

**IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *LABOUR RELATIONS CODE***

BETWEEN:

**UNIVERSITY OF BRITISH COLUMBIA
(the "Employer" or "University")**

AND:

**CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 116
(the "Union")**

CONTRACTING OUT GRIEVANCE

ARBITRATOR:	WAYNE MOORE
COUNSEL for the EMPLOYER:	MICHAEL H. KORBIN CHRIS WIEBE
COUNSEL for the UNION:	DAVID TARASOFF
DATES of HEARING:	APRIL 15 & 16, JUNE 4, 2009
PLACE of HEARING:	VANCOUVER, B.C.

Introduction

This case relates to a grievance, dated November 20, 2007, involving the contracting out of interior painting of residential units at Acadia Park, a housing complex at the University (the "Grievance"). The central issue involves the interpretation of Article 24.03 of the Collective Agreement and, specifically, the meaning of the term "project" in that provision. The Union maintains that the nature of the work in question is ongoing maintenance and, therefore, cannot be contracted out without consultation with the Union. The Employer asserts that the work is a "project" valued at over \$50,000.00 and, thus, can be unilaterally contracted out by the University without going through the consultation process provided for in the Collective Agreement.

Facts and Circumstances

The facts of this case are not, for the most part, in dispute. I will outline the relevant background relating to the language of the Collective Agreement as well as the evidence provided by each witness below.

Article 24.03, a Letter of Understanding ("LOU #14"), and the Protocol for consultation (the "Protocol") in the Collective Agreement are relevant to the issue of contracting out in this case. The current language of Article 24.03 was imposed in the 2002/2003 round of bargaining through a binding mediation/arbitration process with Arbitrator Mark Brown (see *University of British Columbia -and- Canadian Union of Public Employee, Local Nos. 116, 2278, and 2950*, unreported, April 14, 2003 (Brown – BC) (the "*Brown Award*") at p.11-15). Article 24.03 restricts the Employer's ability to contract out, with specific exceptions and provides the following:

Article 24.03 Contracting Out

It is agreed between the parties that this Article shall prevail over other provisions or articles of the Collective Agreement, Letters of Understanding, any other ancillary documents, or practices.

UBC shall not contract out services or work where UBC has employees that normally provide the work or services, except in the following circumstances:

(1) UBC does not have the equipment necessary to provide the required work.

(2) UBC does not have employees who regularly perform such work or are skilled in such work and where such jobs will not be required on a continuing basis in the future.

(3) Emergency situations.

In the above noted circumstances, no employee shall be laid off, suffer a reduction in classification, or have recall withheld because of contracting out.

Where UBC is considering contracting out work or services, UBC will consult with the Union before calling for tenders or awarding contracts. The consultation process shall be governed by the Letter of Understanding: Contracting Out of the Collective Agreement.

Notwithstanding the above, the University may contract out renovation, maintenance, repair or construction project work valued at fifty-thousand dollars (\$50,000.00) or more. For the purposes of determining total project value, the costs of material, labour, and administrative costs will be included in the total....

LOU #14 is the Letter of Understanding: Contracting Out of the Collective Agreement which is referenced in Article 24.03. The Protocol, which is attached to LOU #14, established a consultation and umpire process for dealing with situations where the Employer wished to contract out work. The change imposed by Arbitrator Brown is the 'notwithstanding' clause which exempted "renovation, maintenance, repair or construction project work valued at fifty-thousand (\$50,000.00) or more" from the application of LOU #14 and the Protocol. The language of Article 24.03 was not changed in the last round of bargaining which resulted in the current Collective Agreement.

Gerry Harley began work with the University in 1978. After working in Plant Operations for seven years, he joined the Department of Housing and Conferences ("Housing") in 1985 as the Facilities Manager and was responsible for overseeing the trades, housekeeping, maintenance, renovation, construction, and the conference season (which runs from May to August). He also oversaw the repainting of residences. In 2001, Harley became the Associate Director of Facilities, although he retained much of

the same responsibilities as he had as Facilities Manager. He retired in November 2008, but continued consulting with Housing.

Harley explained that Housing is responsible for a number of different residences at the University, ranging from single student dormitories to family townhouses. Several of the dormitory-type residences are occupied from September until April by students and are used for conferences during the summer months. Other residences accommodate year-round tenancy, but have a lower occupancy rate during the summer.

Prior to 1994, the interior repainting of the residences was done by the University's staff and contractors. Since 1994, Housing has followed a five-year program, which was based on industry associations' standards, for repainting the interior suites in the residences. Repainting in many of the residences occurs in May or June, after students leave for the summer, or in July or August, when occupancy rates are lower than during the school term. In these periods, repainting of large sections of the residences can occur. In certain residences, students are moved out for a week so groups of suites can be repainted at one time. Since 1994, the painting work at all of the residences, with the exception of Acadia Park, has been performed exclusively by contractors.

The Acadia Park complex includes a number of different townhouse and apartment residences and provides housing for students, faculty, and staff with partners or families. It offers year-round occupancy with tenancy arrangements of three or four year leases. Given these tenancy arrangements, the repainting in this complex has been handled differently.

Initially, in 1987, Harley decided to repaint certain of the older buildings at Acadia Park, using painters employed by the University. This led to complaints from tenants who occupied the units while the repainting occurred. Housing then, still using University staff, asked tenants when they wanted their units to be repainted. Contractors could not be used because tenants would decline the repainting at the last minute. In 2004, under a new Director of Housing, the decision was made to paint the units at Acadia Park at the end of the month that occupants moved out.

The repainting occurs during the four or five-day period between the time an old tenant moves out and a new tenant moves in. Sometimes, a tenant will leave early or the incoming tenant will give the University two or three days to paint the unit. At that time, in addition to painting, the University may

upgrade lights and carry out other maintenance. It takes approximately 2 1/2 days to complete the repainting and deficiency work of each unit. In Acadia Clusters, one of the residences at Acadia Park, asbestos procedures must be followed when wall surfaces are broken. The units in that complex are taken out of service for one month and the work is performed by University staff, although the University has used contractors when no painters are available. The University has been able to paint over 90% of the units at Acadia Park at least once in the five-year period that the work has been contracted out.

Prior to the *Brown Award*, if the University wanted to contract out work, it would then in accordance with LOU # 14 and the Protocol go through the Contracting Out Committee (the "Committee"). Harley has been on the Committee since it was established. He identified a number of examples in from 1999 and 2000 where the parties agreed to contract out interior painting work in the residences. He also identified an application by the Employer for the contracting out of interior painting work in the February 13, 2003 Committee minutes. He indicated that that application was withdrawn and the work was contracted out after the *Brown Award* was issued. The Union did not grieve the matter. Since the *Brown Award*, the University has contracted out interior painting work, without consulting the Committee. All of the repainting work was valued over \$50,000 and the Union did not grieve the decision to contract it out.

At the time of the *Brown Award*, Housing employed five painters. Over time, through retirement or attrition, all five have left their positions. Housing has replaced one of the painters with a current incumbent. There have been no layoffs of painters in Housing.

Harley made the decision to contract out interior repainting at Acadia Park. The University entered a contract with Spectrum Painting Ltd. ("Spectrum") for one year commencing April 15, 2004, with the provision that it could be extended with good performance. The University and Spectrum have, to date, entered five one-year contracts which have covered a number of the residences at Acadia Park. A Request for Tender for the interior repainting of the University Apartments, within Acadia Park, was also successfully bid on by Westcan Painting & Decorating Ltd. ("Westcan") in the Spring 2004. Westcan performed that repainting work for two years. The work was then performed by Spectrum. Both Spectrum and Westcan are unionized contractors. The total value of interior repainting work for the five years has

been approximately \$2 million, with the lowest value of work, approximately \$230,000, performed in 2008/2009.

Harley testified that in the summer months, 20 or more units are vacated at Acadia Park at the end of the month. Spectrum has a large pool of 40 to 50 painters to handle the short-term work each month. When both Spectrum and Westcan were working at Acadia Park, they each had 15 to 20 painters working in the summer season when there was high demand, 8 to 12 painters when there was medium demand, and 5 to 7 painters in the slower winter season. The painters work on more than one unit at one time, depending on the flow of the work.

Dennis Magee, a Union shop steward, was a painter in Housing until 2005. Harley indicated that he had at least half a dozen discussions with Magee regarding the interior painting work being performed by Spectrum and Westcan at Acadia Park.

The University has tendered five painting projects and intends to contract out this work on a five-year cycle, with one-year contracts.

In cross-examination, Harley indicated that, since the *Brown Award*, the University has issued Requests for Tender for interior repainting at Acadia Park, Gage, and Place Vanier residences. He confirmed that, prior to the *Brown Award*, the contracting out of interior painting at all of the other residences, except Acadia Park, was discussed with the Committee. Since the *Brown Award*, interior repainting at various residences valued over \$50,000 has been contracted out without consultation with the Committee. Harley confirmed that the interior painting work at Acadia Park was done by University staff until 2004 and that interior painting work at the other residences had been contracted out since 1994. He further indicated that the University did not give the Union a "head's up" about contracting out the interior painting work, as there was no requirement to do so.

Greg Garbe has been employed at the University for approximately 20 years. He currently holds the Sub-Head Labourer position in Plant Operations. He is a senior shop steward and has been involved in the Union for approximately 19 years. In 1995, when the Protocol and the Committee were established, Garbe was a member of the Committee. He remained so for two or three years.

Garbe testified that the University divides the campus into zones and designates painters to specific zones. 14 painters are designated to Plant Operations. One painter is designated to Housing. All of these painters are Union members. In the past, painting at Acadia Park had been performed by painters employed by the University.

Garbe was involved in the 2002/2003 round of bargaining which resulted in the *Brown Award*. After the *Brown Award*, the Union wrote to the University on two occasions to seek clarification with respect to the contracting out language, including the meaning of the term "maintenance". Further discussion between the parties to clarify their understanding occurred in April 2005. As a result of these discussions, the Union asked Arbitrator Brown to reconvene the matter to resolve ongoing implementation issues. Arbitrator Brown determined that he did not have jurisdiction to do so (see *University of British Columbia -and- Canadian Union of Public Employee, Local Nos. 116, 2278, and 2950*, unreported, July 19, 2005 (Brown - BC)). The Union, then, sought the assistance of Umpire Donald R. Munroe, who was named in LOU #14 and the Protocol but he declined jurisdiction over the matter. On March 31, 2006, the University wrote to the Union to address "project-oriented maintenance", which does not include ongoing "operational" maintenance such as "custodial cleaning, lawn cutting and plant bed maintenance, building system preventative maintenance and inspections, trouble call response and minor repair work." Garbe acknowledged that the Union accepts that there is a difference between project-oriented maintenance and operational maintenance.

In cross-examination, Garbe agreed that, after the *Brown Award*, the Union was vigilant with respect to contracting out at the University and, although not certain, agreed that it was likely that the Union asked its shop stewards to report information to the Union if they became aware of contracting out. He indicated that he was not aware that Spectrum had begun the painting work at Acadia Park in 2004. He agreed that members of the Union worked at Acadia Park. Garbe believed the Union was advised of the situation by a shop steward the day before it filed the Grievance in November 2007. However, he agreed that Magee, a painter and, then, a Union Vice-President, who had signed the Grievance, may have had knowledge that Spectrum was painting at Acadia Park prior to November 2007. He indicated that he was not aware, until the hearing, that the Employer had contracted out a number of interior repainting projects since 2003. He believed that there were no

other grievances relating to painting work that had been contracted out by the University.

In the 2002/2003 round of bargaining, Garbe confirmed that the Employer's position was to achieve the ability to contract out renovation, maintenance, repair, or construction project work valued at \$50,000 or more. The Union wanted to maintain the restrictions on contracting out found in the previous collective agreement, but would have agreed to the University contracting out renovation and construction projects valued at \$250,000 or more.

In the 2005/2006 round of bargaining, Garbe indicated that the Union's initial proposal was to raise the threshold in Article 24.03 to \$250,000. The Union, later, proposed that the language refer to "capital construction" and that the references to "renovation", "maintenance", and "repair" be removed. These proposals were rejected by the Employer.

Garbe was a member of the Committee from approximately 1995 to 1999. He agreed that, prior to the *Brown Award*, when the University wished to contract out work, the affected department made an application to put the issue before the Committee. The Committee would determine if the work could be contracted out and, if not, the matter would go to the Umpire. He also agreed that, prior to the *Brown Award*, applications respecting the repainting of residences went before the Committee. He acknowledged that the Committee agreed to the contracting out of certain repainting work in 1999 and 2000, although he indicated that the Committee reached agreements over contracting out work for many different reasons.

In terms of the work performed by the Union's members, Garbe maintained that the University's painters have, can and could paint the residences. He agreed that the 14 painters in Plant Operations work full-time elsewhere and did not want to speculate as to how one painter in Housing could paint the interiors of the residences. He, later, confirmed his belief that there used to be approximately 10 painters in Housing. In his view, the repainting of residential units was operational maintenance work, but could be considered refurbishment and renewal.

Diane Jolly is a National Representative for CUPE and, as such, is involved with contract negotiations and grievances for the Union. She was its chief spokesperson in the 2005/2006 round of collective bargaining.

Jolly confirmed that, in the 2005/2006 round, the Union's proposal was to increase the threshold for Article 24.03 from \$50,000 to \$250,000. With respect to the Union's proposal to change Article 24.03 to refer to "capital" projects, Jolly indicated that the proposal was meant to clarify what the Union understood the Employer's intent to be with respect to contracting out. Based on various articles the Union had read and from various discussions it had had with the Employer, the Union understood that the Employer wanted to contract out capital projects. The language of the proposal was, the Union believed, consistent with the policy of the provincial government regarding contracting out capital projects. Jolly indicated that the Employer did not have a proposal on the table with respect to contracting out. She acknowledged that none of the Union's proposals relating to contracting out were agreed to in bargaining.

In cross-examination, Jolly indicated that the Union's proposed change to "capital" projects would have captured both the Union's and the Employer's intention. She acknowledged that the Employer never told the Union what its intention was and that the articles and the discussions that occurred with respect to the Employer's intention related to 2002/2003 bargaining.

Positions of the Parties

Union

The Union asserts that the University has breached Article 24.03 and LOU #14 by contracting out the interior painting at Acadia Park. It argues that, although the work is valued at more than \$50,000, the interior painting at Acadia Park is not a "project". It asserts that the work is properly defined as "maintenance" (see *Canada Cement Lafarge Ltd. -and- United Cement, Lime and Gypsum Workers' International Union, Local 385*, [1983] B.C.C.A.A.A. No. 63 (Albertini - BC) ("*Canada Cement Lafarge*")) as it is regular, operational maintenance, and not "renovation", "repair" or "construction" work. Accordingly, the Employer cannot unilaterally contract out the work, under Article 24.03, and must proceed with the consultation and umpire process, pursuant to LOU #14 and the Protocol.

In terms of interpreting Article 24.03, the Union argues that the words "renovation", "maintenance", "repair", and "construction" are adjectives which modify the term "project work" such that the Employer can only

The Oxford Dictionary provides that the term "project" means a "planned or proposed undertaking; a scheme" which the Union says supports the notion that a "project" has an exceptional quality to it and is not a routine course of action.

The Union argues that the extrinsic evidence from the 2002/2003 round of bargaining is of no assistance because the language of Article 24.03 was awarded by Arbitrator Brown through interest arbitration and cannot be relied on as evidence of mutual intent (see *Brown Award*). In the 2005/2006 round of bargaining, the Union's proposals for increasing the \$50,000 threshold and amending the language to reference only "capital construction project" were not accepted and the language remained unchanged. Thus, the evidence relating to the bargaining history does not aid in interpreting the term "project".

The Union also argues that correspondence from the University setting out its opinion about "project-oriented maintenance work" and "operational maintenance" is not evidence of the parties' mutual intent.

The Union points to the *Brown Award* for assistance in interpreting the term "project". It asserts that Arbitrator Brown awarded language that would meet the University's stated objectives respecting, in the Union's words, "replacing the roof", not "fixing holes... ..or replacing shingles". That is, the plain meaning of the term "project" does not include ongoing, routine, or cyclical maintenance and will, inherently, have an exceptional quality to it. A "project" is an undertaking which does not require a regular workforce and is not work that has been done by members of the bargaining unit "as a matter of regular or usual practice in the past". A "project" will have a unique aspect that removes it from the routine tasks of the bargaining unit and will be performed and completed in a fixed, discrete period of time (see *Alcan Smelters and Chemicals Ltd. -and- Canadian Auto Workers, Local 2301*, unreported, June 21, 2000 (Hope, Q.C. – BC) ("*Alcan Smelters*"). Project work, the Union asserts, does not provide "a continuing source of steady demand for regular employees. When the projects are complete the work is gone." (*Petro Canada Explorations Inc. -and- Energy and Chemical Workers Union, Local 686*, [1983] B.C.C.A.A.A. No. 538 (Hope, Q.C. – BC) ("*Petro Canada*").

Since the occupants of Acadia Park do not move out *en masse* like those in other residences, the Union argues that the interior painting is not "project work" because it is not of an exceptional quality but is regular, routine, or

cyclical maintenance that provides a continuing source of steady work for regular employees. Given that it is ongoing and is not completed within a specific period of time, the work does not fall within the University's stated objectives of contracting out undertakings analogous to "new construction" or "extensive major repairs" as described in the *Brown Award*.

The Union, in answer to the Employer's argument that it acquiesced to the University's decision to contract out the interior painting at Acadia Park, says that it made no clear representation that the contracting out was acceptable and there is nothing unfair about permitting the Union to pursue its grievance (see *City of Cranbrook, supra*). First, the Union argues that discussions before the Committee relating to interior painting in other residences occurred before the *Brown Award*, on a without prejudice basis and, as such, are not evidence that the Union agreed to contract out interior painting work generally or at Acadia Park. The painting work at Acadia Park was first contracted out in 2004, after the *Brown Award*, and is not an example of contracting out after consultation. Second, the facts that the University withdrew certain contracts from discussion before the Committee or that interior painting was contracted out in other residences after the *Brown Award* without any consultation with the Union cannot be relied on as evidence of acquiescence. The Union points to the steps it took, after the publication of the *Brown Award*, to establish parameters around the new language of Article 24.03. Finally, while there is some evidence that a shop steward knew about Spectrum in the months prior to the grievance, the Union asserts that its knowledge about the contractor was not extensive and, in any event, the Union made ongoing attempts to clarify the contracting out language. Accordingly, it submits that it did not make any representations which caused the University to believe that it agreed that the contracting out of the interior painting work at Acadia Park was acceptable.

In reply, the Union distinguishes the work at Acadia Park from painting that occurs at all of the other residences on the basis that it has only been contracted out since 2004 and has never been reviewed by the Committee. The Union says that the imprecise five-year cycle for painting at Acadia Park and the fact that the painting has historically been done by Union members supports its argument that the work is ongoing maintenance, as opposed to project work. In determining whether the work constitutes a project, the Union says the size of the undertaking can be a factor, but cannot be determinative of the issue. Further, it says that cost savings is an irrelevant consideration when deciding whether the work is a project. It also

notes that the fact that there is one painter employed in Housing is a matter to be considered by the Committee and the Umpire. Finally, the Union disputes the assertion that the painting work at Acadia Park is part of the larger five-year program for painting all of the residences; and, in any event, seeks to sever this facet of the project because it began in 2004 and is completed in a different fashion than at the other residences (see *Canada Cement Lafarge*).

In terms of remedy, the Union seeks a declaration that the Employer has violated Article 24.03, LOU #14, and the Protocol by contracting out interior painting work at Acadia Park without consultation and an order that the parties meet to discuss contracting out this work, under paragraph 5 of the Protocol. If the issue is not resolved, the Union may then refer the matter to the Umpire for further remedies, including a cease and desist order.

Employer

The Employer's position is that the interior painting at Acadia Park is "renovation, maintenance, repair or construction project work" valued at over \$50,000 and, therefore, there is no requirement for prior consultation, under Article 24.03. Noting the Union's acknowledgment that the work is "maintenance" and is valued over \$50,000, the Employer agrees that the focus of this case is the interpretation of the term "project".

The Employer submits that the interior painting at Acadia Park is the same as the interior painting that is done at all of the other residences once every five years, except that the project is completed in a different way. The work is carried out at the other residences during the summer months when fewer units are occupied. Due to the unique nature of the tenancy arrangements at Acadia Park, the units are repainted on a close to five-year cycle when suites are vacated and before the new tenants move in, in order to avoid inconvenience to occupants.

The Employer also argues that since the *Brown Award* imposed the relevant portion of Article 24.03, the interpretation of that language does not involve a determination of the mutual intention of the parties. Rather, in determining the meaning of the provision, the University asserts that a purposive approach is appropriate along with the application of relevant jurisprudence and the ordinary rules of collective agreement interpretation (see *Surrey School District No. 36 -and- Canadian Union of Public Employees, Local 728*, [2005] B.C.C.A.A.A. No. 106 (Moore - BC)).

The purpose of the language imposed in the *Brown Award*, says the Employer, is to permit the University to unilaterally contract out the larger scale renovation, maintenance, repair, or construction work, without consultation. The University cannot contract out relatively minor renovation, maintenance, repair, or construction work, without going through the process in LOU #14 and the Protocol. The imposed language was a significant and expansive change which allowed the University to contract out work with fewer restrictions. The Employer submits that any interpretation of the language must be consistent with this rationale.

After the *Brown Award*, the University contracted out interior painting in residences without prior consultation with the Union. The Employer says that since the University withdrew interior painting applications from the Committee and unilaterally contracted out the work, without objection from the Union, this demonstrates that the Union understood that the painting work was "renovation, maintenance, repair or construction project work".

The Employer argues that a Union shop steward had known for a number of years that Spectrum and Westcan had been doing the interior painting work at Acadia Park and the Union has provided no explanation for its delay in filing the Grievance.

The University agrees that the work is "maintenance" because it is done to maintain the residential units to an appropriate standard. The meaning of the term "maintenance" includes keeping something maintained, in a state of repair or efficiently, in proper or good condition, operating and productive. The term also refers to general repair and upkeep. In the labour relations context, "maintenance" includes painting and repainting (see *Shorter Oxford English Dictionary*, 3rd ed.; *Webster's Third New International Dictionary*; *Funk & Wagnalls, Canadian College Dictionary*; *Black's Law Dictionary*, 8th ed.; *Fleetwood Sausage, a Division of Consolidated Food Brands Inc.*, BCLRB No. B104/2001; *North Central Plywoods -and- Pulp, Paper & Woodworkers of Canada, Local 25*, [1999] B.C.C.A.A.A. No. 398 (Munroe, Q.C – BC); *City of Edmonton*, [1993] Alta. L.R.B.R. 362). The Employer points to Garbe's evidence, in cross-examination, that the repainting of the residences every five years is part of the service, upkeep, repair, replacement, and maintenance of existing buildings and is refurbishment and renewal work to support its argument that the interior painting at Acadia Park is maintenance project work.

The University asserts that the interior painting could also fall within the rubric of "renovation", which means to renew materially, to repair, to restore to a former state, to create anew, to refresh, to make over, to reinvigorate (see *Shorter Oxford English Dictionary*, 3rd ed.; *Webster's Third New International Dictionary*; *Funk & Wagnalls, Canadian College Dictionary*; *Cineplex Odeon Corporation*, BCIRC No. C97/92).

The Employer maintains that the painting work constitutes a "project", which has been defined as "a plan, draft, scheme.... [s]omething projected for execution", "a planned undertaking", "something proposed or mapped out in the mind, as a course of action; a plan", "the interrelated steps or functions... ..established for the purpose of achieving a particular objective", and "the broad overall undertaking rather than the aspect of the undertaking covered by particular contract or subcontract" (see *Shorter Oxford English Dictionary*, 3rd ed.; *Webster's Third New International Dictionary*; *Funk & Wagnalls, Canadian College Dictionary*; *Dunning Paving Limited*, [1989] OLRB Rep. October 1029; *Empire Iron Works Ltd. - and- Ironworkers, Local 97*, [1994] B.C.C.A.A.A. No. 234 (Kelleher – BC) *Paul's Restaurants Ltd.*, BCLRB No. B298/94).

It submits that the painting work at Acadia Park is part of the larger five-year project of repainting the interior of all of the residences of the University. The fact that the work at Acadia Park has been implemented in stages in order to accommodate the nature of the tenancy arrangements, and may take longer to complete, does not take it out of the meaning of the term "project". By choosing to carry out the work in a manner that avoids significant disruption to the tenants, the University has opted for a different model that achieves the same result as when the work is carried out each summer in the other residences.

From a practical perspective, the University points to the one painter employed in Housing who is occupied with his regular work and argues that, if the interior painting at Acadia Park was to be performed by Union members, the University would have to hire 15 to 20 painters to perform the repainting for a certain period each month.

Turning to the bargaining history, the Employer argues that the Union's proposal, in the last round of bargaining, to remove the words "renovation, maintenance, repair" from Article 24.03 and to limit permissible contracting out to "capital construction projects" was not accepted and, accordingly, the

provision should not be interpreted as if it the Union's proposal had been achieved in bargaining.

In reply, the Employer asserts that a "project" does not have to be exceptional and argues that the *Alcan Smelters* and *Petro Canada* cases should not apply here as the specific language of the Collective Agreement permits the contracting out of maintenance projects over \$50,000, even where the work used to provide a steady stream of employment for the bargaining unit.

In sum, the Employer says that since the work falls within the language of Article 24.03 and has been properly contracted out, the Grievance should be dismissed.

In the alternative, if I conclude that the work cannot be unilaterally contracted out under Article 24.03, the Employer submits that the remedy must be limited to a declaration that the parties must proceed under LOU #14 and the Protocol to determine whether the work may be contracted out.

Decision and Discussion

The critical issue in this dispute centers on the interpretation of the term "project" in Article 24.03, which, in part, provides:

Notwithstanding the above, the University may contract out the renovation, maintenance, repair or construction project work valued at \$50,000 (\$50,000.00) or more. For the purposes of determining total project value...

The typical task for an arbitrator in a case involving the interpretation of collective agreement is to determine the mutual intention of the parties as evidenced by the language that they bargained, having regard, if necessary, to relevant extrinsic evidence such as bargaining history. In this case, as the Collective Agreement language at issue was imposed by a third party, bargaining history does not potentially come into play in the traditional manner. Consequently, I must still determine the meaning of the language through the consideration of the wording of the Collective Agreement, using the principles that would ordinarily apply to collective agreement interpretation and assisted by the purpose that was to be achieved by the language.

The starting point, then, is the *Brown Award*. Arbitrator Brown states the following:

After carefully reviewing the parties' positions, I have set out below my decision with respect to collective agreement contracting out language. In general, UBC's proposal to contract out renovation, maintenance, repair or construction project work is accepted. I conclude that the \$50,000 limit will generate more potential savings for UBC resulting in a financial benefit for Local 116 members. Furthermore, because UBC has offered job security, a larger limit is not necessary. The current consultation process in the collective agreement will not apply to the contracting out of the renovation, maintenance, repair or construction projects....

I am not prepared to award the first component of UBC's proposal which would have allowed any contracting out as long as the employees were not laid off or terminated. I acknowledge that the proposed language is found in other public sector collective agreements. However, the proposed wide sweeping language does not reflect UBC's interest as communicated in negotiations at the bargaining table and in public communication. That being said, I have amended the contracting out language slightly so that consultation on contracting out of areas other than renovation, repair or construction project can continue within the existing collective agreement process.

The challenge for the parties over the term of this collective agreement is to demonstrate that the consultation process is efficient and effective so that UBC does not require broader flexibility in this area when the collective agreement expires.

(at p. 13-14)

While Arbitrator Brown did not accept the Employer's initial proposal for unrestricted contracting out where no employee is laid off or terminated, he did impose language that gave effect to the University's objective to increase its ability to unilaterally contract out certain work of a larger scale. In exchange, Arbitrator Brown provided that the cost savings would be passed on to Local 116 for a certain period of time. It is clear from the *Brown Award* that the intention behind the imposed language was to broaden the Employer's flexibility to contract out certain work. Accordingly, Article 24.03 specifies that "renovation, maintenance, repair or construction project work" valued at \$50,000 or more can be unilaterally contracted out by the Employer. Nothing in the 2005/2006 round of bargaining resulted in changes to this language, although I note that the Union was unsuccessful in limiting permissible contracting out to capital construction projects or raising the threshold to project work valued at \$250,000.00 or more.

The parties agree that the work meets the \$50,000 threshold. They also agree that the work can be properly characterized as "maintenance". In my

view, that characterization is appropriate because, while there could be a number of reasons to repaint in certain circumstances, the main purpose of the repainting work is to maintain Acadia Park to an acceptable standard for its occupants. The primary reason for repainting is not for the purpose of construction, repair, or renovation.

On a plain reading of the language of the Collective Agreement, I accept that the nature of the work must be that of a "project" before the University can unilaterally contract it out, under Article 24.03. The question then becomes whether the work, in this case, constitutes a "project". In essence, the Union argues that the interior painting at Acadia Park is not a "project" because it is carried out on an ongoing, monthly basis, under renewable yearly contracts, without any inherent exceptional quality that would take it out of the realm of routine maintenance. The Employer says that the work is part of Housing's five-year program for repainting the interior of all of the University's residences and, as such, falls within the meaning of the word "project".

The word "project" is not a term of art and the definitions put forward by the parties are not particularly helpful in clearly delineating its meaning. Nor, are the arbitral authorities of particular assistance since the purpose underlying the language in this case is a unique recognition of the Employer's ability to contract out certain work that may have been performed by the bargaining unit in the past. Although Article 24.03 prohibits the Employer's ability to contract out "where the University has employees that normally provide the work or services...", with three specific exceptions, it also clearly provides that "[n]otwithstanding the above, the University may contract out the renovation, maintenance, repair or construction project work valued at \$50,000 or more. The *Brown Award* carved out a specific type of work that could be contracted out unilaterally by the University, while other types of work continued to be the subject of the consultation process outlined in LOU #14 and the Protocol. Thus, the Union's reliance on the prior practice of bargaining unit employees performing this work is of no assistance to it.

I note that the *Alcan Smelters* case did not deal with collective agreement language that included the term "project" but commented on that term as it had come to be used by the parties in that matter. However, to the extent that that case stands for the proposition that, in general, "project" work must be distinguishable from regular maintenance, I accept that proposition.

Similarly, the *Petro Canada* case addresses particular types of work (i.e., "new construction" and "extensive major repairs") that did not fall within the contracting out prohibitions in that case. Arbitrator Hope was not interpreting the term "project" but did note that "it is both the nature of the work and its impact on manning which defines the difference in approach" in relation to the employer's ability to contract out specific types of work in that case. In the context of this case, I agree that "project" work can be distinguished from regular maintenance on the basis of the actual nature of work (i.e., what its being done and for what purpose) and the necessities of scheduling it. Arbitrator Hope's comments about regular maintenance are helpful:

As a category of work, the work normally performed by this bargaining unit is maintenance work that is capable of routine scheduling, either by reason of its predictable or recurring nature or by reason of the absence of time constraints which permits its scheduling as time comes available.

(at para. 29)

In my view, the term "project" refers to an implemented plan of action that has some magnitude in terms of scope of work, and has certain parameters around what is to be attained within some period of time. It requires some specificity. Many plans can evolve into a "project" and projects can vary in scope and complexity. However, the task here is to decide whether the interior painting at Acadia Park is the type of "project" that is referred to in Article 24.03. This involves considering what the language in the *Brown Award* was intended to achieve and weighing that against an assessment of the nature of the interior painting work at Acadia Park.

In this case, the Employer's overall goal for the repainting work was to maintain the University's residences. To achieve that objective, Housing implemented the five-year program for repainting based on industry standards. There is no objection as to the reasonableness of the program. The five-year program was implemented in a variety of ways, depending on the specific nature of the tenancy arrangements at each particular residence. In my view, it is the implementation of the program for a particular residence that establishes the "project". That is, the overall plan for repainting the residences becomes a project with unique parameters once it is determined how the program will be carried out in each residence.

Further, I conclude that the interior painting at Acadia Park is an implemented plan of action of sufficient scope and definition to constitute a "project". First, I note that the repainting work at Acadia Park is carried out when it can be reasonably done in light of the established tenancy arrangements. The unpredictability of the work and the specific window of time when it must be carried out support the conclusion that the nature of the work in question is not regular, routine maintenance that would be carried out by the University's workforce.

Second, the scope of the work involves repainting all units, in their entirety, that are vacated at the end of a particular month, as opposed to painting single walls or repairing individual deficiencies. Within the realm of things that could be maintenance, to borrow from the Union's roofing analogy, where one end is replacing shingles or fixing holes and the other is general upkeep of the entire roof, the work in question is closer in nature to the latter. I do not accept that the scope of work is similar to "fixing the holes or replacing shingles". It is more than that. It is no less a project than painting half of a tower for a particular residence, in the summer months when there is little occupancy. The "project" is simply achieved in a different manner due to the individual circumstances of Acadia Park. These circumstances mean that the parameters of the "project" may need to be somewhat flexible.

Third, I find that the scope of work and the approximate time frame in which it is to be carried out are sufficiently defined. The Requests for Tender specify the complexes within Acadia Park as well as the total number of units and indicate that the number of units to be painted monthly is variable and determined by the number of units are vacated each month. While the parties are not able to clearly ascertain which or how many units will be vacated each month, the goal that all must be repainted within the five-year period is the overarching target.

Further, in my view, the fact that the commercial arrangements are in the form of one-year contracts, with an opportunity to renew based on performance, is simply a measure of quality control rather than an indication that the project lacks a discrete end point. Harley's evidence was clear that the five-year program was, ultimately, the goal the University was striving for. At Acadia Park, approximately 90% of the units were repainted in the five-year time frame.

Thus, keeping in mind that the intention underlying the *Brown Award* was to provide the Employer with some flexibility in terms of contracting out

certain larger scale work, I conclude that the interior painting work at Acadia Park falls within the language of Article 24.03. The difficulty of access to the work, with its inherent lack of certainty as to both content and scheduling, and the fact that the work is done pursuant to a general program calling for repainting, under term contracts, brings it within the ambit of the provision. It is maintenance work that has been defined sufficiently in terms of its scope and timing to fall with in the intended meaning of the term "project". In these circumstances, the Employer has not breached the Collective Agreement by failing to consult with the Union prior to contracting out the work.

Given my conclusions in this regard, it is unnecessary to address the parties' arguments respecting acquiescence and delay.

Accordingly, the Grievance is dismissed.

Dated at the City of Vancouver March 10, 2011



WAYNE MOORE, ARBITRATOR