management at SELI S.p.A. and SELI Canada Inc., in Rome, Brazil and Canada were probably working together to undermine support for a bargaining unit of less than 60 employees in Vancouver."

SELI produced the carrot within six days of the vote's result being announced, raising the TFW tunnellers' wage rate to $14.00 an hour, an increase of $10.53 an hour above their previous rate. This wage increase was a blatant violation of Section 45 of the Labour Code which prohibits the employer from unilaterally altering the terms and conditions of employment after a certification vote, but it was effective. Living and working conditions were also somewhat improved and management even held a company barbecue for the workers. As Joe Barrett remarks, this did weaken the tunnellers' solidarity.

SELI had just carried out a textbook example of using the carrot and the stick approach to union-busting. The wage increase raised questions in some workers' minds about the need for a union to negotiate on their behalf. The threat to, in effect, deport union activists to Brazil helped create doubts about the ability of the union to protect its members. In addition, SELI was refusing to meet with Local 1611 to negotiate a collective agreement, which gave the impression that the union had no power to compel the employer to bargain or consider the workers' demands.

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The union did raise all these matters at the LRB, charging the Joint Venture with numerous Unfair Labour Practices (ULPs), including discrimination, intimidation, and refusing to bargain. It had filed a ULP over the attempted deportation to Brazil. It had filed a ULP over the wage increase. These were all clearly pressing matters which required an expeditious hearing and swift resolution by the Board, especially as this was a project which would be completed in eighteen months and its workers all sent home. However, the LRB refused to consider any of the union's ULPs urgent, not even the Section 45 complaint which had clearly had an immediate and harmful effect on the union's bargaining power. (The LRB's decision, when it finally came in 2008, rejected all the union's ULPs.) The failure of the LRB to act severely tested the Canada Line membership's faith in the union's ability to carry out it promises and further weakened its bargaining position.

For there was the one exception to the LRB's failure to act on the union's ULPs: on July 31 it ordered the employer to begin negotiations "within ten days of the date of this decision." But since the LRB was refusing to act on any of Local 1611's other ULP complaints, there was no reason for SELI to negotiate in good faith. Nor did it. It refused to discuss or even consider any of the union's proposals: instead it used the climate of fear and intimidation it had already created to convince its workforce that they must accept whatever the company offered. At times daily crew meetings were being held where threats were made to replace the crew or shut down the project if the company's offer was rejected. In late September, employing a section of the Labour Code which requires a vote on an employer's "final offer," the LRB allowed SELI to force a vote on an offer whose wages ($14.47 an hour for Latin Americans, $18.00 to $28.00 per hour for Canadians doing "specialized work") and conditions were well below those in effect on similar– even non-union - projects elsewhere in the province. The TFW tunnellers' voted to accept, but Local 1611 refused to do so. It argued at the LRB that the vote was invalid because of employer coercion and intimidation while the agreement itself was illegal because paying a different, lower wage to the Latin American

workers violated Section 13 of the BC Human Rights Code which prohibits discrimination in employment based on race or place of origin. Five months later, on February 23, 2007, the LRB ignored Local 1611's arguments and ruled that the "final offer" had been accepted and a collective agreement was in force.

The numerous legal issues, complaints, and hearings triggered by the Canada Line organizing drive are too complex and involved to be discussed at length here. The above is a simplified account of the campaign, focusing on the main events which occurred during the organizing drive and subsequent negotiations and on the union's principle charges against the employer. There were many more examples of employer intimidation and other such illegal activities and there were many more examples of the Labour Relations Board ignoring blatant violations of the Labour Code. One example not mentioned above but worth noting was the LRB's decision to ignore testimony from two retired RCMP officers that SELI had committed fraud by forging the contracts of employment it submitted to the Board during the hearing on its violation of Section 45 of the Labour Code, the section prohibiting it from raising wages for four months after the certification. These contracts of employment were signed by the Latin American workers before coming to Canada, and the retired RCMP officers testified that the second page of these documents, which contained the employees' wage rates, had been removed and a new second page fraudulently substituted. The original page of these documents contracted to pay the tunnellers US$12,000 a year, the forged page amended the rate to US$20,000 per year. This was done so that SELI could argue that it had not violated Section 45 of the Code by increasing wages immediately after the certification vote, it had merely discovered and then corrected a clerical error which had caused it to underpay its tunnellers.

DUELLING TRIBUNALS ONE – THE LRB AND THE SUPREME COURT OF BRITISH COLUMBIA

As noted above, the LRB eventually dismissed all of the union's ULPs, finding that there was no discrimination against the Latin American workers in the collective agreement, no violation of Section 45 of the Code, and no intimidation or coercion of the project's workers. In his April 2008 ruling dismissing the Section 45 and intimidation ULPs, LRB Vice-Chair Philip Topalian stated that:

> "The proposal to transfer certain employees to Brazil … was, as I have found, motivated by valid business considerations rather than by any improper motivation for purposes of the Code. The other matters complained of by the union arose on a piecemeal basis during the course of these proceedings and, I find that in context, they do not amount to a course of conduct aimed at frustrating the union's efforts to organize the employees and negotiate a collective agreement on their behalf."

Unfortunately for Mr. Topalian, when the matter was heard by the BC Supreme Court in May 2009, Mr Justice Paul Walker disagreed with the LRB Vice-Chair and quashed his ruling on the grounds that he had "found actual bias" in the panel's decision and "an apprehension of bias" in remarks made by Mr. Topalian. Justice Walker was particularly unimpressed by Mr. Topalian's handling of the allegation that employer committed fraud to conceal its violation of Section 45, stating that:

> "I also find an apprehension of bias in relation to the Vice Chair's remarks concerning the union's fraud allegations. It is vital for labour relations in this province that the Board's processes be viewed as impartial and procedurally fair."

According to Richard Gilbert, Mr. Justice Walker concluded Mr Topalian's "mind was closed to the union's complaint that unfair labour practices had, in fact, occurred." Unfortunately, Mr. Justice Walker's 2009 ruling was by then moot. Although it gave the union the theoretical opportunity to begin to pursue its ULP charges all over again, the Canada Line tunnel had been substantially completed in March 2008 and the tunnel workers themselves were long gone.

DUELLING TRIBUNALS TWO – THE LRB AND BC HUMAN RIGHTS TRIBUNAL

Wisely, Local 1611 had not relied entirely on the LRB or the BC Supreme Court to obtain justice for the Canada Line workers. It had also pursued an Employment Standards Branch (ESB) complaint on the grounds that SELI was not paying the minimum wage and a BC Human Rights Tribunal complaint on the grounds of discrimination based on race and place of origin. As mentioned earlier, the ESB did conduct an investigation which concluded that the tunnellers had a valid complaint. However, as soon as SELI raised the tunnellers wages to $14.00 an hour, the ESB considered its work done and the case closed. Although under the law the tunnel workers were owed back wages, overtime, and statutory holiday pay, the ESB made no serious effort to ensure that they were paid the full amount of back wages owing.

It was at the hands of the Human Rights Tribunal that the Canada Line workers were eventually to find at least partial justice. Even before Mr. Topalian had made the ruling later quashed in BC Supreme Court, the BC Human Rights Tribunal had already delivered its verdict on the LRB's grasp of the facts and the law as it related to the Canada Line case. On November 17, 2007 it ordered the Joint Venture to "cease and desist from intimidating, coercing and retaliating against TFWs on the Canada Line project". The Tribunal had also ruled on November 9, 2007 that "the employer should not have further contact with the employees in the complainant group except as is necessary in the ordinary course of the project." Unfortunately, by the time these rulings were made, the project was less than five months from completion.

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However, if the Human Rights Tribunal did not have time to finish its hearings into the case before the project ended, it did have the authority to pursue the case even in the absence of the complainants and, if warranted, enforce penalties for violations of the Human Rights Code. On December 3, 2008 it found that Local 1611 had:

> "established a prima facie case that the Respondents (SELI Canada, SNCP SELI Joint Venture and SNC-Lavalin Constructors) 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."

Given the facts before it, the Tribunal's ruling was only to be expected. SELI was paying its European employees a base salary of between $56,000 and $62,000 a year, while Costa Ricans were paid around $23,000 (after the illegal wage increase) with other Latin Americans receiving up to a maximum of $31,000 a year. Most Europeans, whether or not employed as managers, were housed in False Creek apartments, Latin Americans in a low quality motel. Europeans received substantially larger meal allowances than Latin Americans and a $300 monthly allowance for expenses: the Latin American TFWs received no monthly expense allowance. Unlike the LRB, the Human Rights Tribunal found no mitigating circumstances to excuse the employer's behaviour. It did not accept the employer's argument that its wage practices were industry standard elsewhere in the world. As a result, the Tribunal awarded thirty-six workers $2.5 million, almost $70,000 each, in monetary losses and damages for the injury to their dignity.

THE LARGEST HUMAN RIGHTS SETTLEMENT IN CANADIAN HISTORY

In the end, the Canada Line TFWs did have the satisfaction of knowing that because of their courage and solidarity their employer had been forced to pay compensation for its mistreatment of them. SELI and SNC-Lavalin appealed the Tribunal's award and fought it through the courts for six years, but finally in 2013, they offered to settle for half the award, $1.25 million or roughly $35,000 per worker, an offer which the thirty-six workers voted to accept. It was the largest Human Rights settlement in Canadian history and as Mark Olsen, Local 1611's then Business Manager, said at the press conference announcing the settlement:

> "It sends a message right across Canada that companies cannot bring their international compensation practices to BC, if in doing so it is discrimination based on place and origin. If workers are properly brought here from another country, it is irrelevant what they make on another similar job somewhere else in the world. They have to be paid appropriately in BC, especially when they are compared to other workers on the same job."

Cheque distribution ceremony, in Costa Rica, with Charles Gordon, Joe Barrett, Felipe Zuniga -SELI worker, and Bruce Ferguson.

Charles Gordon, lawyer left, Bruce Ferguson former President, Mario Rojas (Secretary Costa Rican Labour Federation), David Noguera - SELI worker.

Three of the SELI workers celebrating.

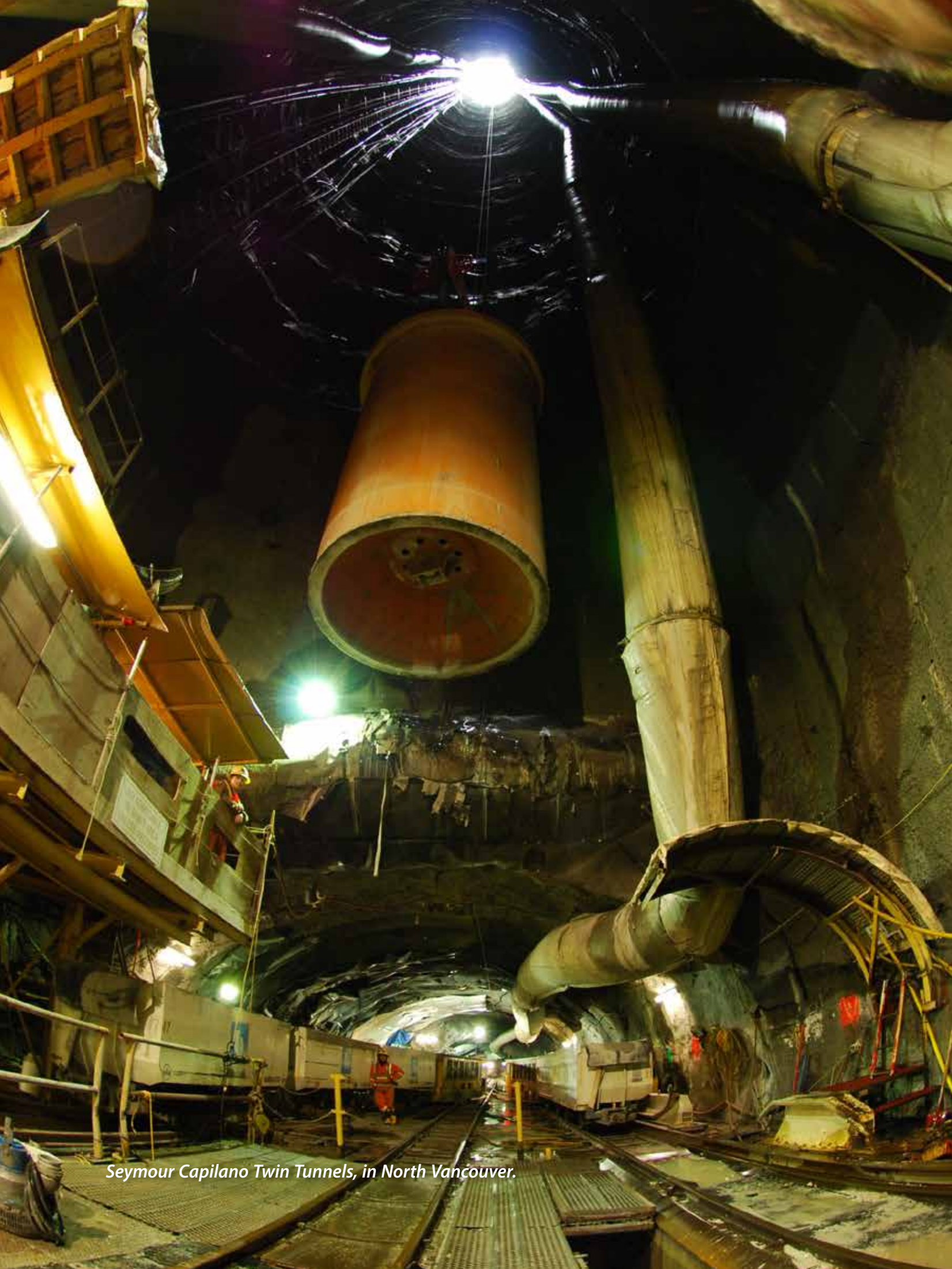
THE END OF THE POST-WAR SETTLEMENT WITH LABOUR

At the start of this history, we referred to the post-Second World War settlement with labour, the recognition by governments and employers, however reluctant in some quarters, that labour had a rightful place in the social, legal, and economic framework of society. The SNC Lavalin-SELI Joint Venture's response to its Canada Line tunnellers certifying with Local 1611 clearly showed that it did not believe that this post-war settlement was still in force. The Joint Venture assumed that, because it was employing Temporary Foreign Workers, it had a licence to ignore labour laws, employment standards, and the human rights code. It was a pardonable assumption given that, with the exception of the BC Human Rights Tribunal, none of the authorities responsible for enforcing these laws and standards, the Labour Relations Board, the Employment Standards Branch, and the Department of Human Resources and Skills Development Canada (HRSDC), made any serious effort to do so. But what is striking about these agencies' tacit support for the employer is that it was not in any way unusual. Both the Labour Relations Board and the Employment Standards Branch carried out their duties much as they would have when dealing with any Canadian company employing Canadian workers, which is to say with both eyes firmly shut. They appear to have seen no reason to open them just because the victims in this case were foreign workers. The LRB may have overstepped the limits when it ignored the employer's blatant violation of Section 45 of the Labour Code and of Section 13 of the Human Rights Act, but this was more a failure to recognise the publicly acceptable boundaries to misfeasance than a break with its previous practice.

Yet if any government agency should be singled out for special opprobrium, that agency would be the federal Department of Human Resources and Skills Development Canada, the agency responsible for administering the Temporary Foreign Worker Program. The TFW Program required the Joint Venture to pay the industry's prevailing wage, which was considerably more than $14.47 an hour, never mind $3.47 an hour. Yet there is no record of HRSDC at any time making an attempt to investigate and ensure that the Joint Venture was abiding by the terms of its agreement with the Department respecting its employment of foreign workers.

Given that the viscerally anti-union BC Liberal Party was in power in the province, it was not surprising that provincial agencies stood by while foreign workers were being mercilessly exploited. But the inaction of the federal government was the final proof, if more were needed, that across Canada the post-war settlement with labour was becoming a dead letter.

Ignaeio Sanchez, one of the last SELI workers still in Vancouver, with Mark Olsen, Business Manager.



Seymour Capilano Twin Tunnels, in North Vancouver.