IN THE MATTER OF AN ARBITRATION

Between

SODEXO CANADA LIMITED
(Hereinafter referred to as "the Employer", "Sodexo", or "the Company")

And

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION, LOCAL 779
(Hereinafter referred to as "the Union", "Local 779", or "HERE")

THE ISSUE

This dispute arises from a finding in favour of the Union in an arbitration award dated July 21, 2014, in which this arbitrator remained seized of jurisdiction to determine matters of interpretation arising out of the award and also of the *quantum* of compensation should the parties subsequently not be able to agree.

Hearings on the issue of *quantum* were held at St. John's, NL, on July 14th, September 14th, 15th, 18th, 19th and October 5th and 6th, 2017.

For the Union:	Mr. Dana Lenehan, QC, LLB, *et al.*
For the Employer:	Mr. Greg Anthony, LLB, *et al.*
Sole Arbitrator:	Mr. David L. Alcock

PART 1

The original arbitration award was quashed by the Newfoundland & Labrador Trial Division. That decision was overturned by the Newfoundland & Labrador Court of Appeal, whose decision was subsequently affirmed by the Supreme Court of Canada when it declined to consider an appeal. Meanwhile, the Employer dismissed original counsel, retained another firm to pursue the SCC appeal, and most recently appointed Mr. Greg Anthony as counsel for the compensation issue.

Having never received the wage payment ordered by the 2014 arbitration award, and having little indication that the Employer was seriously pursuing the matter of compensation, the Union actively sought a hearing for the arbitrator to act upon his jurisdiction on the matter.

On July 14, 2017, counsel met with the arbitrator (Mr. Anthony by telephone) to discuss the status of this file and to schedule futher dates for formal hearings.

During the morning of September 14, 2017, the parties attempted to settle the matter, but failed to do so. In addition to counsel for the Employer and the Union, representatives for Tata Steel Minerals Canada were at the hearing and participated in the settlement discussions. Also, Tata officials from India were involved in the decision not to settle. The arbitrator was not asked to participate in the settlement process. Formal hearings followed immediately after settlement talks failed.

The following items were received into evidence by consent:

C#1 Ministerial Statement – "Tata Steel Minerals Canada Constructs New Mining Project in Labrador" – Department of Natural Resources, May 20, 2015.
C#2 TATA Steel Minerals Canada Ltd. DSO Project Activities Environmental Protection Plan, April 10, 2015.

Witnesses for the Union:
Mr. Bill Schenkles, Vice-President, Sunny Corner Enterprises (via Summons *Duces Tecum).*
Ms. Martine Cyr, Former Camp Coordinator, Sodexo, at the DSO Project (via Summons)
Mr. Doug Harris, CPA, CA
Mr. Peter Smith, Operations Manager JSM Electrical (via Summons)
Mr. John Tobin, Former Sodexo employee at the DSO Project (1st Cook).
Mr. Pat McCormick, Business Manager & Financial Secretary, HERE Local 779.

Witnesses for the Employer:
Mr. Marc Alloy, General Manager, Sodexo Canada Ltd, at DSO Project.
Mr. Ratnesh Choubey, VP Commercial, Procurement, Tata Steel Canada.
Ms. Lisa White, Financial Director Sodexo University Segment in Canada (Sodexo Head Office, Burlington Ontario).

The following evidence was submitted by witnesses:

BS#1 TATA MASTER DATA FILE – From start to December 12, 2015
MC#1 Copy of Spreadsheet for one-day showing employees at all the various employee living accommodations, the Contractor's name, their arrival and departure date and whether their room was occupied on that particular day.
MC#2 Spreadsheet to demonstrate a period greater than one-day (e.g., one month) showing which employee is leaving and who to expect will be coming in the next few days.
MC#3 Summary compilation of Lodging for August 4, 2015 (prepared by Ms. Danielle Rodé – Assistant to Mr. Lenehan) showing total number of rooms and breakdown by accommodation location).

DH#1 Spreadsheet: HERE Local 779 Calculation of Benefits Due from December 18, 2013 to March 28, 2014.

DH#2 August 10, 2017 letter from Doug Harris, CPA, CA to Dana Lenehan explaining the relevant information received from Sodexo, and the basis and assumptions for all calculations contained in 6 page Spreadsheets titled Detailed Calculations John Tobin from March 29, 2014 to December 7, 2015; Pages 1 of 171 and 171 of 171 showing examples of Detailed Payroll Calculations for HERE Local 779 employees alphabetically from April 1, 2014 to December 31, 2015.

DH#3 Spreadsheet containing summary of Payroll Calculations per DH#2 showing Cumulative Monthly Totals from Month ending April 2015 to month ending December 2015.

DH#4 Letter dated August 30, 2017 from Doug Harris to Dana Lenehan containing observations and comparisons between the "Harris Ryan" Spreadsheet and the "Sodexo" spreadsheet, opining that the major difference between the spreadsheets may be accounted for by the inclusion by Harris Ryan of hours in November and December 2015.

DH#5 Summary spreadsheet indicating the difference between what Sodexo employees ought to be paid vs what they were actually paid from December 18, 2013 to December 31, 2015.

PS#1 CLRA Collective Agreement for IBEW Local 2330, January 23, 2012 to April 30, 2016.

PS#2 List of JSM Electrical employees on the DSO Project from April 2015 to November 2015.

PS#3 Employee Breakdown of Weeks Worked on DSO Project site from April 2014 to November 2015.

PS#4 Claim of Lien by JSM Electrical Ltd. Against the Government of Newfoundland & Labrador and Tata Steel Minerals Canada, Ltd. (supporting JSM's end date on site as November 23, 2015).

LW#1 Spreadsheet of wages and benefits owed from December 18, 2013 to March 28, 2014, comparing Sodexo's calculations against the Union's calculations by Doug Harris, concluding that the Union's calculation was $20,594.06 higher.

LW#2 Spreadsheets showing wages and benefits calculations for one employee (John Tobin) based on the CLRA Agreement from March 29, 2014 to December 28, 2015.

LW#3 Spreadsheet summary of the final calculations for all Sodexo employees from December 18, 2013 to December 31, 2015.

RC#1	TSMC Project Location, Ore Deposits, Mining and Processing Facilities in Northern Canada, Logistics from Mine to Port.
RC#2	Full page expansion of Logistics from Mine to Port (see RC#1).
RC#3	TSMC aerial photograph of Dome, Processing Plant and Loop for DSO Project.
RC#4	New Millennium Iron's News Release 14-01 providing an update on TSMC's Direct Shipping Ore Project Progress as of January 20, 2014.
RC#5	New Millennium Iron's News Release 14-11 as of November 12, 2014 announcing "Commencement of Haulage on New KéRail Line at TSMC's DSO Project and Planned Shipping Activity for 2014.
RC#6	New Millenium Iron November 12, 2014, News Release 14-12 providing Financial Results for the third Quarter ended September 30, 2014 (see RC#6).
RC#7	New Millenium Iron News Release 15-16 dated November 12, 2015 announcing Financial Results for the third Quarter Ended September 30, 2015.
RC#8	PLAT graph depicting the ore price action downturn, which has been affecting TSMC.
RC#9	Mining, Processing, Railing and Shipping statistics for the years 2012, 2013, 2014, 2015, 2016 and 2017.
RC#10	New Millenium Iron Corporate information document, *circa* prior to March 2014.
RC#11	New Millenium Iron Corporate information document, circa 2016, DSO Project, NML's Investment in Tata Steel Minerals Canada.
AP#1	CV for André Przybylowski, P.Eng., M.Eng.
AP#2	Daily Report Manpower Data – Meals Served at Sodexo Camp (with First Nations, from January 22, 2014 to December 31, 2015.
AP#3	Lodging – August 4, 2015 showing Location, Contractor, Construction Workers, Non-Construction Workers and Total Workers.

Union's Opening Statement

The SCC upheld the arbitrator's original award, which ordered payment of $314,118.56 for wages for the period December 18, 2013 (i.e., the date the Union was certified) to March 28, 2014. The Employer has not made that payment.

Determination of benefits for that three month period was also ordered. The parties have not made such determination. Therefore, payment is also due for benefits for that period.

Also, wages and benefits are due and payable on a continuing basis until the end of the construction phase of the DSO Project (see p.84 of the award). Mr. Vincent Plamondon, AECOM, anticipated during the original hearings that construction would be completed by the end of December 2014. However, construction has actually extended to December 31, 2015. Wages, benefits and remittances are due for the above period.

The Union asserts that the end of construction was the completion of the Dome and the Processing Plant, which allowed processing of ore for shipping. All construction workers on Site were paid in accordance with the various CLRA Trade collective agreements. However, the CLRA agreement with HERE, Local 779 has never been honoured by the Employer for its bargaining unit members.

The Union is seeking:

1. Payment of all wages and benefits for Sodexo employees from March 29, 2014 forward.
2. Determination and payment of the benefits portion, in addition to the arbitrator's order for payment of wages in the amount of $314,118.56, for the period December 18, 2013 to March 28, 2014.

The differential portion of wages and benefits owing since March 29, 2014 is $6,851,836.00. No shift premiums are included in that amount, but are estimated by the Union's accountant to be approximately $102,000.00.

The total of all relevant segments for the time periods noted is $7,585,554.00.

In addition to the foregoing, the Union is seeking CLRA Agreement wage increases of 2% per year, i.e., 4% for 2014 and 2015.

Furthermore, the Union is requesting the payment of interest of approximately $500,000. The Employer's position is that it does not owe the amount the Union has determined.

The Union feels that the arbitration award took into account every reasonable factor, even that mining had continued from 2012 until 2014, and that the tonnage of ore produced was more than the amount shipped. There was no significant shipping of ore in 2014, but that changed during 2015. Even if Sodexo employees were supporting production, construction was continuing. Construction ramped up in 2014 and 2015. Clearly the Employer does not want to pay its employees anything arising from the arbitration award. And it appears that it effectively wants the arbitrator to reconsider his original decision.

Employer's Opening Statement

Counsel agreed that these proceedings constitute a continuation of the arbitration award.. However, the Union has oversimplified the situation. This is not a pure math issue. The interpretation of the collective agreement is relevant.

It was the Employer's position that the main issue is the period of time the CLRA agreement continued to apply to Sodexo employees. That period did not end on December 31, 2015 as the Union claims. Rather the collective agreement ceased to apply after April 1st, 2015.

For the purposes of this exercise, the Employer has supplied calculations for consideration from December 18, 2013 until the end of December 2015.

The Employer asserts that Articles 7 (Hours of Work) and 9 (Shift Work and Split Shifts) of the collective agreement are relevant.

There is disagreement on how Article 7.01 applies to Sodexo's employees based upon whether they were on a Monday to Friday 5 day, 8 hours/day schedule, or on a compacted schedule of four 12 hour days, Monday through Thursday inclusive. The issue is how straight time and overtime are calculated. Recognizing that Article 7.03 prohibits the pyramiding of overtime, the Employer used the example of an employee who works 12 hours per day, Monday through Thursday, suggesting the following:

Monday	10 hrs straight time	2 hrs overtime
Tuesday	10 hrs straight time	2 hrs overtime

Wednesday	10 hrs straight time	2 hrs overtime
Thursday	10 hrs straight time	2 hrs overtime

But the Union pyramids overtime by applying the following:

Monday	10 hrs straight time	2 hrs overtime
Tuesday	10 hrs straight time	2 hrs overtime
Wednesday	10 hrs straight time	2 hrs overtime
Thursday	4 hrs straight time	8 hrs overtime

In the Employer's view, the employee must work 10 hours straight time on Thursday so that 40 straight time hours may result. The collective agreement does not permit the use of overtime worked to calculate more overtime.

The Employer also disagrees with the Union's interpretation of Article 9. However, these are minor issues. The main issue is how long the CLRA agreement continued to apply to Sodexo employees. April 1, 2015 is the date the Employer asserts the collective agreement ceased to apply because on that date full commercial production occurred, a major shift in the process of the DSO Project. At p. 45 of his award, the arbitrator wrote:

> When Local 779 was certified, on December 18, 2013, the primary focus of work at the site was construction. Since there was no mining performed from December 2013 until the date of this hearing, the primary focus was construction activity. The January 2014 News Release C#6 supports that fact, describing any mining activity as 'trial production that would increase when all the necessary construction work is completed'. Therefore, the evidence clearly establishes that the primary focus of work performed on the project site since 2011 has been construction, not mining.

Since 2011 and up to 2014, all production was on a trial basis to test the operations process, the storage arrangement and the railway system. In other

words, that was a necessary development stage to determine if it was feasible to go into full commercial production. This followed proper procedures from Tata Steel Minerals Canada (TSMC) to determine the grade of iron ore for production. It was also a test to determine if the infrastructure (e.g., the railway) was reliable to get the ore to market. Also, if the moisture content is too high at Sept Isles, the ore cannot be loaded. All the relevant systems had to be favourable to enable full commercial production. That point occurred in 2015.

On p. 68 of the arbitrator's award, seven items of common ground were identified. Items 2, 3 and 5 respectively state:

> 2. that the nature of the development work at the Site in and around the Dome is predominantly construction work, with some trial mining work occurring seasonally.
>
> 3. that the construction phase is anticipated to be completed by December 2014, after which the predominant activity is expected to be mining operations.
>
> 5. that the nature and scope of the work performed at the camp to date is accommodation and catering, mostly for contractors' construction employees.

It is not the relevant issue which construction trade people were on site. Construction activity was mainly on the Dome. Sodexo employees are not construction people. The arbitrator's conclusion was that the role of Sodexo employees was to support construction activity. In April 2015, full commercial production occurred and has not changed since.

The Union recognizes that there was no construction activity past December 2015. So the test of when the collective agreement ceases to apply is when the predominant activity on site is not construction.

At p. 73 of the arbitration award, the arbitrator was satisfied that:

> ...from the date of the certification order on December 18, 2013, construction activity was the predominant activity on that project and that the clientele at the camp were predominantly, but not exclusively, construction industry employees.

The *raison d'etre* is to accommodate construction employees and to continue in that role while the construction phase continues to exist. That changed in April 2015.

The first press release referred to "trial production" in January 2014. The first shipment of ore occurred in September 2013 and the second shipment was in December 2013. All of that was trial production. The press release also referred to TSMC's plan to increase trial production.

The Dome was never brought on line. The KéRail Line (26 km for the site connecting to other rail lines) had its inaugural implementation on November 24, 2014. Prior to that, ore was shipped by truck. It was not economically feasible to continue trucking. So TSMC could not go into production until the 26 km rail line was completed.

Another press release said that regular shipment of ore started in April 2014 and 1.7 million tons of ore were shipped after that.

The Union has argued that ore was "produced". That is the wrong word. Some 900,000 tonnes of ore were mined in 2013 and a similar tonnage was shipped in 2014. From 2015 onward, the ore shipped has been 8 times more than the ore shipped in 2013 and 2014. All the testing was completed and there was full commercial production. Since April 1, 2015, construction has not been the predominant activity on site. In 2013, the cost of construction was more than the cost of production. All the foregoing show that there was a significant shift in 2015. Construction was not the predominant activity on the site. Therefore, it was no longer the *raison d'etre* for Sodexo employees.

The Employer will introduce evidence on three camp sites (e.g., the LIM Camp) where only construction employees were accommodated, but Sodexo performed no support services for those employees. At the Sodexo camp, construction employees lived and ate there. The third area was the town where construction employees had been assigned accommodations. Those accommodations were not serviced by Sodexo except for food services.

In the result, the predominant activity for Sodexo employees has become support for operations, not exclusively, but predominantly. Since April 1, 2015, the support role of the Sodexo camp switched from predominantly construction to predominately operations. What happened in construction at the Dome had absolutely no effect on the product. The purpose of the Dome is to augment

production and extend production during winter. That was not done. The construction activity from 2015 onwards could not have any effect on TSMC's future production.

Union Response

On the matter of interpreting Article 7.1 of the CLRA agreement, the Employer's calculation amounts to a $81,000 difference, which is on the edge of settlement.

The evidence in the arbitration award by Jean-Marc Blake from TSMC was that the intent was always to produce 1.4 tons of ore. That was anticipated by TSMC in 2011 and nothing changed in that regard. The Employer's response was that markets changed and that Mr. Blake was only an HR Manager.

THE EVIDENCE

The Union

Mr. Bill Schenkles, VP Sunny Corner Enterprises, explained the role of his company as Principal Contractor for Mechanical, Electrical and Structural work on the project from July 2013 to December end 2015. Employees of multi-trades were hired for that work, and all trades were subject to their respective CLRA collective

agreements, working a 14 on 7 off rotation. Pages 1 and 2 of BS#1 demonstrate the Construction Manpower Loading by Day and Month from July 15, 2013 to December 10, 2015. Mr. Schenkles explained that after the short period of negligible loading from mid-December 2014 to approximately January 4th or 5th, 2015, which was caused by a payment issue involving the Project Owners, trades employees were engaged in construction activity until the latter part of November 2015 which was as great or greater than during 2014. The exception was a partial decline commencing in April 2015 to a low in mid-June but gradually ramped up again to peak construction manpower from late July through August and September, and then starting to decline again till final construction activity in December. The week ending December 10, 2015 was the last time Sunny Corner had employees on site. Mr. Schenkles testified that, the plant was not operational at that time.

Referring to various purchase orders in BS#1, Mr. Schenkles indicated that the original contract price with Sunny Corner for construction was $24 million, but by December end 2015, his company had billed TSMC for $110,300,000. Most of the original scope of work was contained within the Dome (see AECOM DSO – Timmins Project pp. 3-17). But a subsequent negotiated broader scope for work outside the Dome included such items as structural steel reinforcing for the Dome

and outfeed conveyors (from the Dome to the stockpile). Drying equipment and temporary crusher work, etc., was also inside the Dome.

Page 18 purchase order no. 2100000935 indicates an order date of 07.08.2014 for mechanical work within the Dome and for the Transfer Tower system leading into the Dome, which was installed late in the fall of 2014.

Page 20 for order no. 2200000554 shows a price of $7,500,000 for miscellaneous services, including commissioning, for the delivery date of April 9, 2015. This work could have occurred anywhere including inside and outside the Dome. Mr. Schenkles indicated that there were changes in this subsequently.

Page 25 for order no. 2200000684 shows a price of $322,400 for Commissioning Support Service, for a delivery date of July 14, 2015. Mr. Schenkles explained that this was support to the owner late in the project, for which 4 – 5 people per day were assigned. Commissioning was a part, but not a big part, of the work being done. Out of 100 employees, about 10% were involved in commissioning. The price of $322,400 increased to $600,000 for other work which was subsequently added.

On page 30, purchase order no. 2200000667 for $109,000 contains the scope of supply material and labour for a number of bypass installations: delivery date June 23, 2015.

On page 50, the Grand Total on the TATA Master Employees List (not including sub-contractors) shows 742 employees who worked with Sunny Corner on the project. Some "staff" are included in that number.

Per Sunny Corner's contract, TSMC paid for the employee accommodations. There was some discussion about where employees would be lodged, e.g., the LIM Camp, or the Main Camp on site. However, employees did not have an option where they would be accommodated; they were assigned where to stay.

In cross-examination, Mr. Schenkles testified that demobilization of staff started two weeks before December 10th, 2015.

He also testified that BS#1 is a document showing a portion of the scope of construction work done. The AECOM document indicated the date of February 25, 2013, but Mr. Schenkles agreed that the actual contract date was October 23, 2013. Page 2 of BS#1 indicates the construction Manpower Loading per Month from July 2013 to December 2015. The graph shows the total manpower per month, but not all the employees were on site at the same time. Manpower peaked at more than 300 employees on site during August and September 2015.

With respect to p. 12, Mr. Schenkles explained that the document indicated the activities and dates initially started. Demobilization occurred much later.

The Purchase Order on p.18 for mechanical work, was extra to the original contract. This area was not designed originally, but was designed later for the

purpose of providing somewhere to transfer the ore. Mr. Schenkles indicated that the full process in the DOME was not operating in July/August 2014.

The Purchase Order on p. 20 for the performance of "miscellaneous services at DSO Construction site" shows the Validity Start Date of 01.02.2014 and the Validity End Date of 31.07.2015. The Order Date was 09.04.2015. Mr. Schenkles testified that Sunny Corner's work concerned the operating process within the DOME, but this work could have occurred anywhere, including inside the DOME and outside the DOME. There were changes in this work subsequently, including commissioning.

With respect to p. 25, Mr. Schenkles testified that the Commissioning Support Services activity did occur between May 1, 2015 to July 31, 2015, but he did not have the exact date available at the hearing. He agreed that, since commissioning took place whenever an operations system was being completed, it was possible that some commissioning occurred prior to May 1, 2015.

Further on the matter of commissioning, Mr. Schenkles was asked if many processes within the plant had to be commissioned. He could not say how many. Page 7 of the Contract indicates that all items would have to be commissioned, but he was unable to say whether there was one commissioning for each item, or there were many. Not every commissioning takes the same amount of time: some things

could take 5 minutes; others might take 5 days. However, commissioning would have to occur before the plant went into operation.

Asked about the "Supply of material and labour for installation of Bypass arrangement" on p. 30 (Validity End Date 31.07.2015), Mr. Schenkles was not told what the purpose of this was. In his opinion it could be temporary or permanent; in any event, that work was within the Dome. In accordance with his Company's contract on p. 7, items inside the plant were inside the Dome.

In answer to counsel's question, Mr. Schenkles testified that Sunny Corner has done installation work in Newfoundland and Labrador before. In this province and in Nova Scotia, his company voluntarily recognizes trades employees, and will work under the appropriate trade collective agreements in construction or maintenance work.

With respect to where Sunny Corner's workers stayed while employed on the DSO project. Mr. Schenkles testified that there is a Sodexo Computer system showing where all the workers were accommodated. He personally stayed at the TSMC camp. In 2015, the LIM camp was used for Sunny Corner people, but he could not say for certain it was predominately Sunny Corner people who stayed there.

Ms. Martine Cyr testified under summons. She is presently a Project Administrator at a remote Hydro Quebec camp where the work rotation is 20 days

on – 8 days off. Ms. Cyr previously worked for Sodexo for a couple of years at the Timmins camp in Labrador. She worked most of 2014 with Sodexo and was employed with Mamu Construction until January 2015.

Ms. Cyr recalled the certification of the Union at Sodexo, but was not personally involved.

As Camp Co-coordinator with Sodexo, Ms. Cyr was responsible for booking all available accommodation rooms for all the workers on the DSO site. She managed room assignments so it would be known who was coming in and who was leaving. Cleaning staff would normally report for work at 0530 hours, but some cleaners would be required after supper for a few hours for the night shift.

Since the camp outside Schefferville was a remote "fly in, fly out" camp, reservations were required. Sodexo employees were on a 28–14 rotation. Other accommodation camps also in the area, such as the TSMC camp, the LIM camp and the Town camp had different rotations (different contractors had different rotations). Management usually had a 14–7 rotation. Ms. Cyr was also responsible for assigning to the TSMC, LIM and TOWN camps.

Sodexo used an application process for accommodations. Ms. Cyr received all the reservations from all the various Contractors, matched their requests to room availability, handled the cleaners' schedule, and then reported the numbers and names of all workers accommodated every night to TSMC, Security, and Cleaning

(bed sheets were changed weekly). Copies were also sent to the LIM camp, the people who would be staying in the Town, and to Sodexo itself. Therefore, all concerned would know how many people to expect for the week.

Ms. Cyr introduced MC#1, one small part of an Excel spreadsheet showing a single day (August 4, 2015) of all camp accommodations everywhere, denoting which Camp, person's name, the Contractor, Day/Night Shift, Arrival and Departure dates, and the number of days of occupation. The final page shows the Total Rooms available (633), Total Accommodations assigned at each Camp (Site Camp (188), TOWN/RAIL (231), LIM Camp (143), Rooms Under Maintenance (3), Total Rooms vacant (68), and Total Rooms Occupied (565)). Ms. Cyr worked very hard on developing these excel files; all the formulae were hers. Therefore, she saved a copy on her own computer to ensure that it was conveniently available for her to use.

MC#2, introduced by Ms. Cyr, was a two-page document she generated from the Sodexo system to show the accommodation situation for Local 779 members for periods greater than one (1) day, e.g., a running total showing each day from August 4, 2015 to December 12, 2015. Ms. Cyr was unable to discuss this document further after Mr. Anthony stated that her documents were subject to privacy legislation and he raised the concern that the information was confidential

and was obtained improperly, thereby constituting a violation of the legislation insofar as it violated the employee's fiduciary duty to her employer.

Mr. Lenehan argued that MC#1 and MC#2 are properly introduced into evidence, having been shown to Mr. Anthony beforehand. He consented to them being allowed in, and the first document was discussed. The Union argued that the Company is now seeking a retroactive ruling from the arbitrator, which should not be permitted because the Employer has effectively waived its right to object to the introduction of these documents. Also, the Employer heard Ms. Cyr's own testimony stating the reason why she had these files on her computer, but Mr. Anthony did not object at that time.

Counsel for the Employer agreed that he did not object to MC#1, a document dealing with one day, but MC#2 goes much beyond that one day. It is based on personal information that was obtained in violation of privacy legislation.

Indicating that he will lead evidence to support the Employer's position, Mr. Anthony stated that the Company will consent to these documents being introduced on condition that the information is considered accurate for one day only because other items can change subsequently for other days. Also, Mr. Anthony requested the electronic copies from the same file for all these documents.

Counsel for the Union then proceeded with his direct examination of Ms. Cyr, who further explained some of the details concerning Marc Alloy's

accommodation in MC#1. She also explained that the LIM Camp was closer to Schefferville approximately 40 minutes away from the Site, and it accommodated all Sunny Corner employees.

In arranging rooms, Ms. Cyr said she received direction from TSMC for its people only. They had the same room each time. For convenience sake, she tried to ensure that each Contractor's employees stayed in their own place.

Ms. Cyr introduced MC#3, a detailed summary of the foregoing accommodations on August 4, 2015 prepared by Ms. Danielle Rodé, Mr. Lenehan's assistant, which Ms. Cyr reviewed and was in agreement. This document shows the various Contractors whose employees were being accommodated at the various Camps. Although she did not know the specific details of what each person was doing, she knew that the majority of those accommodated were working at construction.

In cross-examination, Ms. Cyr agreed that her role was to arrange accommodations and she did not see what people were actually doing every day. However, back then she knew what the various Contractors were doing. The reservations they requested designated their employees as tradesmen. She also knew which Contractors worked on mining. For example, she worked for Mamu who did construction as well as operations.

Ms. Cyr testified that she did not know the work schedules of Sodexo employees, but she took care of the Cleaners' schedules. Night shift depended on which Contractor was involved. The Cleaners could not clean a room where a person was asleep. Ms. Cyr was aware that one Cleaning lady did the night shift rooms, but she did not know what hours she worked. Sometimes there was overtime if more night shift rooms needed cleaning. In some cases, Cleaners would have to stay later afterward for staggered hours. Given that Sodexo employees worked 10 hours a day, Ms. Cyr experienced lots of overtime in her own job.

She explained that, with minor exceptions, she tried to keep Contractors in their same areas. TSMC picked the locations where Contractors would live in accordance with discussions with those Contractors. It also depended on what their individual contracts said about locations for accommodation.

Ms. Cyr further explained that MC#1 is derived from the Sodexo System. She built this spreadsheet from that System.

She could not recall exactly when her reports started to go out, but certainly she did the reports six months before she finished work in mid-August 2015. On her days off, her replacement would use the same spreadsheets.

In answer to the arbitrator's questions, Ms. Cyr testified that TSMC would change locations for Contractors often, depending on what rooms would be

available. The main Camp on site was always filled first. The other locations were extra because there was insufficient accommodation space at the Site.

Mr. Doug Harris CPA, CA testified in the original arbitration hearings, providing an accounting assessment of wage damages from December 18, 2013 to March 28, 2014 in the amount of $314,118.56. The July 21, 2014 arbitration decision ordered that amount to be paid. It is still unpaid.

Mr. Harris testified that he has now completed five current assessments of further compensation amounts that were unable to be determined at the time of the arbitration award, but were ordered in accordance with pages 82 to 85 of the award:

DH#1 two page spreadsheet for benefits owed from December 18, 2013 to March 28, 2014. Calculations were based on the wages determined under the CLRA agreement for Sodexo employees who were working during that period. This was not done by person but on the number of hours per person per day. Benefits determined total $318,679.17 (see bottom left page 2).

DH#2 consists of an August 10, 2017 letter from Harris Ryan accountants to Union counsel Dana Lenehan outlining the payroll documentation from Sodexo relied upon, the arbitration award, the relevant CLRA agreement, and the logic, procedures and assumptions relied on in the methodology that determined the

remaining pay package amount owing for the period March 29, 2014 to December 31, 2015, which exceeds the amounts paid out by Sodexo by $6,851,836.22. The whole 6 pages of the letter plus the 4 page summary of calculations attached are essential to understand Mr. Harris' results. This is especially so for the calculation of overtime, the job classifications chosen, the calculation of vacation and holiday pay, basing Health & Welfare benefits and Pension benefits on hours "earned" instead of hours "worked", and addressing the issue of Shift Differential. Since the information contained in the letter is quite detailed, I consider it necessary to set out its contents here.

Dear Mr. Lenehan

Re: Hotel and restaurant Workers Local 779 (HRW 779) v. Sodexo Canada Ltd. (Sodexo)
Your letter of May 17, 2018 (sic)

We acknowledge receipt of the above-captioned letter from you by which we were retained by HRW 779 to perform certain calculations relating to the payroll records originating with Sodexo. These calculations are necessary because of an arbitration award dated July 21, 2014 affecting HRW 779 and Sodexo.

We acknowledge receipt of the other documents and items referred to in your letter, particularly the arbitration award of David Alcock, dated July 21, 2014, and the collective agreement between HRW 779 and the CLRA effective May 1, 2011 to April 30, 2016.

The Sodexo payroll information was received by us as two separate computer files. The first was a Microsoft Excel spreadsheet, prepared (we have been told) by Sodexo which contained the payroll data from December 18, 2013 to October 31, 2015. The second was an Adobe Portable Document Format (commonly referred to as a "pdf") file, also

prepared by Sodexo, and which contained the payroll data from December 18, 2013 to December 31, 2015.

In accordance with our understanding of the instructions contained in your letter and applying the terms of the arbitration award and the collective agreement as we understand them, we have carried out certain procedures and have calculated certain results, the details of which are explained below.

1. We started with the Excel Spreadsheet provided by Sodexo. We added it to the information contained in the pdf file for the period November 1, 2015 to December 31, 2015. We used a software program which is capable of converting a pdf file into an Excel spreadsheet in order to do this. We copied the relevant lines from the new spreadsheet into the original Excel spreadsheet.

2. We deleted all the rows from the original Sodexo spreadsheet which contained information up to and including March 28, 2014.

3. We deleted from the spreadsheets payments in the amounts of $138.32, $147.00, and $85.33 which represented payments to three employees where there were no hours recorded and no indication of the applicable job classification. These three employees received no other payroll amounts in the period under review.

4. We revised the data to identify situations where a given employee had multiple entries for the same day. We combined these entries into a single data row for each employee for each day. In certain cases, this has resulted in a large number of hours for an employee in one day. We calculated the pay as if this number of hours was accurate for that day.

5. We developed a software program capable of analyzing the data to determine when overtime should be paid and calculating the amount of each benefit payable under the collective agreement. This program was run against the data obtained in steps 1 and 2 above and produced the output submitted as part of this report.

6. The program used the following logic to determine when an employee would be paid overtime:
   a. The pay week runs from Monday to Sunday
   b. The project operated on the basis of a 4 days per week, 10 hours per day regular work week.
   c. The pay for all hours worked in excess of 10 hours per day was calculated at overtime rates.
   d. If the cumulative total of hours from Monday to Thursday was greater than 40, the pay for all hours in excess of 40 was calculated at overtime rates.
   e. The pay for all hours worked on Friday, and Sunday was calculated at overtime rates.

7. Sodexo did not always describe job classifications consistently with the descriptions in the collective agreement. We assigned employees to job classification based on a combination of the Sodexo descriptions, the classifications described by Mr. McCormick in his evidence on pages 30 and 31 of the arbitration decision, and the classification clarifications provided to us in 2014. The regular rate of pay for each employee was determined by reference to his or her job classification.

8. We calculated the pay and benefits in accordance with Schedules in Appendix A to the collective agreement applicable to the dates of the actual payroll records. The rates used to calculate benefits were consistent throughout the period under review. The basic wages changed on May 1, 2014 and May 1, 2015 in accordance with the collective agreement.

9. Vacation pay and holiday pay were calculated as percentages applicable to the total wages otherwise determined.

10. The Health and Welfare and Pension benefits were calculated as a rate per hour. The "hour" in these calculations is an "earned" hour and not a "worked" hour. In other words, for these benefits, one hour of overtime pay earns two hours of each benefit.

11. All other benefits paid on an hourly basis were calculated based on "worked" hours. In these cases, one hour of overtime pay earns one hour of each benefit.

12. The Sodexo data contained certain pay items coded as type 65. We have been told this is a pay type described as "Travel Allowance Earn[ing]". We have excluded these amounts from our analysis.

13. The issue of shift differential has been raised but not accounted for. Only five lines in the Sodexo information contained a reference to shift pay. We have not been informed as to which employees consistently worked the night shift. We therefore excluded the five lines of shift pay from our analysis and we have not calculated any amount of shift differential.

14. Vacation pay was not specifically identified a vacation pay in the Sodexo data. We treated all payments (other than the amounts referred to in points 11 and 12 above) for which there were no hours recorded, but for which an amount was paid in the Sodexo data, as vacation pay. The total "difference" between the amounts paid by Sodexo and our calculation of the amounts which should have been paid therefore takes these other Sodexo payments into account.

The results of our work are contained in the computer files which accompany this report. These files have been provided in both Microsoft Excel and pdf formats.

15. The files named **2017 08 10 Detailed Calculation of Amounts Payable.xisx** and **2017 08 10 Detailed Calculations of Amounts Payable.pdf** contain the detailed calculations of pay and benefits for each relevant row of data. We have attached a printout of pages 1 and 171 of this data. As can be seen, it would require 171 pages of ledger size (11 x 17) paper in landscape mode to print the entire file. The following observations may be made:

    a. The columns labelled A through I contain the original Sodexo data referred to in paragraphs 1, 2 and 3 above.

b. In cases where we amalgamated multiple rows into one row, the calculation described in Column H is not accurate. In these cases, the amount in column represents the total of amounts combined into one row.

c. Columns J and K represent the recharacterization of the hours in Column F based on the rules described in paragraph 5 above.

d. Columns L and M show the respective "worked" and "earned" hours for each row. These columns assist in verifying the calculation of the amount of the benefits to which they apply.

e. Column N is the applicable rate of pay as per the collective agreement for the appropriate classification. These rates change in accordance with paragraph 8 above.

f. Column O is the overtime rate. It is provided to assist in verifying the calculation of the overtime pay.

g. Columns Q through X contain the formulae used to calculate each benefit. The rates applicable to each benefit are drawn from the collective agreement.

h. Column Y represents the total pay and benefits as calculated under the terms of the collective agreement.

i. Column Z represents the amounts paid by Sodexo and not identified by pay type (see paragraph 14 above). We considered these amounts as vacation pay, and took them into account in determining the balance owing by Sodexo.

j. The relevant totals on page 171 agree with those in the other files below.

16. The accompanying pdf, **2017 08 10 Detailed Calculation of Amounts Payable.pdf,** contains the same data in pdf format.

17. The files named **2017 08 10 Summary pf Amounts Owing to Each Employee.xisx** and **2017 08 10 Summary of Amounts Owing to each Employee.pdf** contain a summarization, in employee name sequence, of the data contained in the detailed reports described above. We have attached a printout of this file for your reference. The totals at the end of the files agree with the similar totals in the detailed files. These files show that the amounts calculated in accordance with the methodology described in this report exceed the amounts paid by Sodexo for the relevant period by $6,851,836.22.

18. We have also included two files named **2017 08 10 Detailed Calculations John Tobin.xisx** and **2017 08 10 Detailed Calculations John Tobin.pdf**. We have provided a printout of this file for your reference. This data was extracted from the detailed file referred to above and reports the amounts for a particular employee for the period. The totals in these files agree with the amounts reported on the relevant line of the summary reports referred to in paragraph 17 above. The report and files highlight how certain aspects of the calculations are affected by the data. For example:

    a. The green bars serve to highlight distinct payroll periods. Note that there is a period that ends on 2014-03-30 which contains time for only two days. The pay period starts again on 2016-03-31 for purposes of determining overtime.
    b. The "WeekNum" column shows that Sodexo used a different pay period.
    c. By observing any particular pay period, the method of determining overtime hours can be observed. The regular and overtime hours are reported in columns J and K.
    d. 2014-07-25, 2014-07-26, and 2014-07-27 show the effect of starting to work on a Friday.
    e. 2014-09-01 shows the effect of combining multiple rows of data.

We trust the foregoing is satisfactory. If we can be of further assistance, please contact the undersigned.

Yours very truly, Douglas G Harris CPA., CA
Partner

Mr. Harris reiterated how he calculated overtime for a work week commencing on Monday. For each Monday, Tuesday and Wednesday, it was 10 hours straight time and 2 hours overtime. Thursday was 4 hours straight time and 8 hours overtime. Friday was 12 hours overtime.

Sodexo's calculations were done on the basis of five 8 hour days.

DH#3 Detailed Payroll Calculations were produced from DH#1 and DH#2 items above. DH#3 provided cumulative totals month by month to April 2015 as well as continuing to December 31, 2015.

The next document submitted was DH#4, an August 30, 2017 letter from Douglas Harris to Dana Lenehan written subsequent to receiving Sodexo's spreadsheet on August 29, 2017. This was an attempt to identify the differences between his and the Sodexo spreadsheet. For ease of comparison, DH#4 is set forth below (with apologies for format alterations):

Dear Mr. Lenehan:

Re: Hotel and Restaurant Workers Local 779 (HRW 779) v. Sodexo Canada Ltd. (Sodexo)
Your email of August 29, 2017
The spreadsheet NLDOCS-#358059-v1Tata_Steel_CBA_Calculation_EM_

240817.XLSX (the Sodexo spreadsheet)

We have reviewed the above-captioned spreadsheet and can offer some preliminary comments thereon. Our references to the HR spreadsheet, or amounts calculated by HR should be taken to mean those contained in the Harris Ryan spreadsheet **2017 08 29 Mon to Thurs 10 hrs per day Complete – By Month.XLSX,** a copy of which we have provided separately.

We can make the following observations and comparisons between these two spreadsheets:

	Item	Sodexo	Harris Ryan
1	Regular work week	Five days, eight hours a day	Four days, ten hours a day
2	Overtime (at double time)	Hours worked in excess of eight per Day, and all time worked on Saturday or Sunday	Hours worked in excess of ten per Day, and all time worked on Friday, Saturday, or Sunday
3	Hours on Friday	First eight hours of pay on Friday at straight time	All hours at double time
4	Pay rates to 2014-03-28	Uses CLRA contract	Adjusted to reflect the arbitration decision
5	Benefits to 2014-03-28	As per CLRA contract	As per CLRA contract
6	Months of November and December, 2015	Excluded	Included
7	Total hours worked	145,598	157,565
8	Total earned hours	201,704	227,196
9	Total paid to employees by Sodexo	$2,730,798	$2,792,468
10	Reduction in pay from Using arbitration	(discussion re option, see DH#5)	$61,458
11	Total owed to HRW 779 employees	$6,819,314	$7,403,629
12	November and December 2015 hours	0	$10,647
13	November and December 2015 Earned hours	0	$15,272
14	Paid to employees by Sodexo in November And December 2015	$0	$185,107
15	Total November and December 2015 dollars	$0	$502,932
16	Off-Shift Premium	$0	$102,000 This is an estimated figure.

The Total difference between the Sodexo and HR calculations before the shift premium (Item 11 above) is $584,324. Fully $502,932 of this is accounted for by the inclusion of November and December 2015 in the HR calculations (Item 15). The balance, $81,381.86, is caused by a number of minor differences. Clearly, the only significant area of disagreement is with respect to the inclusion of those months.

The adjustment to the wages paid in the period prior to March 29, 2014 (the original arbitration decision) is $61,458 (Item 10).

With November and December 2015 accounted for HR has 1,321 more hours paid by Sodexo than Sodexo does. This may be accounted for by HR's treatment of "negative hours" as per our previous report. We are not clear as to how Sodexo has treated these hours.

Again, with November and December 2015 accounted for HR has calculated $8,526 more paid by Sodexo than Sodexo has. HR's figures are more favourable to Sodexo than its own figures.

Finally, with November and December 2015 accounted for HR has calculated 1,219 more earned hours than Sodexo has.

We trust the foregoing is satisfactory. If we can be of further assistance, please contact the undersigned.

Yours very truly,

Douglas G. Harris CPA, CA
Partner

Mr. Harris introduced DH#5, which constitutes the summary page spreadsheet reflecting the calculations in DH#4 for the period December 18, 2013 to December 31, 2015. It indicates the difference between what Local 779 members ought to be paid and what they were actually paid.

These calculations were adjusted to reflect no pyramiding of overtime.

The amount of $7,342,169.66 does not include shift premium. Nor does it include any calculation for interest.

To get a feel for an appropriate amount for shift premium, Mr. Harris chose to look at the four highest paid employees. His estimate was approximately $102,000. To calculate an exact amount for shift premium, Mr. Harris would have to know

exactly which employees actually worked shifts. As the matter stands, the information received from Sodexo shows the number of hours employees worked per day, but does not show when they worked during any day.

In cross-examination, Mr. Harris testified that the Job Classifications in DH#1 Column B are based partly on Sodexo's evidence, partly on the evidence Mr. Pat McCormick provided in the original hearings on the merits, which are in the arbitration award, and partly on the CLRA agreement. See DH#2 Item 7 for details.

Vacation pay in Column Q on DH#1 is calculated on the collective agreement (gross pay x 8%), based on the number of hours worked. Everything on Sodexo's numbers indicating an amount paid but not identified, Mr. Harris assumed it to be vacation.

An example of how overtime would be calculated in DH#2 for an employee who started work on a Friday, Friday would be his first day worked and he would be paid 2 times the hourly rate for all time worked. Mr. Harris explained that overtime in DH#5 is calculated on the Union's interpretation of the collective agreement, which pays more overtime to employees than Sodexo determined.

Mr. Harris clarified DH#3, DH#4 and DH#5 to counsel's satisfaction, particularly explaining that the $61,458 difference between the $7,403,628.24 and $7,342,169.66 at the RHS bottom Column of DH#5 is reflected in Item 11 on

DH#4, namely the reduction in pay awarded to employees as a result of the arbitrator's decision to choose option 2 instead of option 1 of the Union's submission.

Mr. Peter Smith Operations Manager for J & M Electrical (JSM) since 2004, testified that his Company performs electrical installation in the commercial and industrial construction sector. His employees are fully trained Red Seal certified electrician tradespersons who are unionized by IBEW Locals 1620 and 2330. See PS#1, the 2011 – 2016 CLRA collective agreement for Local 2330.

For the TSMC project, JSM was primarily involved in Electrical Installation in the plant, and Instrumentation tubing, which was done later in the project. The cost of the project to JSM was $38 million. Some preparation work was done beforehand, but JSM started work on the site in May 2014. IBEW Local 2330 supplied the required tradespersons and supervisors. Mr. Smith was personally on site six times during the course of JSM's contract, which ended with the last work order on November 23, 2015. The number of JSM's employees on site varied, depending on other trades work being performed, and TSMC's receivables. Sunny Corner was the primary project Contractor. The CLRA collective agreement was followed for all trade work on the project.

PS#2 is a list in alphabetical order of JSM's employees compiled by JSM's Office Manager for Sunny Corner. One person on that list worked a single day. This list contains employee's start and end dates and shows generally that employees worked regularly during those periods. JSM was on site at all times except the Christmas period. The 256 names include 22 management people (numbers: 24, 32, 38, 79, 84, 92, 112, 121, 124, 154, 155, 156, 157, 158, 162, 166, 195, 202, 208, 217, 226, 254). Therefore 234 unionized tradespeople worked for JSM on site.

PS#3, also prepared by JSM's Office Manager, shows the actual work weeks for the various employees. This document also shows the TOWN accommodations (individual homes provided by TSMC in Schefferville) from which they commuted to the work site. Accommodation for JSM's employees was part of its contract with TSMC. Arrangements were handled by certain people on site. The contacts on site were Martine Cyr and another lady.

In cross-examination, Mr. Smith testified that the electrical installation and the tubing work occurred in the Dome. A third party did the commissioning. JSM did its own "pre-commissioning" in preparation for the third-party commissioning. Installation activities were ongoing while pre-conditioning was being done. Essentially the third party confirmed the pre-conditioning, possibly assisted by an electrician.

Mr. Smith testified that demobilization on site involved returning to TSMC what it supplied. Generally, there were fewer people on the site during demobilization. He also indicated that, while May 2014 was the start of work on site for JSM, there may have been some employees in April beforehand. In PS#2, Note #3 shows some off-site employees for pre-work. They were not employed on the project site. The "boots-on-the-ground" start was May 2014 with 8-12 initial employees. During peak numbers, there were 45-48 employees per shift (2 shifts at the time) and 90-100 employees during the summer and fall of 2015. Mr. Smith agreed it was possible that JSM had 100 employees on site in April 2015 and that numbers decreased on a sliding scale in the summer and fall.

Asked about PS#2, Mr. Smith said that there were some layoffs periodically. However, it would involve some checking through the documentation to determine if that happened for a particular individual. For example, he would have to cross reference with PS#3 to determine if employee Roger Baker was sometimes on layoff.

He presumed that the information on PS#3 was determined by noting particular individuals who received the transportation amount per the collective agreement. The assignment of people to accommodations was done by TSMC and the two women on site. Mr. Smith was not involved in those logistics. However, he was aware that the employees who lived in Schefferville were native people

who were hired in accordance with the project agreement. Those four people performed cleaning services in the original buildings on site. Mr. Smith testified that he never discussed whether or not those native individuals were union members, or what they were paid. After he called to check on their situation, he learned that they were not union members and they were not paid in accordance with the CLRA collective agreement.

PS#4 was introduced to support Mr. Smith's evidence on the end date of November 23, 2015. This document was a claim of lien against Tata Steel Minerals Canada, Ltd. in the amount of $7,612,261.43 filed on December 21, 2015 for the work completion date of November 23, 2015.

In answer to the arbitrator's question how overtime was paid by JSM under their CLRA collective agreement, Mr. Smith testified that for 12 hour shifts, payment was as follows:

Monday	10 hours straight time	2 hours overtime
Tuesday	10 hours straight time	2 hours overtime
Wednesday	10 hours straight time	2 hours overtime
Thursday	10 hours straight time	2 hours overtime
Friday		12 hours overtime

Mr. John Tobin testified that he lives in Bay Roberts and has worked the last two years at Muskrat Falls with Labrador Catering handling the accommodations, bookings, etc. Previously he worked in Schefferville, Que at TSMC's Timmins

camp where he was employed by Sodexo as 1st Cook from April 2012 until December 2015.

In 2012, he relieved for the Head Chef and did the scheduling for the cooking staff. The Head Chef did the ordering of food, etc. He had been there 2-4 days when Mr. Tobin first started work. In 2013, a Chef was hired, so Mr. Tobin performed the duties of Cook.

In his first year, Mr. Tobin's schedule was 28 days on and 7 day off (2 of which included travelling). In his second year, his schedule was 28 days on and 10 days off (including travel). In his third year, his schedule was 28 days on and 14 days off (including travel days; i.e., there was no payment for travel time). Indeed, if he arrived on site before lunch he would start work immediately. Mr. Tobin resided at the TATA Camp. Sometimes he was on site for more than 28 days, even as many as 32 days, when a large turnover of staff occurred and he was required to help out.

In his first year, there was a person with the title of 1st Cook, but when the Head Chef came the other person (Scott Rogers) became 2nd Cook. While he and Mr. Rogers were employed together there, Mr. Tobin worked 12 hours a day and Mr. Rogers worked 10 hours. But whenever Mr. Tobin was gone, Mr. Rogers worked 12 hours. At those times, Mr. Rogers was the only 1st Cook on site, probably with assistance from Pam O'Neil. When Mr. Rogers left employment

there, Mr. Tobin was generally the only 1st Cook. There was only one other 1st Cook after that. Mr. Tobin's hours were from 8 am to 9:30 pm. It was "requested" that he had to be at work for all those hours. The standard for his shift was 12 hours daily.

Mr. Tobin was familiar with the Kitchen staff on site and the Drivers, etc., but not too familiar with the Housekeepers. Although he could not cite particular categories, on any given day there could be 9-10 employees in the Kitchen. On an average day, the bus from Schefferville would arrive before 7 am. The Sandwich Makers and the Housekeepers were on that bus and would start their shift at 7. The bus would depart again at 5 pm. Breakfast was from 4:30 am to 8 am. One Dishwasher came in at 4 am. Mr. Tobin started at 8 am and Mr. Rogers came in at 10 am. Three Sandwich Makers per shift were required. And another dishwasher came in at 5 pm.

Hot Lunch was from Noon to 1 pm for approximately 200 Administration people. Later a new building for administrative people was erected on site by the Dome. Mr. Tobin made up the food for the Cambro containers, or special orders, which were picked up by labourers and taken to the trailers around the site and to the Lunchroom by the Dome. A full Cambro container would feed 45-50 people. Mr. Tobin would send down 8 or 10 containers per day.

Mr. Tobin estimated that around 280 workers could be accommodated at the Camp. What the Kitchen served daily depended on how many were accommodated. He recalled that 480-500 people was the largest service he had to prepare for. That was provided to people that were assigned to the TOWN, the HOLLINGER Camp, plus some others.

For security purposes, employees who were entitled to eat at the site camp were supposed to sign a sheet, but in Mr. Tobin's view, a lot did not sign the sheet. There were no ID Badges for those at the Sodexo camp.

Two breakfast cooks came in at 11 pm, i.e., a 2nd Cook and another person. The Shovellers also started early about 4 am.

Supper took place after 4 pm, and the majority of time Mr. Tobin worked if there was a night shift.

By referencing DH#1, Mr. Tobin testified that the information in his name indicates that he was on site from November 10, 2015 to December 7, 2015. The last page shows him with 38.5 regular hours at the rate of $21.00 per hour. In his opinion that probably included his vacation pay, and also a $2.50/hr premium he had requested.

Some of the Contractors he was familiar with on site included Gray Rock, JSB, Sunny Corner, IPA, Rail Co., TATA, AEComm, etc.

By way of cross-examination, Mr. Tobin testified that he was employed on site for all of 2015. The schedule for meals did not change that year. Breakfast was 4:30-8:00 am. The Kitchen then closed until Noon; Lunch was served from Noon-1:00 pm; the Kitchen was closed till Supper, which took place from 4:15 to 8:00 pm.

Staff requirements for Breakfast were 2 Cooks and 1 Dishwasher. Lunch was Mr. Tobin, a 2nd Cook, Salad Makers, a Dishwasher and Sandwich Makers. Dinner was 2 Cooks plus 1 or 2 Dishwashers.

On the same level as the Kitchen was the Recreation Room, Nurses Station, Sodexo office, and Boot area. The Kitchen itself is separate from the Cafeteria. Mr. Tobin's job is in the Kitchen, not the Cafeteria. The "Sign-in" process took place at the entrance to the Cafeteria. Only non-residents of the Camp would have to sign in. Normally someone was there to watch over that process. Mr. Tobin testified that he was unable to see who did or who didn't sign in. He knew how many to expect from the Camp itself. He could see from the list some who did not sign in; he knew who actually ate there. However, Mr. Tobin conceded that it was not his responsibility to track those who signed in and those who didn't.

Based on his own experience, it was normal to prepare twice as much food for those expected to come for meals. Individuals were allowed to have multiple helpings. Mr. Tobin was able to estimate how many servings to prepare after being

notified how many rooms were booked at the Camp and in the Town, etc. Marc Alloy would give him a note every day indicating how many people to expect for meals. In addition to those staying at the Camp on site, those accommodated in the Town, Schefferville, Hollinger, would eat the Buffet Breakfast, Lunch and Supper.

Mr. Tobin prepared Lunch and Dinner, but occasionally did Breakfast Buffet as well. He also worked later than usual on the site. The preparation for 480-500 people occurred during the summer of 2015 (June, July and August). Mr. Tobin knew some of the people at that function personally, but he could not say whether they were all construction people or all operations people. He also could not say what proportion were construction or operations. As for the Cambro containers he filled every day for the administrative offices and others spaced around the site, the Contractors ordered in advance and the containers were picked up by labourers.

In answer to the arbitrator's question how he reached the conclusion that, during his tenure, it was mostly construction workers who Sodexo served at the site Camp, Mr. Tobin testified that the camp was originally to accommodate the growing numbers of construction workers, like Sunny Corner, that the night shift was opened for Sodexo in 2013, and he felt the same way about the presence of construction workers during 2015.

Mr. Pat McCormick, Business Manager and Financial Secretary for Local 779, testified that Sodexo has not paid any money of any kind under the collective agreement to the bargaining unit members. The arbitration award was rendered in July 2014 and since has been referred to judicial review in the Trial Division, appeal in the Court of Appeal, and the Supreme Court of Canada. The essential result is that the arbitration award stands. The arbitrator ordered Sodexo to provide payroll records to the Union for the purpose of determining the issue of compensation. Such records were received by the Union at various times to enable Mr. Harris to compute his figures on the matter. A meeting was held between lawyers for TSMC and the Union in 2017, which resulted in disagreement on each other's numbers.

The interpretation of the collective agreement for calculating overtime was at issue. Given that both sides already seemed to be in agreement that the decision of this compensation arbitration would accept either Mr. Harris' original interpretation of overtime, or the Employer's interpretation, sometimes Mr. McCormick's testimony on the subject suggested yet another option, which complicated and confused the matter.

Mr. McCormick testified that a twelve hour shift weekly schedule was used by Sodexo. Another schedule was four 10 hour shifts. Another option was a 5 day week, 8 hours a day. Mr. McCormick told Mr. Harris, it did not really matter

which schedule – just do the numbers. He testified that, in the construction industry, employees are scheduled 40 hours per week. On a 14 day schedule, employees would be guaranteed a total of 80 regular hours no matter what day of the week they started work. Any work over 10 hours a day would be double time; work on Friday, Saturday and Sunday would also be paid double time. After discussing the details on which overtime was calculated by Mr. Harris and the Employer, Mr. McCormick testified that Mr. Harris' new estimate was based on 10 hours straight time and 2 hours double time for Monday, Tuesday, Wednesday and Thursday, plus all time worked on Friday would be paid at double time.

Mr. McCormick did not know if the IBEW CLRA collective agreement had the same overtime language as the Local 779 CLRA collective agreement did.

In cross-examination, Mr. McCormick testified that there was no notice to commence bargaining for 2016 and 2017. Since there were no construction workers at the site Camp in those years, the collective agreement would not apply.

Mr. McCormick reiterated that work on Friday is always paid at double time.

The Employer

Mr. Marc Alloy, Sodexo General Manager, testified that he has worked for SODEXO for 5½ years, first as Assistant General Manager. Mr. Jacques Dufresne was General Manager at the main Camp on site until he was transferred in 2015. In

2012, Mr. Alloy worked elsewhere for Sodexo while the Timmins site was closed for 2 months. His role on site was to ensure the scope of work for housing, food services and janitorial services as per the company's contract with TSMC. In 2012, his rotation was 3 days in, 1 day out; in 2014 it was 28 days in, 14 days out; and from 2014 onwards it has been 21days in, 10 days out.

Mr. Alloy explained that housing in the area was 45 km away. The Sodexo Camp on site has not really changed except for the 25 foot and 50 foot dorms (trailers) that were in the same general area. The Camp's capacity increased after 2012. The work site was in the Dome and on operations facilities. Sodexo employees work at the Camp and they are mostly housed at the site except for some Housekeepers who commuted from the Town of Schefferville, Quebec. No Sodexo employees worked at the Dome. Prior to 2016/2017, there was no reason for Sodexo employees to go around the Dome area, except to deliver lunch to TSMC's administration and management.

In 2015, Sodexo assigned people to accommodations at the LIM Camp. Fifty-five people were accommodated at the Hollinger Camp outside Schefferville; those people ate lunch and supper at the site Camp. Those accommodated in the Town also ate at the site Camp. The reservation system used by Sodexo to assign accommodations was first used at the Timmins site in 2012. That system is now used elsewhere.

Showed MC#3, the Lodging Summary for August 4, 2015 prepared by Danielle Rodé, Mr. Alloy testified that he never saw that document until it was presented at this arbitration hearing. However, in his opinion, the total of 188 housed at the Camp on August 4, 2015 was close. At the end of 2015, the Camp was closed for mould. The LIM Camp also ended in 2015.

Sodexo determined where to house people by using a contractor reservation system which was in place since the end of 2013. The system involved Contractors sending requests to Sodexo, which assigned accommodation locations and rooms; it is still in use today. The MC#1 reports were done daily and sent to TSMC, all the Contractors, Security and Sodexo.

Mr. Alloy was familiar with the information contained on MC#1. It shows the person's name, the arrival and departure date, the dates the person stayed in the room, and whether that person was in the room on August 4, 2015. Clearly, if no name shows, then nobody stayed in the room. However, Mr. Alloy indicated that things can change for a number of reasons, e.g., a person might stay for a longer or shorter period than intended. That aside, Mr. Alloy considered MC#1 to be accurate for the particular date of August 4, 2015. On MC#2, Mr. Alloy pointed out arrivals occurring on the day someone left, which indicates how things can change along the way.

Mr. Alloy testified that Sodexo had no involvement in construction, mining, or shipping of ore. Also, Sodexo provided no services at all at the LIM Camp, which was 25 km away, except for arranging initial accommodations. The LIM Camp had its own food facilities, and packed lunches for the people housed there.

Ms. Lisa White testified that she works in Ontario as the Financial Director for Sodexo's University Segment in Canada. She had some involvement with the Timmins project in the area of risk assessment. Ms. White has a BBA (1994) from Brock University, and has been a CPA/CGA since 2008. She prepared LW#1 in accordance with the arbitration award. This document compares Sodexo's calculations with the Union's (Mr. Harris' calculations in DH#1) for the benefit amount owing from December 18, 2013 to March 28, 2014. Her methodology included information from the arbitration award, the CLRA collective agreement and Sodexo's payroll data. It is based on the arbitrator's award of wages ($314,118.56) and Sodexo's calculation of hours. Vacation pay is 8% of $594,261.91= $47,540.95; Holiday pay is 5%= $29,713.10. DH#1's calculation of hours x rates of pay claims a total of $662,889.83. Therefore, Vacation pay =$53,031.19 and Holiday pay=$33,144.49. As for difference in benefit totals for the various categories, Ms. White indicated that the Union's calculation of hours work included statutory pay hours, which were hours not worked.

LW#2 is an excerpt from Sodexo's data and calculations above for one person (John Tobin). The same rationale may be applied to all other Sodexo employees. The Sodexo payroll week is Saturday to Friday, but LW#2 is based on Sunday to Saturday. That was also applied for calculations for all other employees. The classifications chosen come from the classifications in the Sodexo data and the classifications in the CLRA collective agreement. Mr. Tobin's end date was December 28, 2015.

LW#3 is a summary of the final calculations for all Sodexo employees working from December 18, 2013 to December 31, 2015. The top section provides the month-by-month totals, the bottom section provides running totals. Also, the columns in LW#3 correspond to the total hours determined in LW#2.

In cross-examination, Ms. White said that she works out of Sodexo's head office in Burlington Ontario. In November 2016, she was asked by her boss, Bernard Taylor, to participate in the above calculation. At that time, she had all the necessary information for LW#1, including the amount of $314,118.56. She testified that she never read the arbitration award; however, she was provided with the above amount. She considered that to be the difference between the total amount and what SODEXO had paid. Ms. White confirmed that she saw Mr. Harris' documents before she testified at these hearings. She referred to DH#1 in LW#1. Mr. Harris said that his calculation of benefits sought was $318,679.19,

which was based on the collective agreement. She did not look to see why this was higher than the $314,118.56; she viewed the $314,118.56 as the difference owed. However, Ms. White did not know what Mr. Harris based his $318,679.19 on.

Ms. White agreed that she was asked to isolate the name of John Tobin for an individual calculation. The biggest difference between hers and Mr. Harris' numbers for Mr. Tobin was because she relied on the actual work week he worked, not on the presumed work week in the collective agreement. The application of overtime hours is significant in this. Ms. White agreed that she did not read the arbitration award to see what the arbitrator might have said about that subject.

On the issue of classifications for employees, Ms. White testified that she cross-referenced the "field" in the Sodexo information with the information in the collective agreement. She could not remember any clashes in the classifications used. She would have to check back to make sure, but she could not recall any specific employee who might warrant a check.

By way of re-direct examination, Ms. White testified that her first calculations made in November 2016 were on the basis of a 5 day, 8hrs/day weekly schedule. However, she did the calculation for a 4 day, 10 hr/day schedule just last week.

Mr. Ratnesh Choubey, a Tata Steel employee for 17 years, testified that he has been VP Commercial – Procurement functions for three years. He explained

that Tata Steel invested in Labrador and Canada. Commercialization of an iron ore mine for the Tata Project occurred in 2010. This mine was previously owned by New Millenium, which identified ore underground, but shut down its operation after 1980. Therefore, when the Tata Steel DSO Project began, no operation was in place. Development of the site started in 2011, including infrastructure for the Mine, the Processing Facility, Logistics, the Plant, and the Customer.

The mine involved exploration, geological mapping, laboratory work and checking with customers who would do their own ore testing. Ore testing occurred in both places. Not all ore can be utilized because of the presence of elements such as arsenic. Ore had to be chemically examined to ensure that it was devoid of such chemicals for its processing plant.

Third party labs tested in 2011 and 2012, and a shipment was sent to Europe and China for customer testing to see if it was acceptable for use in large quantities in their blast furnaces. Mr. Choubey explained that if the chemical composition of ore contained a high Sulphur content, it would destroy the quality of any steel produced. It was up to each customer to satisfy itself of the acceptability of ore shipped to its facility. In 2013 and 2014, testing revealed that all aspects of the ore received was good for the customers.

Processing in the mine involved exposing the ore, moving it to the processing facility for crushing and cleaning, thereby preparing it for transport to shipping facilities.

A dry processing system only crushes the ore to a quality content meeting a standard of 62%. This process, which produces fine particles, was completed in 2013.

A wet processing system also washes the ore and adds chemicals so that it increases the ore's quality to 65%, which is considered to be a premium product. TSMC decided to construct this additional process to provide it with the option to use it when ore prices were high enough to justify its extra cost. This wet processing system was constructed from 2012 to 2014 and completed in 2014, but TSMC decided not to operate it at that time for economic reasons. Also, in 2015 the wet process was not brought on line because the price of iron ore decreased to the unprecedented level of $45/tonne. Therefore, for the years 2015, 2016 and 2017, while ore prices were so low, TSMC solely employed the dry operating system.

During 2014, there was no need to produce any more ore; it had enough stockpiled. In 2015, the operating season was from April to November and the Company has continued to use the dry processing system ever since.

Mr. Choubey also explained that the moisture content of iron ore is an important consideration for determining the transportation and shipping season. At 10 degrees below zero, moisture in iron ore freezes. It is not possible to transport the ore when it freezes in one huge chunk because it is too difficult to handle at Schefferville for loading.

On the matter of logistics, RC#1 demonstrates the ore deposits, the mining and processing facilities in northern Canada, and the logistics involved in transporting iron ore from the Timmins mine to the Shipping Port facilities. There are some 618 kms of railway lines between Mine and Port. Mr. Choubey testified that when small quantities of ore (e.g. 40T) were first shipped to Customers for chemical composition testing purposes, loads were transported by truck from the Timmins Mine yard to the existing 203 km TSH Rail line, which connected to the 349 km QNS&L Rail line (used by the IOC, now Rio Tinto, Mine in Labrador City). TSH was owned by a combination of First Nations peoples. The QNS&L Line ran from Labrador City to the port city of Sept-Iles Quebec.

In planning for full production and transporting much larger quantities (e.g., 1500 tonnes), TSMC anticipated the need to construct a relatively short rail line of 26 km to connect the Mine yard to the TSH Rail line. This short section is known as KéRail and was constructed by TSMC between 2013 and July 2014. However, on completion, KéRail could not be used immediately. Transport Canada issued

the final certificate at the end of October 2014 -- after the Lac Megantic rail disaster. Meanwhile TSMC had to rely on trucks for transportation of ore for testing purposes to the TSH line. Clearly, the KéRail line was critical to be ready for full production shipping.

In 2015, mining occurred in Area 3 and the ore was shipped through the Sept-Iles port. In September/October 2015, the CFA Rail line permitting access to the Pointe Noire port was previously owned by the Quebec government. TSMC had usage agreements with the various rail lines, first in 2013/2014 for the small shipments to Europe and China for testing, in August 2014 an agreement was made with TSH and later a 3-year agreement from April 2015 to 2018. TSMC also has a usage agreement with CFA, which promises to ship a certain number of tonnes of ore, payable whether or not usage occurs – a requirement of the Rail line. Port usage agreements have been in place from October 1, 2014 to May 2018. Now, TSMC has two shipping options: Sept-Iles and Pointe Noire.

Mr. Choubey explained that the product produced by TSMC at the Timmins Mine is very different from other iron ore products in Canada. For example, IOC has to crush, screen, and wash its ore. Sept-Iles has traditionally shipped IOC ore, but it had lots of capacity in 2013 -2014. Therefore, it was comfortable with an expected higher tonnage agreement from TSMC. There is also capacity in Pointe Noire, a public/private arrangement available to multi-users. In 2015, TSMC was

using only Sept-Iles. In 2016, TATA tried one shipment through Pointe Noire. In 2017, more tonnage was shipped. Therefore, TSMC is currently using both ports.

RC#3 shows a rail line loop from the upper left and around to the back of the Dome. Mr. Choubey testified that the Dome is there to keep the process from freezing while using the wet processing system. There are 2 crushing facilities: Plant No. 1 was completed in 2014 and used in 2015, Plant No. 2 was operational in 2012 and handled the shipments for testing. Essentially, the Dome allows the Company to have a better process by extending the processing season and by improving the ore quality to 65% or 66%. Therefore, the Dome provides two advantages. However, the wet process was not brought on line while there was a downturn in iron ore prices.

Removing overburden has continued each year while the Company moved from deposit to deposit. However, there was no mining in 2014 because there was enough ore stockpiled. As of October 2014, the certificate for KéRail (completed in July 2014) was obtained. At that time, most rail usage agreements were in place and the Customers were ready to receive large shipments of ore. In August 2014, there was a small difference in price between the Standard 62% Dry process and the Premium 65% Wet process. Full production occurred in April 2015 and the price of ore was improving. However, the Dry process was still being employed because of the economic conditions already explained.

In commenting on Construction activity on site in 2015, Mr. Choubey testified that everything outside the Dome had been completed earlier. The only thing left was some commissioning inside the Dome. From April 1, 2015, onwards the Company was in full production and shipping. The Dry process was fully functional in April 2015. The only thing not operational was the Wet process system under the Dome. The price difference between the Standard and the Premium products made it uneconomical to use the Wet process.

RC#4 is New Millennium Iron's News Release 14-01 providing an update on TSMC's Direct Shipping Ore Project Progress as of January 20, 2014. Mr. Choubey indicated that the Timmins project was hauling ore by truck for small shipments going to prospective customers at that time. This release anticipated "completion of the processing plant in Q4 2014 with commissioning by year-end".

RC#5 is New Millennium Iron's News Release 14-11 as of November 12, 2014 announcing "Commencement of Haulage on New KéRail Line at TSMC's DSO Project and Planned Shipping Activity for 2014. Mr. Choubey testified that this marked the first time opportunity for greater shipping tonnages was available after the KéRail Line certificate had been received in October 2014. From that point on, the Company was fit to go as far as bringing ore to market was concerned, subject of course to the state of the market at the time.

Also on November 12, 2014, News Release 14-12 provided Financial Results for the third Quarter ended September 30, 2014 (see RC#6). In the fourth paragraph it states, "a crushing and screening operation is well established and there was significant progress made on the continuing construction of the covered ore processing plant".

RC#7 is News Release 15-16 dated November 12, 2015 announcing Financial Results for the third Quarter Ended September 30, 2015. The fourth paragraph states in part: "1. Near completion of processing facilities and commencement of trial production; 2. Regular shipping of crushed and screened ore with 10 cargoes totaling 1.7 million tonnes in the 2015 operating season through the third quarter". Mr. Choubey testified that an additional 600,000 tonnes was shipped from October onwards.

Commenting on RC#8, the PLAT graph depicting the ore price action downturn, which has been affecting TSMC, Mr. Choubey indicated that in August/September 2015, the Company decided not to operate the Wet process during the winter months, but would continue with the Dry process until November 2015. The Company is now cautious about the price rate difference between the Standard and Premium products.

RC#9 contains the Mining, Processing, Railing and Shipping statistics for the years 2012, 2013, 2014, 2015, 2016 and 2017. Mr. Choubey explained that this

document supports his former evidence about the development of commercially viable production. In his view, the Company must ship more than 1.5 - 2.0 million tonnes for it to be a commercially viable operation. Pointing to 72,807 tonnes shipped in 2014, Mr. Choubey described that amount as a single shipment. In contrast, the shipped amount of 2,262,190 tonnes in 2015 constitutes about 14 shipments. Mr. Choubey insisted that, by any measure, one or two shipment is nothing as far as commercial viability is concerned.

RC#10 is a Corporate information document, *circa* prior to March 2014, indicating *inter alia* on page 2 that:

> ...In 2013, TSMC (Tata Steel Minerals Canada) continued with production of DSO grade products by continuing operations of a portable crushing and screening plant. TSMC achieved significant milestones first by shipping the first train to Sept-Iles on July 11 and then first shipments on September 14 to Tata Steel Europe. Most of the necessary agreements are in place, and development and construction activities are ongoing to achieve the estimated production targets of 1.5 mtpy in 2014, ramping up to 5 mtpy in 2015 and reaching 6 mtpy in 2016.

RC#11, another 2016 Corporate information document, was introduced to further support Mr. Choubey's testimony, stating that:

> ...Shipping of the crushed and screened DSO began in 2013 to Tata Steel Europe and to China, and seasonal deliveries to these markets continue. Construction of the processing facilities is essentially complete and trial production has been successfully achieved, but the plant is not yet in regular operation.
> During the 2015 season, there were thirteen shipments totaling approximately 2.3 million tonnes. For the 2016 season through September 30, there were nine shipments totaling approximately 1.6 million tonnes....

Commenting on the effect of government legislation on the operation of the Mine, Mr. Choubey said that there was early federal financial support by way of a tax rebate on fuel. The provincial government provides credits for fuel and electricity. However, when the Mine is in production, electricity credits are given, but not fuel credits -- since May 2015. Also, there is no credit for diesel fuel used in mining equipment. Since the site is not connected to any electrical grid, diesel fuel has been used for the generators.

On the issue of employment for First Nations people, Mr. Choubey testified that an agreement with the Newfoundland & Labrador government for various native groups required a hiring commitment from TSMC for 40 native employees on site, which was reported to government on a monthly basis. Most of those people are based out of Schefferville and the Company provides monthly reports on a quarterly basis to First Nations. Currently there are approximately 25 Naskapi individuals employed. During the construction period, the commitment was still there, but there was a problem with lack of trades skills. Therefore, there was a greater expectation for increased native employment during mine operations. Native employees are good at operating equipment. They live in their own homes, but receive food services on site from Sodexo; they also now constitute 25% of the workforce – approximately 300 employees are on site each day. Mr. Choubey was

not familiar with SODEXO's computer employee accommodation system, but he does know that system does not track natives because they live in their own homes.

In cross-examination, Mr. Choubey confirmed that he has been VP Commercial with Tata Steel Minerals Canada since August 2014 and has been associated with the DSO project since 2014 negotiating with the Howse project. Prior to that he was Head Business Analyst with Global Minerals Resources based in India with Tata Steel. He now lives in Montreal.

Mr. Choubey was not involved before the original arbitration hearing in March 2014. However, he knew that no mining occurred during the summer of 2014. In his view, at the time RC#10 was written it was reasonable for TSMC to estimate a production target of 1.5 mtpy in 2014 (see p.2) because it would have taken into account the operation of the Dry and the Wet processes. RC#11 indicates that 9 shipments totaling 1.6 mtpy were shipped to September 30th. Mr. Choubey agreed that the Company's intent has always been to ship product of up to 1.8 mtpy using both the Dry and the Wet process when the price of ore is right.

Mr. Choubey agreed that RC#9 demonstrates that some stockpiling of product is essential. He further agreed that in 2015 the crusher which would have been used for the Wet process would also be used for the Dry process and shipping.

By way of re-direct examination, Mr. Choubey testified that the price of ore was approximately $120/tonne when RC#10 was published in 2014. Clearly, the

price of ore would determine the amount of product produced – between 1.5 and 2.0 mtpy would make the operation commercially viable. The price of ore was around $50-$60 in 2015, 2016 and 2017. In Mr. Choubey's view, now is the time to reset and go; the assumption is that the Mine will produce even during low ore prices if future expectations are reasonable.

Mr. André Przybylowski P.Eng., M. Eng, provided his credentials in his CV (AP#1). Since 2009 he has been VP and Senior Consultant with Revay and Associates Limited, Montreal Que, providing consulting and analyses to large corporations. During his 40 years in business, he has worked with large companies such as Canadian Comstock, Honeywell, National Construction and SNC Lavalin. Mr. Przybylowski also has extensive experience with industrial companies (e.g., paper mills) and has held many positions in the construction industry. He testified that he is familiar with TSMC in Labrador and that he was retained 6 or 7 weeks ago to determine the number of workers served by the Sodexo camp, and also to determine how many were construction or non-construction people served by Sodexo.

To undertake this work, Mr. Przybylowski needed a count of those people lodging at the Sodexo Camp, the Town, and the LIM Camp, etc. Sodexo's daily reports indicated this detailed information, all available on EXCEL Spreadsheet.

He also found which individual was working on any particular day with a particular company. Using information from TSMC and his own familiarity with construction companies, he determined which companies were construction companies or non-construction companies. He then categorized the companies, not the workers. Once he developed the company categories, he identified where non-construction people were accommodated. His analysis speaks to everyone who was served at the Sodexo Camp, who were accommodated there, and those who were accommodated elsewhere, but were served meals at the Sodexo Camp.

In Mr. Przybylowski's opinion, spreadsheet AP#2 for 2014 and 2015 is accurate, with a few gaps that were not of a serious nature. In essence, AP#2 shows an overall decline of service for construction workers from 67% to 20%. The construction percentages were dropping in 2014 and also during the first quarter of 2015. Then after April and May, a flip occurred between construction workers served and non-construction workers served.

Asked about commissioning work, Mr. Przybylowski testified that such can be attributed to construction, i.e., each contractor has to ensure its own work. He also explained that some of this activity drifts into activity delivered by people deciding to commission systems for the Employer as a matter of startup. In AP#2, he included all construction commissions of all contractors. If some of that were to be deducted out, it would decrease the numbers for construction.

AP#3 was submitted to show the location of lodging for employees on August 4, 2015 by contractor, construction workers, and non-construction workers. A summary of meals on August 4, 2015 is included, showing the percentage of Construction meals as 45% of the total.

In cross-examination, Mr. Przybylowski, testified that he was retained verbally in early August) by Mr. Éric Azran's Montreal law firm (Strikeman Elliott) to perform the above analysis. (Mr. Azran was in attendance at the compensation hearings). Mr. Przybylowski had never worked for Strikeman Elliott or TSMC before. His instructions came from Mr. Azran: he was expected to review the manpower levels served by Sodexo to construction and non-construction workers. He agreed that in that exercise, some companies went in and out. The material he was given came from Sodexo's daily sheets, purchase orders, etc. A Mr. Philip Coren (sp?) from Revay assisted him by gathering the various pieces of information on the spreadsheets he was given. However, Mr. Przybylowski directed the consult. He knew he might be called as a witness in this matter. He was given the arbitration award and also the various court decisions. From those documents, he understood that because the arbitrator's final award in 2014 said the work at Sodexo was predominately construction work, then the collective agreement applied. In his opinion, Sodexo's association with the construction industry ceased.

(At this point in the hearing, Mr. Azran and Mr. Lenehan became involved in a testy dispute about Mr. Azran's objection to a lack of solicitor/client privilege with this witness and Mr. Lenehan's questioning whether Mr. Azran had standing at this hearing. They were allowed some latitude to have at each other, whereupon the situation defused and the hearing continued, wisely, without any request, or need, for a ruling from the arbitrator).

Mr. Przybylowski testified that he did not personally go to the Sodexo Camp. However, he interviewed the Project Manager and others from TSMC, but no one from Sodexo.

Regarding AP#3, the Lodging Summary, Mr. Przybylowski testified that he saw document MC#3 by Martine Cyr. He acknowledged that he placed the Sodexo employees in the "non-construction" category because they were not construction workers. He also acknowledged that he did the same thing in AP#2 despite having read the arbitration award and the Court documents.

Asked about Grey Rock Mining showing up in three places in AP#3: the Sodexo Camp, Hollinger Camp, and the Town, Mr. Przybylowski testified that the names Grey Rock Civil or Grey Rock Services were construction industry in his view.

Asked about the far right column in AP#2, LIM Camp Meals, Mr. Przybylowski indicated that the employees residing at that Camp were served at

that Camp, whereas the others were served at the Sodexo Camp. He also determined that the people at the LIM Camp were construction workers. AP#3 indicates that 143 Sunny Corner people were construction employees. Therefore, if those employees were added to the construction column, that would affect the proportion of construction workers.

ARGUMENT

The Union

Counsel took the position that the Employer is arguing the same matter that was decided by the arbitration award in July 2014. In his view, the compensation issue should be solely an accounting matter at this stage. That is what usually occurs in such cases, and it ought to be the same in this case. What the Employer wants now is to appeal the arbitrator's decision to the arbitrator; clearly, what the Employer is asking has already been ruled on.

Much of the nature of the evidence in these compensation hearings, the arbitrator has already considered. In the result, the arbitration award is what it is. The ruling on compensation has been made. The arbitrator ordered compensation to be paid for 1. wages and benefits earned between December 18, 2013 and March 28, 2014; and 2. Wages and benefits from March 29, 2014 onward. On pages 81

and 82 of his award, the arbitrator found that the Local 779 CLRA collective agreement "bound Sodexo and the Union to its terms and conditions effective December 18, 2013" and

> ...[the collective agreement] is valid and applicable in its own right. Therefore, I order the Employer to comply with the terms and conditions of the collective agreement retroactive to the date of December 18, 2013 and to continue compliance for the duration of the construction phase of the Tata Steel project site.

On page 84, the arbitrator ordered the Employer to pay wages and benefits amounts owing to employees for the period from March 29, 2014 to the date of the award and further stated that

> The Employer is ordered to make wage and benefit payments to the employees on a continuing basis from the date of this award until the completion of the construction phase of the Tata Steel project.

Then on the issue of industry fund payments, the arbitrator said at page 85:

> The Employer is further ordered to make the required CLRA/Local 779 collective agreement payments to the Union on a continuing basis as of the date of this award until the conclusion of the construction phase of the Tata Steel project.

The Newfoundland and Labrador Court of Appeal upheld the arbitrator's jurisdiction and confirmed his award, and the Supreme Court of Canada denied the Employer's application for appeal. The problem is that the Employer and its sponsor, Tata Steel, has never been able to accept that decision. Clearly, the Employer's responsibility is to make wage and benefit payments until the end of the construction phase of the Tata Steel project.

During the original arbitration hearings, Mr. Vincent Plamondon, AECOM Mechanical Engineer and Mr. Jean Marc Blake, Tata Steel Minerals Canada, both testified that the construction phase was expected to finish by the end of December 2014.

Counsel indicated that the largest part of the construction phase was the Dome itself and inside the Dome, including the Wet process, requiring Structural & Mechanical trades (Sunny Corner) and Electrical trades (JSM Electrical). The biggest construction focus in 2015 was the wet process inside the DOME. This was done to increase the quality of the iron ore and to enable winter season production. Both Bill Schenkles and Peter Smith testified that the construction phase did not end by December 31, 2014. Therefore, the CLRA/Local 779 collective agreement extended well beyond that time into the 2015 year.

The May 20, 2015 Ministerial Statement released by Minister Derrick Dalley (C#1) indicated that in his address to the Speaker of the House of Assembly, he greeted executives of TSMC, recognizing their work for the TSMC project in Labrador. In the third paragraph of the release, the Minister stated that

> For the past three years, Tata Steel Minerals Canada has been constructing a new iron ore mine in Labrador's northern Menihek region which will be fully operational by late 2015. The high-grade ore will be processed locally before being shipped directly to Tata Steel plants in Europe.

The fourth paragraph states in part:

> This project ... is employing 500 people in Labrador during the construction phase. Approximately 300-500 people will be employed during long term operations currently estimated to last at least 15 years.

Counsel noted that the information above concerning employing 500 people during the construction phase is consistent with Mr. Choubey's testimony. But the main point here is that the Minister is announcing that the construction phase was continuing into late 2015.

Mr. Schenkles testified that his company (Sunny Corner) originally started work on the project with a smaller construction contract, which swelled to $110 million for extra piping work, etc. He testified that he hired only unionized trades people from the Newfoundland Building Trades throughout the project up to December 2015. Some 180-190 Sunny Corner construction workers were on site on any given day.

Similarly, Mr. Peter Smith explained how JSM's $34 million Electrical Contract came about, and his evidence was that his Electricians worked until late November 2015.

Clearly, the information from Minister Dalley's statement and the evidence from Mr. Schenkles and Mr. Smith clearly demonstrate that construction work actually continued to December 15, 2015. And the evidence now is that the Wet process is still not operational due to low iron ore prices.

The fact of the matter is that, for 2½ years, neither the Union nor the bargaining unit employees of Sodexo have received a nickel from Sodexo under the CLRA collective agreement. Now the Employer is trying to make a better case than it made originally. The Employer's argument is that it takes a certain tipping point to indicate whether there are construction employees. The facts establish that this case was never about only construction workers being on the site. Counsel for the Employer previously argued that this was really a mining operation and always would be. The arbitrator has considered that information. Among a series of letters included in the arbitration award, one by then Employer solicitor Harold Smith responding to a February 27, 2014 grievance sent to Union counsel Dana Lenehan, contained the following statement:

> . . . .
> *It is our view that* our client is not engaged in the construction industry as *the camp in question is permanent and operates in support of an operating mine site.* The billeting of construction personnel is of necessity of the remote location but *essentially are permanent operations as support for the operating mine.* [Emphasis added.]
> . . . .

In Mr. Lenehan's view, the above passage clearly advised the Union that the Employer's position was that the Sodexo Camp was on the site of a mining operation that would go through a construction stage, after which it would be all mining. Essentially, Mr. Smith agreed that construction and non-trade workers were being accommodated at the same time.

The arbitration award addressed many concerns about the TSMC project also having mining going on while construction was in process. Note was taken on pp. 71-72 of Local 779 having attained considerable status and experience representing accommodation workers on special projects as well as other large construction projects in the province. On pp. 73-74, the arbitrator wrote:

> By the time the Union applied for certification, Sodexo already had a contract from Tata Steel to provide accommodation and catering for the workers on the Timmins, Labrador iron ore development site. While counsel for the Employer insisted that the camp was a permanent camp, I am satisfied that the evidence unequivocally established that, from the date of the certification order on December 18, 2013, construction activity was the predominant activity on that project and that the clientele at the camp were predominately, but not exclusively, construction industry employees. Clearly, mining activities have been and still are seasonal and are conducted on a trial basis. Indeed, there was no mining activity at all between the date of the certification order until sometime in March 2014. Whatever the ultimate intention may have been for the camp, its *raison d'être* during the construction phase of the development project was mainly to accommodate construction industry employees. Whether by design or circumstance, this was the situation that existed for Sodexo at the time of certification and continues to exist until the construction phase is completed. In my view, Sodexo has found itself to be an employer squarely engaged in the construction industry on the project at the Tata Steel site.

The Employer now suggests that the mining operation had a new character to it in 2015. There was nothing new about operations people being accommodated on the site. The Employer now contends that the construction phase continued at least until March 31, 2015, but the construction industry collective agreement should not apply when the mining operation expanded. Sodexo suggests that it

does not matter that Sunny Corner and JSM were still doing construction in November and December 2015 because TSMC was running operations full time as of April 2015. However, from the above passages, Mr. Lenehan pointed out that the arbitrator had already considered the mining activities up to the time of the award and into the future. Therefore, he ruled that the collective agreement would apply until the end of the construction phase. The evidence is clear that that the construction phase did not end by April 2015; it continued until the end of the year.

Jean Marc Blake's evidence on pp. 38-42 of the award indicated that 300,000 tonnes of ore was shipped in 2012 and he discussed that seasonal mining occurred from April to November – all of which was confirmed by Mr. Choubey's testimony. At p. 39 of the award, Mr. Blake said 1.5 tonnes would be shipped in 2014. Mr. Choubey testified that, for economic reasons, the Company did not mine in 2014, but shipped a small amount of ore that had been stockpiled. He also indicated that more was shipped in 2015.

The arbitration award ordered the Employer to pay Sodexo employees until the end of the construction phase, which was expected to end in 2014. The 1.5 million tonnes expected to be shipped in 2014 was postponed until 2015 according to Mr. Choubey. But that did not change the arbitrator's award. Now the Employer is making these compensation hearings an exercise of appeal of that award. This

has never been an issue of construction workers being exclusively accommodated at the Sodexo camp.

Therefore, it is the Union's position that the arbitrator has to determine when the construction phase ended. If Sodexo had honoured the collective agreement and had discussions with the Union on when the collective agreement would cease to apply, the issue would have been dealt with at the time. But that obviously did not happen. At this juncture, both parties only agree that construction ceased on the project at some point. They do not agree when that point occurred. It now becomes the arbitrator's responsibility to determine retroactively when the construction phase ended.

The arbitrator has also been asked to rule on the benefit amounts owing from December 18, 2013 to March 28, 2014. That is a matter of considering the differing amounts on spreadsheets introduced by Mr. Doug Harris and Ms. Lisa White, including an amount for night shifts, on which there is no agreement and no calculated amounts, but there is a reasonable estimate offered by Mr. Harris.

The arbitrator also must determine the amount of wages and benefits owing from March 29, 2014 onward. That is also a matter of determining when the collective agreement ceased to apply.

A further matter to be determined is the payment of interest. A large amount of money is at issue in this case. In the Union's view, the arbitrator need only declare that interest shall be paid.

The foregoing matters should have been what these compensation hearings were all about. However, should the arbitrator agree that there is some legitimacy to the Employer's position that the issue of liability should be reopened, then the Union urges the arbitrator follow his own precedent about the effect of mining being performed while construction was continuing on the DSO project as he considered in his original award.

In determining whether the percentages calculated by Mr. Przybylowski should be considered in this case, it should be noted that it has always been known that some mining was occurring in 2013 and 2014. As for Mr. Przybylowski's figures showing accommodations for construction workers at the LIM camp, that fact does not matter. What does matter is that the construction phase was ongoing until the end of 2015. Accommodations at the Sodexo camp were not exclusively for construction employees. Also, Mr. Przybylowski did not include Sodexo employees or employees accommodated at the LIM camp as construction workers. Had he done so, his percentage of construction employees served would have been far greater.

In support of its various positions, the Union submitted the following jurisprudence:

1. *Re: Irving Pulp & Paper Ltd. v C.E.P., Local 30,* 2013 SCC 34, 2013 CarswellNB 275, 2013 CarswellNB 276, [2013] S.C.R 458, June 2013, Docket 34473.

2. *Re: Judgement Interest Act* RSNL 1990 Chapter J-2.

3. *Re: Resource Development Trades Council of Newfoundland and Labrador* and *Long Harbour Employers Association Inc.* (2013), unreported (Clarke).

4. *Re: The Nova Scotia Public Service Commission, representing Her Majesty the Queen in Right of the Province v. Nova Scotia Government and General Employees Union* [2004] Nova Scotia Court of Appeal, Docket CA 195684.

5. *Re: Cargo Link Transport Ltd.* and *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 2006* (2011), CAAB No. 60411/10L [Section 104 LRC].

In *Re: Irving Pulp and Paper, at paras. 78 and 79, the SCC wrote:*

> 78. Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption – for the parties, labour arbitrators, and the courts – that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. As professor Weiler, a leading authority in this area, observed in *U.S.W.A. v. Triangle Conduit & Cable Canada (1968) Ltd.* (19700, 21 L.A.C. 332 (Ont. Arb.):
>
> > This board is not bound by any strict rule of *stare decisis* to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable. [Emphasis added; p. 344.]
> >
> > ....
>
> Thus, while arbitrators are free to depart from relevant arbitral consensus and march to a different tune, it is incumbent on them to

> explain their basis for doing so. As this Court has stressed, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir,* at para. 47). Because judges are not mind readers, without some explanation, whether implicit or explicit, for a board's departure from the arbitral consensus, it is difficult to see how a "reviewing court (could) understand why the [board] made its decision" (*N.L.N.U. v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 16). Reasonableness review includes the ability of courts to question for consistency where, in case like this one, there is no apparent basis for applying a rationale for an inconsistency.

In light of the foregoing, the Union requests that this arbitrator not change his prior decision; he should follow his own precedent. Unless something significant changed subsequently, the arbitrator cannot now come to a different decision regarding compensation than he did in his original decision. In counsel's view, the Employer's witnesses provided no substantial differences about mining. It is still seasonal and it still involves crushing and screening. The additional KéRail section merely enabled the shipment of more ore; it did not change the ore itself.

On the question what was the predominant activity on the project during 2015, counsel argued that, when Sodexo employees and the workers housed at the LIM camp are properly placed in the construction category in AP#1, it would show that the greater number of workers on the site in 2015 would be construction workers.

Damages

The Union's expectation for the award of damages in this case would be for the arbitrator to specify precise amounts, or to direct the parties how to calculate those amounts. Also, the Union expects the arbitrator to rule that the payment of interest shall apply after damages have been assessed. If he sees fit, the arbitrator can select who will calculate such interest. The Union proposes the following amounts for damages:

1. $314,118.56
   This is the arbitrator's original award for employees' wages owing from December 18, 2013 to March 28, 2014. This amount was one of two amounts proposed by the Union at the time. The arbitrator chose the amount above on the rationale that a time of transition to the new collective agreement regime should be allowed. The Union views this as a $61,000 giveaway.

2. $318,679.17
   This is the benefit amount owing from December 18, 2013 to March 28, 2014, as calculated by Mr. Doug Harris on DH#1, which he based on the strict language of the collective agreement. Lisa White based her numbers on the wage amount of $314,118.56 mentioned in the arbitration award, which came to a difference in benefits of $20,594.06. However, on page 85 of his award, the arbitrator ordered the Employer to pay employees benefits from December 18, 2013 to March 28, 2014.

3. $7,342,169.66
   This constitutes the "end of the construction period" calculation. The Union does not have the information Sodexo has. Therefore, the Union does not know precisely when construction ended in 2015. Tata Steel has that information but they have not provided it. Therefore, the Union considers Mr. Schenkles' testimony on this matter to be the best evidence available. Mr. Schenkles said his company's construction workers were on site into December 2015. Similarly, Peter Smith's evidence was that his company's Electricians were working until November 23, 2015. This information was the basis for Mr. Harris' calculations. Mr. Harris' final calculations in DH#5 were made after discussions with Sodexo. It should be noted that his final numbers were modified in recognition of Sodexo's claim that the Union's calculation of

overtime was pyramided. In other words, the Union agreed with the Employer's position and revised its DH#1 numbers on DH#5. Calculations were made for every single employee to the end of December 2015, and includes the above amounts of $314,118.56 (wages) and $318,679.17 (benefits) and all other amounts payable from March 29, 2014 onwards – except for shift premiums. In other words, when the $314,118.56 is extracted, the amount payable to the employees and the Union is $7,028,051.28 "new money". The Union wants all this money to go where it should: to individual employees of Sodexo. The Union is not merely looking for an overall global sum.

4. $102,000.00

This amount is for shift premium, which is most difficult to nail down. It is calculated on approximately 15% of earned wages only, not on holiday pay, etc. Ms. Cyr's evidence was that there was one person working the night shift and sometimes two. Mr. Tobin, who worked in the kitchen for two years, described how sandwich makers came in early, and at different times dishwashers came in early; the 2nd Cook and Baker came to work at 10 o'clock at night. However, the information provided by Sodexo does not indicate when these people worked during the day. Since the Union has not been provided with the necessary information to make accurate calculations on this matter, it is requesting that this global amount estimate be awarded for this particular item, and that it be apportioned among the appropriate employees.

5. $ Interest to be calculated

The Union is requesting that the payment of interest be awarded on all amounts owing, to be calculated quarterly to March 28, 2014 (~6 or 7% accrued), and the $7,342,169.66 at a minimum of 4% (~$300,000) in accordance with the provisions of the *Judgement Interest Act.*

Counsel for the Union indicated that any award of interest can be registered as a judgement before the courts. Support for the application of interest payment in Newfoundland and Labrador may be found in *Re Resource Development Trades Council, supra,* at page 9 of that June 25 award where the arbitrator ordered interest. Further support for an arbitrator's authority to award interest may be found in *Nova Scotia Public Service Commission, supra,* where the Nova Scotia Court of Appeal found so at paras. 49 and 50. And in *Cargo Link Transport Ltd., supra,* interest was awarded by the arbitrator at pp. 7-8. There the arbitrator noted that:

It has long been settled that arbitrators have jurisdiction to make an order for interest on the basis that it compromises part of the damages suffered by the aggrieved party having been denied the use of funds to which the party was entitled.... Therefore, interest must be paid on a damage award unless there are good and sufficient reasons in the particular circumstances of any particular case not do so....

Although the Union asked that interest be awarded it did not make any argument on the amount of interest or how it should be determined. As may be appreciated, with the award going back almost five years, the interest rates over that period have varied considerably and often. To calculate interest on the amounts owed as they accrued would be quite complicated.

What I have elected to do is use the *Court Order Interest Act* RSBC 1996 c.79 as a model even though it does not directly apply to labour arbitrations....

Using that model, I order that interest be calculated in six month segments of each year in which the damage have accrued for each driver back to August 1, 2006 to the date that the damages are paid to the Union under the terms of this award both before and after the award except that no interest shall accrue after the award is registered in the Supreme Court Registry under Section 102 of the *Labour Relations Code* or is referred to the Director of Employment Standards for enforcement under the Employment Standards Act, as the case may be. The rate for each six-month period shall be set on January 1 and July 1 in each year based on the prime lending rate of a chartered bank at that time, which I select as the Royal Bank of Canada. The interest shall not be compounded.

The Union shall calculate the interest based on the prescribed formula and send the calculations and amounts to the Employer for verification. The interest in each case shall be added to the damage award for each driver. If the Parties are unable to agree on either the calculations or any amounts of interest to be paid within five business days from the date they are referred by the Union to the Employer, they shall be referred to me for a final and binding decision.

On the basis of the foregoing, the arbitrator should restore the employees and the Union to the positions they would have been in has the breach of the collective agreement not occurred. Interest should accrue to the $314,016.56 awarded by the arbitrator in his original award, and to the amounts for wages and benefits accruing since March 29, 2014 until the end of construction in December 2015.

The Employer

The Employer fundamentally disagrees with Union counsel that the Employer is asking the arbitrator to revisit the issue of liability, i.e., to reopen the award. In fact, the Employer acknowledges that the collective agreement applies, but from December 18, 2013 to March 31, 2015, and asks that the arbitrator apply his award to the period between those dates.

Counsel took the position that the circumstances on the project have been different from the conditions that existed when the original award was made. When the arbitrator rendered his award in July 2014, the fact was that the mine was clearly in the construction phase of the project. It was a principal part of the first hearings that the employees of Sodexo were working in a facility on the site where the construction activity was occurring. The arbitrator reached a reasonable decision that, because the predominant activity at the time in 2014 was clearly construction, the collective agreement applied. The evidence has established that it

was trial mining that occurred to that point, not seasonal mining. In fact, there was no mining going on at all in 2014. Consequently, the arbitrator's award was that Sodexo employees were working within the construction industry because their predominant *raison d'être* was to support the construction activity on the site. This point is made clear at pp. 71-72 of the arbitrator's award, where an examination of extrinsic evidence revealed that the

> ...provision of camp accommodation and catering, especially remote camp accommodations and catering for employees performing construction work in what is regarded as traditional trades, has been integral and critical to the operation of large construction sites...While I am inclined to agree that the provision of accommodations or catering is not the same work that is performed by red seal tradespersons and apprentices... catering has long been recognized and considered as an essential element of the construction industry, particularly on large projects. (p.71)
>
> ....
>
> Local 779 does have members in the construction industry whenever it becomes certified for an employer's employees providing camp accommodation and catering on a large non-special project. While the CLRA/Local 779 collective agreements may not receive as much use as some of the other CLRA agreements with traditional craft unions, when the appropriate occasion does arise for it to be activated, it is as valid as any of the other CLRA/Trade Union collective agreements. (p.72)

The above constitutes the basis for the arbitrator's finding that the CLRA/Local 779 collective agreement applied to Sodexo. The Employer agrees with that, and has always understood that there would be some point in time when the collective agreement would not apply to Sodexo employees. It is counsel's position that the determination of that point in time is the main issue at these compensation

hearings. The Employer simply disagrees with the Union when the construction phase ceased. In the Employer's view, it ended on April 1, 2015. Although the approximately $4.5 million difference between the parties turns on the arbitrator's finding on this matter, it does not constitute a reopening or an amending of the original award.

Counsel argued that there was a fundamental shift in the DSO on April 1, 2015. Prior to that time, only trial mining, transporting, and shipping were conducted for customer testing purposes. The client had to confirm that the ore was suited for its blast furnaces before it was finally determined that the ore on site was acceptable for processing. The Company also needed to ensure that this ore could get to the market by rail transport and that the port at Sept-Iles could handle a different product than the ore from the IOC mine it had traditionally handled. All these matters took place between 2012 through 2014. Tata Steel could not go into commercial production until all the forgoing took place, including construction. It should also be noted that if Tata Steel had made arrangements with the various rail lines prematurely, the Company would be required to pay for a service it did not use.

At the time of the original award, the mining of ore on site was a trial process. Mr. Choubey's evidence is uncontradicted on all the various aspects that needed to be put into place to support full commercialization of the mine.

There is a time when a mine development project moves from construction to operations. The situation changes at the point operations is the main activity. At that time, the application of the construction industry collective agreement ceases. During the construction phase, Sodexo primarily supported construction activity. If those services were to be disrupted, it would affect the economics of the project. Counsel argued that big projects of any kind don't make any money until they commence commercial production. Therefore, the sooner they get out of construction and get into operations, the better. Once the switch is made to commercial operations, the last thing a company would want then would be a disruption to its operations. In other words, once that switch is flipped and a labour dispute occurred, the operation would have a problem.

In counsel's view, even if construction were going on during commercial operation, such construction would not constitute a construction phase. Commercial production would then be the primary phase. And getting to that primary phase would all depend on lining up the trial mining, customer testing and approval, ensuring railway transportation and port services for shipping.

The issue in this case is when did the project switch to predominately operations from predominately construction. The Union's argument that Sodexo's primary activity was to support construction in December 2015 is not on. That was not Sodexo's primary focus in December 2015, and it was not its primary focus

after April 1, 2015. The arbitrator's award talks about the predominant activity being construction and it was Sodexo's predominant purpose at that time to service construction people on site. That was not the case in December 2015. Seventy-five (75) to eighty (80) percent of Sodexo's activity at that time was supporting operations. It is not sensible that a construction industry collective agreement should apply to the people who are not involved in construction.

The Employer is not asking the arbitrator to amend his original award, but it is asking the arbitrator to apply his award to the circumstances that existed on site in 2015. In other words, in determining, whether the collective agreement should continue past April 1, 2015, the arbitrator should apply his previous award. On page 75 of his award, the arbitrator wrote:

> On the basis of the preceding considerations, I am satisfied that the work performed by Sodexo's employees was not "construction" work as was performed by the contractors employing traditional trades or craftsmen, but it was most definitely work in the construction industry....

Applying that rationale to the situation in 2015, the arbitrator should determine that the construction phase ceased when Sodexo's employees should have been considered to be working in the "production" industry.

The arbitrator's award recognized that since December 2013, the main activity on site was construction, not mining. The Employer suggests that situation was switched in 2015 when the main activity on site was operations, not construction. On April 1, 2015, all necessary factors were in place and the site was

commercially operating. The only construction that was going on then in 2015 was the non-essential wet process in the Dome.

On page 68 of the arbitrator's award, he lists seven (7) areas which are common ground. Among them are:

> . . . .
> 2. that the nature of the development work at the site in and around the Dome is predominately construction work, with some trial mining work occurring seasonally;
> 3. that the construction phase is anticipated to be completed by December 2014, after which the predominant activity is expected to be mining operations;
> . . . .
> 5. that the nature and scope of the work performed at the camp to date is accommodation and catering, mostly for contractors' construction employees;
> . . . .

This is consistent with Mr. Choubey's evidence. The award provided a decision that the collective agreement would continue during the construction phase, not until all construction was finished. If the parties had agreed when the construction phase concluded, they would not need a hearing on the matter.

Item 5 above also speaks to the work of Sodexo employees being predominantly in support of construction employees.

Page 73 of the arbitrator's award also speaks of "predominant activity":

> . . . I am satisfied that the evidence unequivocally established that, from the date of certification order on December 18, 2013, construction activity was the predominant activity on that project and that the clientele at the camp were predominantly, but not exclusively, construction industry employees....

Continuing to page 74:

> Whatever the ultimate intention may have been for the camp, its *raison d'être* during the construction phase of the development project was mainly to accommodate construction industry employees. Whether by design or circumstance, this was the situation that existed for Sodexo at the time of certification and continues to exist until the construction phase is completed....

It is the Employer's position that this situation flipped on April 1, 2015. The Sodexo camp was the primary accommodation facility for the project for all people on the site. If there were 500 people on the site doing construction, but Sodexo only accommodated non-construction people, it would be absurd to conclude that its *raison d'être* was to service the construction industry.

The Sodexo employees were not performing construction activity; they were actually supporting construction activity. This does not apply when those employees actually support mining activity, i.e., when the situation on site flipped.

In the early days of the project, there was nothing much happening. See RC#3. The Dome was not there; neither was Plant 1 or 2, and the rail loop did not exist. Significant construction was required to enable the Employer to commence commercial production. Between 2012 -2014, the Plants, the rail loop on site, and the Sodexo camp were erected. The KéRail section was constructed, but the Company could not go to commercial production until KêRail was certified. Obviously, trucking of ore could not support a viable commercial operation. A construction phase also had to happen. Mr. Choubey testified that all aspects were

in place by the end of 2014. His evidence was about what was needed to be accomplished in order to go into commercial operation. All that was completed by the end of 2014. Therefore, when start up commenced on April 1, 2015, commercial operations began. Although construction was still going on at the site, it was not the primary activity.

All the circumstances that would be required to make 65% ore grade were not a primary concern; the wet process was not used because ore prices could not justify it in 2015. It was simply a process that was not viable to bring on line. However, the Dry process for the 62% standard ore was viable and did operate. 2015 was when significant numbers (e.g., 1.5-2.0 million tonnes) shipped were sustained. The same occurred in 2016 and 2017.

The Union has claimed that all this work was considered in the arbitrator's original award. But that is not the case. The situation on the site in 2015 was not the same as it was in 2014. The evidence is that vastly different circumstances prevailed in 2015, which should be considered by the arbitrator in deciding the issue of compensation.

In 2011-2012 when there was interest in having a Dry process and a Wet process, ore prices were $140-$150/tonne. However, in 2015 ore prices were 1/3rd less. Therefore, the Wet process was not viable to operate. In 2014, Wabush Mines, Clift Resources and IOC Mines closed. TSMC could not walk away from

its enterprise at that time. Therefore, it decided to operate with the Dry process only in 2015. That was when Sodexo went from primarily supporting construction employees to primarily supporting operations employees. This was the 2015 flip Mr. Przybylowski said occurred because Sodexo employees were servicing mostly operations employees.

Referring to RC#4, the January 2014 News Release which discussed trial production; RC#5 the November 2014 News Release announcing the KéRail Section coming online and that the crushing and screening operation is fully established and that the Wet process is 80% complete, thereby leaving the Dry process the only one operational; and the November 2015 RC#7 News Release announcing near completion of processing facilities and commencement of trial production as well as shipping of 1.7 million tonnes all as of September 30, 2015, counsel agreed that some construction had occurred but it did not affect the likelihood of the Wet process being used. That construction work was only to make that process available if needed, which was the same situation in 2016 and 2017. Counsel emphasized that the construction activity in 2015 had no impact on commercial production – that evidence is uncontradicted. Counsel argued that a Company can have construction activity ongoing while its facility is in full operation, but that does not mean that the Company goes into a construction phase.

Beyond the foregoing, the evidence is that government tax credit legislation deals with changes when commercial production occurs. The net result is that this project was no longer a construction project in 2015 and Sodexo employees were no longer working in support of a construction phase, rather, they were working in support of the production industry.

Counsel acknowledged that the Union referred to the Department of Natural Resources Statement in May 2014, but the Employer's position was that this Statement is hearsay evidence, which should be considered only with care, subject to its weight. The Employer insisted that more current evidence is more reliable. Nothing in that Statement says anything about the construction phase of the project; the Minister is simply saying that the process in the Dome will become fully operational by late 2015.

In support of its various positions, the Employer submitted the following jurisprudence:

1. *Re United Steelworkers of America v. Diepdaume Mines Limited* (March 30, 1982), 1982 CanLII 852 (ON LRB) (Franks, Vice-Chairman). This case involved an application for certification in which the Board considered the "build-up principle in a mining operation", and also "approached the various stages of mining operations by setting out different appropriate bargaining units for the various stages". This policy is set out in the *Surluga Gold Mines Limited* case, [1967] OLRB Rep. July, 253 which reads in part as follows:

> 4. It has been the practice of the Board for many years to find three types of bargaining units appropriate for collective bargaining in mining operations. During the period that the mine is under

construction it is the Board's practice to find that a bargaining unit of all employees engaged in the "construction stage" of the mining operation to be appropriate for collective bargaining. After the construction stage has been completed and during the time that the mine is being developed it is the Board's practice to find that all employees engaged in the "development stage" of the operation are appropriate for collective bargaining. Finally, when the development of the mine has been completed and the mine has entered the "production stage" of its operations, it is the Board's practice to determine that a bargaining unit of all employees of the respondent in its mining operations (without qualification) is the appropriate unit for collective agreement.

5. It has been the Board's practice to find that a mine has entered the production stage of its operations at such time as the ore which has been mined during the development stage ceases to be stock-piled and is either shipped or processed through a mill at the mine site.

6. In the instant case, it would appear that the mine has passed the construction stage of its operations since the respondent has taken over the operation of the mine from the contractor (sic) constructed the mine. It would further appear from the evidence that since the ore presently being mined is being stock-piled and is awaiting the completion of the mill, the construction of which is to be commenced during the fall of 1967, that the mine is in its development stage.

7. It has been the Board's long standing practice to determine that the three bargaining units described above are appropriate in order to reconcile the build-up principle in mining operations during the various stages of a mine. In applying the build-up principle in mining operations, it is the Board's practice therefore to ascertain which stage a mine has reached in order to determine the appropriate bargaining unit rather than direct a vote of all employees at some future date when the production stage of a mine has been reached and a representative number of employees have been employed.

. . . .

In the instant case, it is the Employer's position that once all the necessary construction was done to enable commercial production of the TSMC mine, that was when the construction stage ceased and the operations stage commenced.

2. *Re Aramark Canada Ltd.,* [2007] O.L.R.D. No. 3913 (September 20, 2007) (Harry Freedman, Vice-Chair) No. 2356-06-R. This case involved an application for certification. Evidence was required:

> 13 ...to demonstrate that the responding party's employees were working in the construction industry on the date this application was filed". In order to do so, the Applicant would need to prove the nature of the construction activity taking place at the site and then must demonstrate the relationship between that construction activity and the activity at the trailers requiring cleaning, as well as dealing with the question whether the responding party was an employer in the construction industry on the application date.
>
> . . . .

The role of supervision was considered in who oversaw the performance of the cleaners' work and who instructed the timing of the work and inspected it while it was being done. The Board stated in part in *Re Ellis Don Limited,* [1993] OLRB Rep. July 594 at p. 594:

> ...It would be artificial to characterize some aspects of the cleanup work over which Ellis Don had responsibility as construction industry work, and other aspects of it as outside the construction industry.

Counsel also referred to para. 18 in the above case, which states:

> It is also important to note that merely because work takes place at a construction site does not necessarily mean that that such work is work within the construction industry. The delivery of material to a construction site is not work in the construction industry. See *Ethier Sand and Gravel Limited,* [1979] OLRB Rep. May 692; *Four Seasons Drywall,* [1990] OLRB Rep. May 525; *Marel Contractors,* unreported, Board File No. 2172-00-G, decision dated October 18, 2001, Q.L. cite [2001] OLRD No. 4154 and *Ellis Don Limited,* [2004] OLRB Rep. January/February 56. That is the case despite some of the work performed by the persons doing the delivery of the material

being similar, if not identical to work being done by employees in the construction industry. In *Ellis Don, supra,* the Board noted the ready-mix drivers were required to mix ingredients, pour concrete into forms and wash chutes, but held that such work was integral to the delivery of the material. The Board wrote at page 67:

> ...the definition of construction industry focuses on the activity of the operations engaged in rather than that of the employees. In determining whether the drivers in question are engaged in construction work consideration must be given to whether their activities are an integral and necessary part of a construction business.
>
> ....

Similarly, in counsel's view, the arbitrator must look at whether the Sodexo employees were an integral and necessary part of a construction phase of the TSMC project in 2015. In his 2014 award, the arbitrator found that Sodexo employees' predominant activity was supporting construction activity. So, it must be considered whether Sodexo employees' predominant activity in 2015 was supporting construction or operations. In the Employer's view, once commercial production commenced and government treated the project as such, then the predominant activity of Sodexo employees was to support operations, not construction. It would seem unusual to find that the predominant activity on the site was construction if government determined otherwise. In 2014 and 2015, Sodexo's work did not change, but the context in which that work was being done in April 2015 changed because its context became the supporting of the production phase of the project.

3. *Re International Brotherhood of Electrical Workers, Local 353 v. Mid South Contractor/Daimler Chrysler Limited* [January 11, 2005] 3190-03-G, Ontario Labour Relations Board, (Jack J. Slaughter, Vice-Chair). This case is a referral to arbitration, in which the Applicant requested that the Board "take a view" and the Respondent disagreed. In paragraph 14 the Board provided its rationale for declining to take a view, viz:

> In weighing the competing considerations, the Board finds that the preponderance of relevant factors is against taking a view in this matter. The workplace as it currently exists is a far different place from the construction site that existed at the time of the Grievor's discharge incident. The changes are significant. A tribunal should not take a view where the workplace no longer represents the scene as it existed at the time of the events involved in the grievance: *Zehrs, supra*; also see the consequent decision in *Zehrs Markets Inc.*, [2001] O.L.A.A. No. 688 (Lynk); and *Northwest Hardwoods (Delta Division),* [2004] B.C.C.A.A.A. No. 203 (Steeves). There is little to be gained from the Board observing a workplace that is dramatically different than the one that existed at the time of the discharge incident....

Clearly, the Board there recognized that a company's workplace will be different when it is in the production stage than it was in a construction stage. The same logic applies to the TSMC project site. In 2014, mining was on a trial basis, transportation and shipping arrangements were being finalized and construction was in progress to enable commercial operations. By April 2015 all the foregoing was done; all the preliminary factors had been completed to enable the Company to commence commercial production. The site was not the same as it was before. It was dramatically different. Clearly, when a change occurs in the nature of a facility, it changes the nature of its focus. In 2015, the LIM Camp almost exclusively accommodated construction people. If production was not the priority

on site, it would have made sense to house those people closer to the site. But the priority on site in 2015 was to have the production people stay at the Sodexo camp on site. The situation was different when construction was the main activity on site. The LIM Camp was 30 minutes away.

Mr. Przybylowski's evidence on who were construction workers and who were production workers in 2015 was not contradicted. The only issue raised by the Union was that Sodexo employees should be included in the construction category numbers. It is the Employer's position that Sodexo employees were considered non-construction workers because they were not performing construction trades work. The most sensible thing to do was to move them out altogether in determining the predominant activity on site. Even if Sodexo employee numbers are eliminated entirely, the construction category only comes to 47%. And if Sodexo employees are included in the construction category in 2015, that only brings construction to 49%, not a majority. That still does not put the construction category over 50%, which it would need to be to make it the predominant activity on the site.

Mr. Przybylowski's evidence and analysis concluded that there was a flip in site activity in April 2015; not exclusively operations, but predominantly operations activity. The test in the arbitrator's award was determining what was the predominant activity on site at the time. The arbitrator should now use the

same test for 2015. The Union's reasoning that the collective agreement applies even if there is any construction activity at all leads to an absurdity and is not consistent with the arbitrator's reasoning in his 2004 award.

Damages

As the foregoing submissions indicate, the main issue in determining damages is to decide when the collective agreement ceased to apply. Otherwise, the Union's and the Employer's calculations are not much different.

Mr. Harris said that he did a revision of his calculation based on the Employer's interpretation of overtime. Therefore, his recalculations effectively were based on the Union's new view of overtime. However, Mr. McCormick testified that Mr. Harris' recalculations on overtime were incorrect. Clearly the Union's calculations cannot be relied on. While there is very little difference between the parties' calculations and there are explanations on fine matters by both sides, counsel argued that the Employer's calculations should be given the nod because Lisa White worked from Mr. Harris' evidence and his numbers. LW#3 is helpful because it tracks each month and indicates the ongoing cumulative cost. Her calculations for the amount owing to Sodexo employees include all items and totals to up April 1, 2015 (the Employer's position) and goes even farther up to December 31, 2015 (the Union's position). The former establishes $3,580,950.51

owing to April 1, 2015 plus the $314,118.56 owing from the arbitration award, all totaling $3,895,069.07. The latter shows $6,679,242.66 owing to December 31, 2015 plus the $314,118.56 from the arbitrator's award, all totaling $6,993,361.22. The difference between the parties' two positions is $3,098,352.15.

The Union relied on p. 83 of the arbitrator's award for Mr. Harris to calculate the benefit portion owing from December 18, 2013 to March 28, 2014, i.e., "The Employer was ordered to pay appropriate amounts to the individual employees for the period involved." But the "appropriate amounts" for benefits were based on the wages awarded by the arbitrator in 2014. Therefore, Mr. Harris' calculations inflated the amount of benefits owing for that period. Vacation pay and holiday benefits cannot be based on the collective agreement. A benefit calculation cannot be based upon other than the arbitrator's award of wages in 2014.

The Union's suggestion of $100,000 for shift premium must be denied. The Union has the burden to prove its case under the collective agreement. There has been no evidence from any employee that anybody worked any shifts which entitled them to shift differential.. The Union has not demonstrated who those people were or that anyone was entitled to that premium, and it has provided no calculations on the matter.

In counsel's view, it would be exceptional for an arbitration decision to award interest. The Union's case *Irving Pulp & Paper, supra,* provides no indication

what interest was based upon, i.e., the collective agreement or otherwise. In counsel's opinion, the clear practice in this province has been for arbitrators not to award interest.

Paragraph 36 in *Nova Scotia Public Service Commission, supra,* writing for the Court of Appeal, Cromwell J.A. said:

> [36] I would hold therefore that if the power to award interest is implied by the terms of the **Civil Service Collective Bargaining Act** or by the collective agreement between the parties, that implicit authority is sufficient to authorize an award of interest against the Crown. Whether that power to award interest be implied is a matter of interpretation of the governing statute and Collective Agreement.

Therefore, if such a power is implied, it still must be decided if interest ought to be applied. Counsel submitted that there is no implied right in the *Judgement Interest Act* or the collective agreement for an arbitrator to award interest. The case before the Court above was an arbitrator's decision dealing with the obstruction of justice by the Employer, i.e., it was an exceptional circumstance. In the instant case, the delay was because of the rights of the parties to go through the judicial review process. That was not an intentional delay. First, the Employer applied to the Trial Division, which quashed the arbitrator's award. Next the Union appealed to the Court of Appeal, which reinstated the arbitration award. Finally, the Employer sought leave to appeal the Court of Appeal decision before the Supreme Court of Canada.

In the alternative, should the arbitrator decide to award interest, it should not be Mr. Harris who does the calculation. Both parties can do that. The $314,118.56 is straight forward. If the amount owing is determined to be up to April 1, 2015, it cannot be said that interest should not be backdated to that day.

However, the Employer's main position is that it would be inappropriate for the arbitrator to order interest in this case; the arbitrator has no jurisdiction to do so, and also has no power to do so under the collective agreement or the relevant legislation.

In summary, there is clear evidence from Tata Steel that there was a distinct switch on April 1, 2015 from predominantly construction to predominantly operations activity on the mine site. The collective agreement should not apply after April 1, 2015 because there was no construction phase. The mine had moved into commercial production at that point.

Damages

The amount owing by the Employer to Sodexo employees is limited to:

1. $314,118.56 for wages ordered in the July 2014 arbitration award from December 18, 2013 to March 28, 2014, plus $298,085.11 benefits based on the wages ordered by the arbitrator for that period

2. $3,580,950.51 for wages and benefits from March 29, 2014 to March 31, 2015 as calculated by Ms. Lisa White in LW#3.

Union Rebuttal

Counsel for the Union indicated that, even if counsel for the Employer may not have had awards of interest by arbitrators, he has had them in his own arbitration practice in this province -- *Resource Development Trades Council, supra,* being one of them. In his experience, it has been a long-standing practice for arbitrators to award interest not as a penalty upon employers but as part of the principle of making the outcome right for the grievors, i.e., to put the grievors in the position they would have been in had the breach of the collective agreement not occurred in the first place.

On the issue of shift differential, counsel thought it odd for the Employer to claim that the Union has not proven its case on the matter. The Union relied on the testimony of its witnesses that some Sodexo employees did work a later shift, but in light of the Employer's challenge, the Union wonders how far it has to go in order to demonstrate entitlement to this benefit, whereas the Employer felt it was sufficient to rely solely on Mr. Choubey's testimony that a fuel tax credit is no longer being allowed.

On the issue of calculating benefits from December 18, 2013 to March 28, 2014, counsel argued that $314,118.56 for wages was the arbitrator's choice of the options provided to him. That was a concession by the Union on wages; it was not

a concession on benefits. The arbitrator ordered the Employer to pay applicable benefit amounts to employees. The Employer's calculation is incorrect.

Counsel for the Employer misstated the arbitration award. At page 68, the arbitrator did not say that the construction phase would cease when the predominant activity became operations. At item #3, the arbitrator states that a matter of common ground was that "the construction phase is anticipated to be completed by December 2014, after which the predominant activity is expected to be mining operations." In other words, the arbitrator was talking about the future expansion of the mine after the construction phase ended. That is what was intended by the parties and understood by the arbitrator, not that the construction phase would cease when operations became the predominant activity.

The Employer's position is that the contracting work in 2015 was the non-essential Wet process. However, the fact of the matter is that there were always construction employees working day in and day out during 2015. Clearly, the Employer has relegated this construction activity to the periphery of existence simply because operations became the predominant activity on site in 2015. That is not acceptable. Mr. Przybylowski's spreadsheet AP#3 concluded that there were 332 construction workers & construction management out of a total 564 employees on the site on the date of August 4, 2015. If the 18 Sodexo employees were placed among "construction workers" as they should have been, that would have reduced

the "non-construction workers" from 231 to 213 meaning that there would have been approximately 62% construction employees on site, not the 42% that the employer claims.

Therefore, with that percentage of construction workers still on site at that time, counsel questions how the construction phase could possibly be considered over.

The main focus in the arbitrator's award was construction being the predominant activity at the time of the award and expected to be so until the end of 2014. If Tata houses some construction workers at the LIM camp (mostly Sunny Corner employees), that supports the conclusion that the construction phase of the project continued into December 2015. Clearly, as far as construction was concerned, what was expected to take place in 2014 (commercial production) actually did not take place until 2015. The arbitrator was aware in 2014 what the mine production would be in 2015. The fact that it would be the predominant activity in 2015 was nothing new for the arbitrator then and it is nothing new at this point. His focus was on construction activity then, and his focus should be on construction activity in 2015.

Post Hearing Matters

Upon the conclusion of submissions on October 6, 2017, the arbitrator met with counsel to advise them that he was prepared to provide a bench ruling that:

1. he disagreed with the Employer's main argument that the collective agreement should not apply past April 1, 2015;

2. the construction phase of the project did continue while construction work continued during 2015, the precise extent of such work and the date it was concluded was still unclear;

3. the fact that mine operations shifted to full commercial production did not alter the fact that the construction phase continued; both the construction phase and the operations phase may exist at the same time;

4. what the parties needed to consider was the proportion of work Sodexo employees continued to support construction activities on site, and how long that support work continued.

5. the CLRA collective agreement continued to apply while and to the extent to which members of the Sodexo bargaining unit provided support services to the construction activity on the site;

6. there were several accounting details that the arbitrator would not be in a position to order precise amounts for in a bench ruling; he would need to study them further before doing so, and might possibly need some accounting assistance of his own;

7. among those details are overtime calculations, the wage basis and hours on which vacation, holiday and other benefit calculations may be calculated, the determination of shift differential pay; interest would also be ordered.

In light of the foregoing, the arbitrator suggested that counsel consider a proportional settlement recognizing the extent of construction activity and commercial operations activity that occurred in 2015.

Counsel requested that the arbitrator not make a bench or any decision until they consulted with their clients and considered whether they could reach agreement.

Nothing further was heard until the arbitrator was advised on October 10th, 2017 that counsel would make contact with him late that day. Submissions from both counsel were received on November 3, 2017.

The parties had been made aware by the arbitrator from the very outset that he would be leaving the country on November 4th, 2017 for a lengthy trip to Australia & New Zealand and would not be in a position to deal with this matter until his return in mid-January, 2018.

Following the writing of the parties evidence and argument at the hearings, the arbitrator reviewed and considered the parties' submissions of November 3, 2017. Those submissions follow in the order they were received:

The Employer

The Employer, Sodexo Canada Limited, acknowledges that the CLRA Collective Agreement applies to all hours worked by Sodexo employees up to March 31, 2014 (as per your first award).

At the end of the hearing on October 6, 2017, you stated to counsel that it was your position that in 2015 there was both construction activity and production activity ongoing simultaneously at the Tata Steel Site and that the parties should consider a quantum calculation which would compensate Sodexo employees under the CLRA Collective Agreement in proportion to the work they performed for construction workers who were utilizing food and/or accommodation services provided by Sodexo (i.e., all those construction workers staying at the Sodexo Camp or Town Site, those staying at the LIM Camp were excluded as they did not avail of either accommodation or food services from Sodexo).

On that basis and without prejudice to Sodexo's position argued at the hearing, we respectfully submit two options for the calculation of amounts owing (the second being alternate to the first):

1) that the evidence presented at the hearing, in particular Exhibit AP#2 (which evidence was uncontested), established that from April 2014 until December 2015, Sodexo did not provide services exclusively to construction workers at the Site. In that regard, compensation based on the CLRA Collective Agreement should be ordered in proportion to the percentage of construction workers who were utilizing food and/or accommodation services provided by Sodexo for the period April 2014 to December 2015.

This approach properly compensates Sodexo employees under the CLRA Collective Agreement for work performed in relation to construction activity and takes into consideration the declining construction activity for the aforementioned period.

The relevant percentages set forth in Exhibit AP#2 are presented by day, however, for ease of reference, the employer took the average for each month and applied it to the calculation of monies owing each month as set out in LW#3.

The total amount therefore owing to the Union and Sodexo employees pursuant to the CLRA Collective Agreement is reflected in the attached table Annex A, and would be $3,949,725.86, plus interest.

2) Alternatively, should you deem this approach applicable only for the period of April 1, 2015 (when Tata commenced commercial production at the Site) to December 31, 2015, then, based on the same methodology as set forth in point (1) above, the total amount would be $5,302,404.64 (see table Annex B), plus interest.

As argued during the hearing, there is respectfully no merit whatsoever to include or consider Sodexo employees as "construction employees" in the context of this calculation for at least 2 reasons: 1) they do not offer construction services and 2) the whole purpose of the present debate is to consider whether they should (and to what extent) be considered construction employees. We submit that including them as construction employees for purposes of determining the appropriate percentages would not only be contrary to fact and logic, but would also prejudge and circumvent the purpose of the hearing.

With respect to the question of interest, you stated to counsel that you were going to award interest on the amount owing. In that regard, Sodexo submits that interest for the period December 18, 2013 to July 21, 2014 should be calculated from the date of the first arbitration award (July 21, 2014) to the date of this current award. Interest should then be calculated for each month after that to the date of your current award (ie. calculated from the end of each month that the money became owing, to the date of your award). For example, money owing for the month of October 2014 should accumulate interest for the period October 31, 2014 to the date of your award in the within matter. Finally, interest should be calculated pursuant to the Judgement Interest Act.

The Union

This is the further email I indicated I would send today. I want to underline that there is no expectation on the part of the union that you will provide any award until you have returned from your trip and you have had the opportunity to fully review the evidence and the submissions of counsel. I am forwarding this email because I said I would.

This email is longer than previously expected as it became apparent as I was dealing with the aspect of calculating a portion of the damages by a percentage approach that the union's position needed to be more fully stated:

So far the following pertains:

1. The parties have agreed $314,118.56 is owed from the original award.

2. The parties have agreed there is an amount owing for the benefits from December 18, 2013 to March 28, 2014, but have disagreed on the amount.

3. The parties have agreed the CLRA agreement should be applied one hundred percent to the Sodexo employees from March 29, 2014 to March 31, 2015, but have disagreed on the amount owed.

4. The parties have disagreed on whether judgment interest on the original award and prejudgment interest for any subsequent damages should be applied.

5. The parties have disagreed on whether there should be a shift premium paid.

6. The parties have disagreed on whether the CLRA agreement should be applied for the period April 1, 2015 to December 31, 2015.

With respect to item number 6 above, the gulf between the two parties is 3.5 to 3.6 million dollars depending on the interpretation of the collective agreement. Your comments on October 6 were that the CLRA agreement applied while construction continued, which would be from April 1, 2015 to sometime in December 2015, but only to the extent that the Sodexo employees provided support to the tradespeople. So, there is a figure to be reached between the 3.5 to 3.6 million dollar gulf.

The balance of this submission will deal with two general areas based on one, the approach to reconcile the damages owed for the period April 1, 2015 to December 31, 2015 and two, the union's position on the damages overall in light of this approach in reconciling the damages for that period.

The Approach to Reconcile the Damages owed for the period April 1, 2015 to December 31, 2015

It is the union's understanding that, based on your comments on October 6 following the conclusion of the hearing, the approach Sodexo intends to take to determine the damages for the disputed period would be to apply a percentage approach and that percentage approach should be based on percentages used by the employer witness, Mr. Przybylowski, as contained in Exhibit AP#2. The union believes using a percentage approach is flawed. Using Mr. Przybylowski's evidence is particularly troublesome and the proposition that it be used should be completely rejected for the following reasons:

1. The evidence of Mr. Przybylowski was never seriously challenged because his evidence was never tendered as being the basis of a calculation of an award of damages. It was tendered to support an argument that there should be no damages paid for the period April 1, 2015 to December 31, 2015.

2. It was pointed out in cross-examination of the witness that he incorrectly assumed the Sodexo employees who had been served meals were considered non-construction employees even though you had found, in the original award, they were construction employees and the Court of Appeal had confirmed that finding.

3. The percentages are based on the meal preparation component of the Sodexo work. In other words, at best it would reflect the percentage of time the kitchen staff spent in support of construction workers but would not reflect the percentage of time spent by other people in the bargaining unit including housekeeping, snow shovellers, janitors, drivers, etc.

4. The following scenarios show the folly of relying upon the percentages of meals served to construction workers and the evidence of Mr. Przybylowski, generally, in relation to the calculation of percentages as the basis of determination of the damages;

(a) If you look to Exhibit AP#3, for August 4, 2015 you will see that Mr. Przybylowski has determined the total number of construction employees who received meals were 45 percent of the overall workforce. If you were to add the 18 Sodexo employees to the 189 other construction employees, this would bring you to 207. The percentage that 207 represents of the total of 420 is 49 percent.

(b) Again, relying on AP#3 and adding the 18 Sodexo employees to the Sodexo Camp residents for August 4, 2015, you will see there were 110 construction employees in the Sodexo Camp versus 78 non-construction employees in camp. Some Sodexo employees, including the housekeeping staff and the janitors would have worked only in support of the camp residents. There would be 110 construction employees of the total of 188, therefore 59 percent of the time of the Sodexo employees on August 4 in the housekeeping and janitorial departments was in support of the construction trades.

(c) If you were to look at the drivers who worked for Sodexo, on August 4, 2015 they would have been providing support to the total workforce, namely the 563 identified in AP#3. Again, if you add the 18 Sodexo workers to the construction employees you have 350 construction employees and 213 non-construction employees. The 350 employees of the total 563 are 62 percent of the workforce. So, arguably, the drivers who, among other things, would drive all of the buses transporting the construction workers from the LIM Camp, would have provided 62 percent of their time in support of tradespeople.

5. Another issue to be determined is what base value the percentage is applied to. All the evidence submitted at the hearing were calculations of the difference between the amounts actually paid by Sodexo and what should have been paid if the collective agreement rate was applied at 100% for the period of time in question. If a percentage approach is applied, it would need to be determined whether that percentage is applied to the full collective agreement rate, or whether the percentage is applied to the difference between what was actually paid and what should have been paid had the collective agreement been applied to the full extent. The difference in these two approaches is significant. For example: A classification 7 worker, who worked one 10-hour shift, was paid $140 ($14/hr) by Sodexo, but would have been paid approximately $420 ($42/hr) if the collective agreement was applied at 100%. The difference between the two amounts is $280 for that one day. If a percentage of 50% is applied to the full collective agreement rate, the worker would be owed $210 for that day, whereas, if the percentage is applied only to the difference between the two rates, the worker would be owed

$280 for that one day.

The Union's Position on the Damages Overall

One of the union's exhibits was DH#5. It showed a bottom line figure of $7,342,169.66 exclusive of interest and the shift premium claim. The $7,342,169.66, to be clear, did include the $314,118.56 owed from the first award and the approximately $318,000.00 owed for the benefits from December 18, 2013 to March 28, 2014.

DH#5 did not have the monthly increments shown. A previous rendition of the claim, entered as Exhibit DH#1 did, but the interpretation of the agreement on which those figures were based was abandoned prior to the arbitration.

I have attached a further breakdown by Mr. Harris, provided to me on October 19, 2017 showing the claim as it grew in increments monthly. The bottom line is, of course, still $7,342,169.66, exclusive of the interest and the shift premium claim.

The union submits, that for the reasons pointed out in the previous section on the challenge to the percentage approach, that applying some percentage to the last nine months of 2015 is not reasonable. Mr. Harris has advised us it would be a "nightmare" to try to attribute the damages to respective workers based on a percentage.

It is the union's position that the only feasible way in which to assess the damages would be based on an end date to the construction agreement based on the proposition that up to that end date the agreement applied 100 percent. For the purpose of concluding the litigation, but in fairness to its members, Hotel and Restaurant Workers are prepared for that cut-off date to be the end of September 2015, at which point the damages would be $6,414,331.57, exclusive of the interest and the shift premium claim. The interest would have to be calculated. The shift premium claim, as we submitted in closing arguments, would have to come in the form of a global amount.

These are the further submissions of Hotel and Restaurant Workers Local 779 following your comments of October 6, 2017.

I understand that Greg Anthony is going to send you a submission today as well.

With the hope of convincing counsel to consider some further points before abandoning settlement altogether, which the arbitrator continued to feel would provide a more beneficial outcome than an imposed arbitration award, counsel were contacted by e-mail a second time on February 28, 2018, providing an update on the award, and communicating some observations and questions for their consideration:

> I don't think I will need to meet with you, but I do have a few questions and a few observations.
>
> To date my award contains detailed reasons for rejecting the Employer's main argument on "predominant activity". My ruling is that the construction phase and the operations phase were not mutually exclusive in 2015. They occurred simultaneously. Predominant operations did not affect the construction activity on the Wet process that existed throughout 2015.
>
> The collective agreement applied to the work Sodexo's bargaining unit performed for Construction employees on site during 2015.
>
> Observations:
> Sodexo employees did not perform work for some of the construction workers on site.
>
> Sodexo employees provided services for both construction and non-construction people at the camp from December 18, 2013 to the end of 2014. No distinction was made between them in the compensation calculations Sodexo made for that period.
>
> Sodexo's compensation calculations also made no distinction throughout 2015.
>
> The number of Sodexo employees in 2015 appears to be reasonably consistent with the number between Dec. 18, 2013 and Dec. 31, 2014. The number of bargaining unit members needed to provide services to construction workers plus "some" (I haven't decided this proportion yet) non-construction workers in 2015 has not been identified. But given that this is a fly in/fly out camp for lengthy periods, I am satisfied that employing part time or temporary employees would be most unlikely. Therefore, full time employees would seem to be the most probable scenario. On balance, my sense is that the required size of the bargaining unit would seem to be somewhat less than needed to provide services to a full capacity camp of both non-construction and construction employees, but a substantial bargaining unit in its own right nonetheless, and lasting later in the year than has been suggested by the Employer.
>
> The main wrinkle comes about due to the likelihood that as construction work gradually diminished in 2015, one would expect the size of the bargaining unit to reduce accordingly. There is no evidence on this, and none likely to materialize

retroactively because that was not the mindset of the Employer at the time. Mr. Przybylowski's calculations in AP#2 do not assist in this matter because their purpose is to support the Employer's main argument that the collective agreement ceased to apply as of April 1, 2015. We need to turn our minds to the size, compensation (should read composition) and duration of staff. Therefore, this is where I will need each party to provide me with its global estimate of compensation with rationale (exchange with the other party) and I will reserve the right to choose one or the other, or neither of them.

Other Compensation matters:

1.Benefits from Dec 18, 2013 to March 28, 2014 shall be based on the arbitration order of wages. It would be inconsistent to do otherwise. A 10 hour 4 day schedule should apply. Overtime calculation shall be 10 hrs straight time and 2 hours OT for Monday, Tuesday, Wednesday and Thursday. Friday, Saturday, Sunday at double time.

Both parties please recalculate, exchange documents and send to me.

2. This same calculation shall prevail from April 29, 2014 and throughout 2015.

3. Shift differential of $102,000 shall apply. I am satisfied on the evidence of camp operations that, had the collective agreement been applied as it should have been, shift differential would have applied. It is not the employees' fault that the Employer did not do this at the time, and it's not their fault that the Employer cannot provide the necessary numbers now. The Union has no way to prove without the Employer's records. The Employer never follows the collective agreement; therefore, it has no such records. The provision of such numbers is the Employer's responsibility.

$102,000 is the best estimate available. I accept that.

4. Interest shall apply from December 18, 2013 to December 31, 2015 for the purpose of meeting the common arbitral principle of making the employees and Union whole.

5 Since calculating compensation for 2015 will be difficult, the parties are free to negotiate a mutually satisfactory settlement on any basis they choose.

6. I will address the issue of lack of due diligence in the award.

Other matters

I have Mr. Choubey's first name as Ratnef. But I googled a Ratnesh Choubey with TSMC. Clarification please.

Did Sodexo Drivers drive Sunny Corner workers at the LIM camp to and from the

project site?

AP#2 indicates that workers at the LIM camp received no LIM camp meals after October 28, 2015. The evidence was that Sunny Corner employees were on the site up to December 10th. Who fed them?

That's it for now. Please get back to me within 7 days.

The following are counsels' comments:

The Employer responded first on March 13, 2018

Re: HRW 779 v. Sodexo Canada Inc.

Dear Mr. Alcock:

I write in response to your email dated February 28, 2018 following the hearing of this matter on September 14, 15, 18, 19, and October 5 and 6, 2017.

In light of the content of your email, I would like to provide some relevant background to my response.

You will recall that immediately following final legal arguments of counsel presented by both Mr. Lenehan and myself to you on the last day of the hearing, you asked to see both myself and Mr. Lenehan in a separate meeting room (the "Meeting").

During the Meeting (which involved only the three of us), you had clearly indicated the following:

- that on the one hand, you would be rejecting the employer's argument on "predominant activity" – in other words, you did not accept that there would be no compensation owing to Sodexo employees under the CLRA Collective Agreement as of April 1, 2015;

- on the other hand, you indicated that you would not accept the Union's position "as is", meaning you would not order full compensation to Sodexo employees under the CLRA Collective agreement to the end of 2015, as if they were catering only to construction workers; and

- you stated that it was your position that in 2015 there was both construction activity and production activity at the Tata Steel Site and that the parties should consider a quantum calculation which would compensate Sodexo employees under the CLRA Collective

Agreement in proportion to the work they performed for construction workers who were utilizing food and/or accommodation services provided by Sodexo.

It is our position that the evidence presented by Sodexo during the hearing, including Mr. Andre Przbylowski's (sic) (Revay and Associates Limited) testimony, is clear and undisputed to the effect that in 2014 and especially 2015, Sodexo employees were catering to both construction and "non-construction" workers. Further, the evidence presented during the hearing was specifically that all those construction workers staying at the LIM Camp in 2005 did not avail of either accommodation or food services provided by Sodexo and therefore should be excluded from consideration.

During the Meeting you asked both counsel to first attempt to agree on the quantum (with your comments in mind), failing which, each counsel was to provide submissions to you, again, on the basis of the clear direction you had provided during the Meeting. As the parties were unable to reach an agreement on quantum, counsel made submissions to you on November 3, 2017 (a copy of Sodexo's submission is attached).

With that said, the hearing is now over, the evidence has been closed, legal arguments presented by the parties and the essential aspects of your ruling have been communicated to the parties during the Meeting. In our view, all that is left to be determined is quantum, pursuant to the ruling you rendered during the Meeting (the "Ruling").

As requested, Sodexo provided the attached submission to you on Friday November 3, 2017 at 4:51 p.m. It is our submission that this provides a clear analysis of what it deems to be the appropriate quantum, in accordance with the Ruling. Of course, should you require clarifications on those submissions, it would be our pleasure to provide you with same, but we respectfully submit that it would be inappropriate and contrary to the law for new arguments and evidence to be presented at this stage, considering the Ruling.

In relation to your comments regarding the size of the bargaining unit, these issues have already been addressed during the hearing and cannot now be re-opened. With respect to your comment that "*On balance, my sense is that the required size of the bargaining unit would seem to be somewhat less than needed to provide services to a full capacity camp for both non-construction and construction employees, but a substantial bargaining unit in its own right nonetheless, and lasting later in the year than has been suggested by the Employer*" we refer you to the evidence presented at the hearing that the Sodexo camp was to be the permanent camp for Tata Steel and that in 2015 the LIM camp was being used primarily, if not exclusively, to service construction workers and that other accommodations previously being used at the Tata Steel Site were being closed in light of the diminishing demand at the Tata Steel Site. Mr. Przbylowski (sic) provided uncontradicted evidence with respect to the

percentage of construction workers as compared to production and operations workers who were utilizing the services of Sodexo workers through 2014 and 2015.

Further, and with respect to your comment that "*The main wrinkle comes about due to the likelihood that as construction work gradually diminished in 2015, one would expect the size of the bargaining unit to reduce accordingly. There is no evidence on this, and none likely to materialize retroactively because that was not the mindset of the Employer at the time*", we once again refer you to the fact that the Sodexo Camp was to be the permanent camp for the Tata Steel Site and Mr. Przbylowski'(sic) uncontradicted evidence was that, as construction activity at the site wound down through 2015, fewer construction workers were availing themselves of Sodexo services. Sodexo still required the same number of staff to work at the Sodexo Camp because the size and nature of the camp did not change, rather the construction workers on site who were using Sodexo services were being replaced by non-construction (operations) workers. The size of the bargaining unit would not reduce, rather the people they were servicing changed from construction workers to production/operations workers. As mentioned previously, this matter was specifically addressed in Mr. Przbylowski's (sic) evidence.

Under your heading "*Other Compensation matters*", please note the following comments.

1. There was no evidence to suggest that employees worked seven (7) days per week. Sodexo provided evidence through Lisa White with respect to the calculation of pay based upon actual hours worked. In addition, the Union's witness Patrick McCormick, admitted that the Union's accountant and witness, Doug Harris, did not correctly calculate overtime and that the Company's approach to the calculation of overtime was correct and in compliance with the Collective Agreement.
2. Sodexo submitted its calculations on the quantum as an attachment to its submission of November 3, 2017.
3. As stated during our final argument, the Union failed to provide sufficient, or any, evidence to establish a quantum owing for shift differential. Specifically, the onus rests on the Union to prove its case in relation to an entitlement to a shift differential under the Collective Agreement and it is the union that must prove the amount owing for a shift differential. The Union did not introduce any evidence to establish which employees were entitled to shift differential, how many shifts they worked that they worked that would entitle them to a shift differential payment and how much money is owed to these employees by Sodexo. In fact, the payroll data which was entered into evidence shows little or no shift work which would attract a shift differential. The Union did not request or present evidence before and/or during the hearing to properly establish their claim. As stated during our final argument, we respectfully submit that this claim cannot be granted.
4. On the issue of interest, we refer you to the arguments contained in our submission on November 3, 2017.

5. The parties attempted to negotiate the quantum and therefore compensation based on the Ruling, without success. This is why we were requested to provide the November 3, 2017 submissions.
6. With respect, we have great difficulty understanding and accepting your reference to "lack of due diligence" on the part of our client. As such we are asking that you provide further clarifications in that respect so that we may answer this issue fully and adequately.

In response to your question, please note that Mr. Ratnesh Choubey was previously Vice-President Commercial with Tata Steel but has held the position of Chief Financial Officer from September 2017.

As indicated above, I remain available to clarify for you any details stemming from the submissions we have already provided. However, we must respectfully restate that the hearing is over, legal arguments have been made, and the essence of your ruling has already been communicated to the parties through the Ruling.

We thank you in advance for your consideration of the above observations and remain available should you require further clarifications.

Yours very truly,
Gregory M. Anthony

Counsel for the Union responded on April 13, 2018, offering the following comments, viz:

Finally, please accept these comments in relation to your February 28, 2018 email.

First, before making my own comments on behalf of HRW 779, I would observe that, although Greg, twice, in his letter of March 3, 2017 said "*...the hearing is over, legal arguments have been made, and the essence of your ruling has already been communicated to the parties through the Ruling*", he provided substantial comments nonetheless.

At this point, the RDTC only wishes to make comments with respect to two observations you made in your February 28 email: • *"Sodexo employees provided services for both construction and non-construction people at the camp from December 18, 2013 to the end of 2014. No distinction was made between them in the compensation calculations Sodexo made for that period.* : •*Sodexo's compensation calculations also made no distinction throughout 2015."*

As we observed in our November 3, 2017 email, in the third paragraph at the point numbered number 3, *"The parties have agreed the CLRA agreement should be applied one hundred percent to the Sodexo employees from March 29, 2014 to March 31, 2015, but have disagreed on the amount owed."* The first award applied the CLRA contract up to the end of March 2014. As noted above, the CLRA agreement applied to the end of March 2015. Therefore there was no need for Sodexo to do any percentage calculation for any time prior to April 1, 2015.

I trust none of your award will be revisiting the original award or taking issue with the agreed facts regarding the application of the CLRA agreement to the end of March 2015.

You had raised whether or not our November 3, 2017 emails to you should be considered in relation to your decision. Since you had invited comments from both parties and both parties responded via respective emails of that date, I very much believe they should, and must, be part of your considerations.

I trust this adequately sets forth the RDTC's position. I understand an arbitration award will be forwarded shortly.

Thank you for your efforts.

Dana Lenehan
