

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

MOUNT ALLISON UNIVERSITY

("the University")

**AND:**

MOUNT ALLISON FACULTY ASSOCIATION

("the Association")

**IN THE MATTER OF:**

RENEWAL COLLECTIVE AGREEMENTS

**SOLE ARBITRATOR:**

Kevin M. Burkett

**APPEARANCES FOR THE UNIVERSITY:**

Brian Johnston - Counsel

**APPEARANCES FOR THE ASSOCIATION:**

David Mombourquette - Counsel  
Andrew Irwin - Chief Negotiator

Pursuant to Section 79 of the Industrial Relations Act of New Brunswick, Mount Allison University and the Mount Allison Faculty Association (MAFA) have agreed to submit to binding arbitration before a sole arbitrator the differences between them in respect of the negotiation of their collective agreements (one covering full-time faculty, the other part-time faculty), including differences arising from the return to work following a three-week strike. I am that arbitrator. There is no dispute with respect to my authority in this regard.

Mount Allison University, established in 1839, is a small, primarily undergraduate university located in Sackville, New Brunswick. It offers a wide range of programs, with the institution organized into three faculties: arts, social sciences and science. In recent years, enrolment has averaged just under 2,500 students. Mount Allison is critically recognized as one of the highest ranked primarily undergraduate university in Canada. The mission statement of the University, in turn, recognizes the quality of its faculty in maintaining its preeminent standing, which both the University and the Association are committed to maintaining.

The Mount Allison Faculty Association is the bargaining agent for full and part-time faculty and librarians. It was first certified in 1981 for the full-time faculty and then in 2003 for the part-time faculty. Prior to this round, it had bargained nine full-time collective agreements and three part-time collective agreements. There are

approximately 150 members in the full-time bargaining unit and about 50 members in the part-time bargaining unit.

By way of background with respect to this round of bargaining, the Association gave formal notice of intent to bargain renewal collective agreements on May 7, 2013. Non-monetary proposals were exchanged on June 21, 2013 with an exchange of monetary proposals on July 25, 2013. It is to be noted that the University tabled a number of its own proposals, one of which, pertaining to the use of student evaluation in faculty promotion, tenure and evaluation decisions, proved to be particularly difficult. The parties negotiated through the summer, with the Association applying for conciliation on August 7, 2013. A "no board" report issued on December 20, 2013. Although the parties returned to the bargaining table, a three-week strike commenced on January 27, 2014. Mediation sessions were conducted by a provincial mediator and then on February 12 and 13, 2013 by an independent mediator. Under the auspices of the provincial mediator who was then called back into the dispute, the parties entered into the Return to Work Agreement under which I have been appointed to adjudicate upon the issues that remain in dispute.

The issues that remain in dispute and are before me for determination are listed below:

#### Full-time Collective Agreement

- Anonymous student questionnaires (ASQ) – University
- Sabbatical deferral for individuals approaching retirement – University

- Term of the agreement – University and Association
- Across-the-board salary increases – Association

### Part-time Collective Agreement

- Anonymous student questionnaires (ASQ) – University
- Restriction upon payments in lieu – University
- Improved compensation to stipendiary teaching – Association
- Term of the agreement – University and Association

The parties have made extensive submissions with respect to the interest arbitration decision-making process. In the normal course where the parties are not permitted to strike or lockout, an interest arbitrator must take into account the prevailing economic context, comparability and demonstrated need in applying the replication principle; that is, these factors must be considered and weighed in shaping an award that fairly reflects what the parties would have negotiated had they the right to strike or lockout. In this case, the parties have that right and have vigorously exercised it in the form of a three-week in-term strike. However, the parties understood that they were so entrenched in their respective positions that the strike would have had to continue for a much longer period before serving its necessary purpose of forcing the parties together on all issues in dispute. The parties understood that a much longer strike would significantly harm both the student population and the institution itself. Accordingly, to their mutual credit and consistent with their shared objective of maintaining the status

of this university, the parties ended the strike by remitting the issues in dispute to binding arbitration.

The decision-making considerations that apply in this context, where the parties not only have the right to strike or lockout but have exercised it, are the same as those that apply where there is no right to strike or lockout. The economic issues must be decided on an application of the replication principle. The arbitrator must look to the economic and fiscal landscape and, in particular, to the relevant comparators in determining what the parties would most likely have agreed to had the strike continued to the point of mutual agreement on all outstanding issues. The requirement for demonstrated need, as applied generally in interest arbitration, continues to govern in adjudicating non-monetary issues.

### ECONOMIC IMPROVEMENTS

The parties became deadlocked over the quantum of the economic improvements and over what term, with the Association proposing across-the-board increases of 3%/year over a three-year term and the University proposing annual across-the-board increases of 1.25%, 1.5%, 1.75% and 1.75% over a four-year term. The gap in the parties' respective positions proved too wide to bridge in direct two-party negotiations.

It is important when considering these competing economic positions to do so having regard to where the University sits relative to comparator universities and where the University will sit based on the awarding of one or other of these economic positions. It is necessary, as a first step therefore, to determine what the appropriate comparators are and the weight to be given. The University relies on these "primarily undergraduate" Maritime Canada universities:

- Acadia University
- St. Francis Xavier (SFX)
- St. Thomas University (STU)
- Mount Saint Vincent University (MSVU)
- Cape Breton University (CBU)
- Saint Mary's University (SMU)
- University of Prince Edward Island (UPEI)
- Université de Moncton (U de M)

The larger universities in Atlantic Canada, i.e. Dalhousie University, University of New Brunswick and Memorial University of Newfoundland, are not accepted as legitimate comparators by the University because they are comprehensive research-intensive universities with much larger student populations.

The University presented the following 2012-13 ranking of relevant comparator salary scales for minima/maxima and step configuration as follows:

University	Minima (Assistant Professor)	Maxima (Full Professor)	# of Steps	Step Size
Acadia	\$67,500	\$133,500	33	\$2,000
CBU	\$64,934	\$137,675	30	\$2,450, \$2,325, \$2,525
Mount Allison	\$66,386	\$140,473	26	\$2,850
MSVU	\$64,621	\$130,342	26	\$2,630
SMU	\$66,511	\$139,629	26	\$2,632, \$2,788, \$2,958
SFX	\$65,076	\$138,166	30	\$2,275/ \$2,444, \$2,601
STU	\$65,574	\$145,542	26	\$3,279
UPEI	\$66,121	\$138,500	26	\$3,048
U de M	\$67,896	\$140,676	30	\$2,426
<b>Average (including Mount Allison)</b>	<b>\$66,069</b>	<b>\$138,278</b>	<b>28</b>	<b>\$2,657</b>

The corresponding ranking for librarians was presented as follows:

University	Minima (General Librarian)	Maxima (Full Librarian)	# of Steps	Step Size
Acadia	\$55,500	\$117,500	31	\$2,000
CBU	\$56,543	\$109,553	26	\$2,100
Mount Allison	\$53,563	\$129,075	27	\$2,850
MSVU	\$50,983	\$112,922	27	\$2,630
SMU	\$66,511	\$139,629	26	\$2,262
SFX	\$56,114	\$111,930	29	\$2,400
STU	N/A	N/A	N/A	N/A
UPEI	\$50,346	\$119,132	23	\$3,023
U de M	\$50,914	\$116,416	27	\$2,426
<b>Average (including Mount Allison)</b>	<b>\$51,748</b>	<b>\$115,091</b>	<b>27</b>	<b>\$2,378</b>

The University also presented its comparator across-the-board increases for the period 2012-17 as follows:

University	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017	Duration of Agreement	Current Agreement Term
Mount Allison (University Proposal)	2.5% (actual)	1.25% (+0.5% pension)	1.50%	1.75%	1.75%	4 Years Proposed	July 1, 2013 to June 30, 2017 (proposed)
Mount Allison	2.5% (actual)	3%	3%	3%	N/A	3 Years Proposed	July 1, 2013 to June 30, 2016 (proposed)

(MAFA Proposal)							
Acadia	0.5%	1.60%	N/A	N/A	N/A	4 Years	July 1, 2010 to June 30, 2014
CBU	2.9%	1.75%	1.50%	2.00%	0.75%	3 Years	July 1, 2013 to June 30, 2016
MSVU	1.75%	1.75%	2.00%	N/A	N/A	3 Years	July 1, 2012 to June 30, 2015
SFX	1.5%	2.00%	2.00%	2.50%	N/A	4 Years	July 1, 2012 to June 30, 2016
SMU	1.75%	1.75%	2.00%	N/A	N/A	3 Years	September 1, 2012 to August 31, 2015
STU	2.5%	2.00%	1.75%	1.50%	N/A	3 Years	July 1, 2013 to June 30, 2016
U de M	0%	3.50%	N/A	N/A	N/A	3 Years	July 1, 2011 to June 30, 2014
UPEI	1.5%	1.75%	1.75%	2.25%	N/A	4 Years	July 1, 2012 to June 30, 2016

The Association asserts that as one of the preeminent undergraduate universities in Canada, the relevant comparators extend beyond the small Maritime universities relied on by the University. The comparator universities relied upon by the Association and their 2013-2014 salaries and across-the-board increases through 2015-2016 were presented by the Association as follows:

University	2013-14			2014-15 Increase	2015-16 Increase
	Floor	Ceiling	Increase		
Trent	\$81,408	\$175,314	2.00%		
Moncton	\$69,809	\$144,397	2.82%	1.76%	
Laurentian	\$69,764	\$150,859	2.90%		
UOIT	\$69,746	\$174,365	1.90%	4.95%	
Nipissing	\$69,684	\$151,004	1.00%	1.00%	
Acadia	\$69,000	\$135,000	2.20%		
Lakehead	\$69,000	\$168,000	2.99%	2.90%	
UNB	\$68,392	\$151,932	2.50%	2.50%	
Mount Allison (MAFA)	\$68,378	\$144,687	3.00%	3.00%	3.00%
SMU	\$67,675	\$142,073	1.75%	2.00%	
UPEI	\$67,278	\$140,932	1.68%	1.75%	2.25%
Mount Allison (University)	\$67,216	\$142,229	1.25%	1.50%	1.75%
Bishop's	\$66,958	\$134,507	2.00%	2.50%	
STU	\$66,886	\$148,453	2.00%	1.75%	1.50%
Brandon	\$66,648	\$147,661	3.00%	3.00%	
SFX	\$66,377	\$140,929	2.00%	2.00%	2.50%
Cape Breton	\$66,070	\$140,084	1.75%	1.50%	2.77%
MSVU	\$65,752	\$132,623	1.75%	2.00%	

UNBC	\$62,507	None	2.50%		
Winnipeg	\$62,281	\$143,187	4.04%	2.92%	6.72%

It is to be noted that the University of New Brunswick faculty is the recipient of a September 29, 2014 arbitration award by a board of arbitration chaired by Brian Keller that provided for annual economic adjustments of 3.5%, 4% and 5% respectively for the period ending June 30, 2016. The parties had agreed to interim annual increases of 2.5% in each of the first two years with the arbitrator charged with determining the extent of additional catch-up for these years and the third year quantum. The award, although not applying the average of an agreed upon 14-university group of similar-sized comparators located in various provinces across Canada, was clearly influenced by this group of comparators.

It is the Association's position that whereas the University's scale floor was precisely in the middle of this group for 2012-13, i.e. 10<sup>th</sup> out of 19, its salary proposal would result in moving its scale floor rank to 9<sup>th</sup>. It is noted that under the University's proposal, it would fall to 11<sup>th</sup>, tied with UPEI. The Association calculates that the average percentage increases for 2013-16 for all its comparator universities is 2.58%/year and that the average percentage increase across Maritime and U4 league universities for this period is 2.09%/year. It is asserted that combining two years of annual increases of 2.09% with the necessary catch-up increase spread over three years results in combined annual increases of 2.70%, 3.10% and 8.51% for the scale floor to catch up with the average floor at Acadia, Moncton and Bishop's after three years. The Association maintains that the across-the-board increases suggested by the University

would result in an erosion of position within the comparator group and would cause Mount Allison University to fall below the scale floor at St. Mary's and UPEI.

In all of this, account must be taken of the fact that these parties have agreed in direct bargaining that the University will increase its annual pension contribution by .5%, effective from the first year. Regardless of where Mount Allison University sits relative to its comparator universities with regard to the quantum of the University's pension contribution, this is an increased cost to the University that, although it does not necessarily equate dollar for dollar, must be taken into account in determining the quantum of the salary increase.

## ANALYSIS

The first issue to be addressed is that of term. It is clear from the data that has been filed that there is not as yet a settlement pattern for 2016-2017 (the fourth year of a renewal agreement). Given that these parties have never before negotiated or had imposed upon them a four-year collective agreement, I am not prepared to award a four-year term in circumstances where I would be required to speculate as to what the settlement pattern might be for that year. While the University would prefer a four-year term for reasons of certainty and stability, I am not convinced, given the absence of a settlement pattern and given the Association's strong objection, that if left to their own devices, the parties would have concluded a four-year collective agreement. Accordingly, a three-year term will be awarded.

I now turn to the question of the appropriate salary increase. Comparators provide a useful reference point as to the reasonableness of a given bargaining position and, therefore, constitute an important element of the collective bargaining process. Comparators are especially important where interest arbitration is the final dispute resolution mechanism, such that replication becomes a decision-making determinant. This is not to say that comparators are easily applied or that their use necessarily produces a single correct result. There is often a dispute as to which comparators should be utilized and, even where there is agreement in this regard, there is often a dispute as to where within a group of relevant comparators the bargaining unit at issue should sit. While it is not uncommon in the university sector for the parties to develop a formulaic approach to bargaining based on placement within a group of agreed upon comparators, this is not the case here. In this case, each party relies upon its own group of comparators (albeit with some overlapping) that, in its respective view, produces the correct result. As noted, the University, for its part, relies on the smaller primarily undergraduate universities located in Maritime Canada while the Association relies on these universities together with a number of other smaller primarily undergraduate universities from across Canada and, in addition, the larger comprehensive University of New Brunswick (UNB), the latter because of its location. It would appear that the inability of the parties to resolve their difference as to which comparators should be relied upon was one of the main factors that led to the impasse between them. Not

surprisingly, each asks me to adopt its group of comparators and to be governed accordingly.

Absent a clear understanding to the contrary, collective bargaining is not intended to be a formula-driven exercise. It has long been accepted that there is no single correct result but rather a range of results within which a reasonable resolve will be found. It follows that the parties, and by necessary extension an interest arbitrator, must proceed with an open mind and a preparedness to assess and weigh all the information available in attempting to come to a result that falls within the "range of reasonableness." I have considered the submissions of the parties with respect to the appropriate comparators in this light and have concluded as follows.

1. Mount Allison is a small, primarily undergraduate university located in Maritime Canada. Accordingly, the most compelling comparator group in terms of both absolute salaries and rate of increase is comprised of other small, primarily undergraduate universities located in Maritime Canada.
2. As a nationally recognized leading, small, primarily undergraduate university, Mount Allison should be within the upper end of the salary range within small, primarily undergraduate universities in Maritime Canada.

3. Because Mount Allison is located in Maritime Canada, account may also be taken (although given less weight) of the rate of faculty salary increases at the University of New Brunswick as indicative of what the New Brunswick economy can support.
4. Because Mount Allison is recognized nationally as a leading, primarily undergraduate university and because, to some extent, the market for University faculty is a national one, account may also be taken of the rate of increases at other primarily undergraduate Canadian universities. Because of the obvious disparity between various provincial economies, even less weight should be given to the rate of increase outside Maritime Canada and very little, if any, weight should be given to the absolute salaries.

The data with respect to the maximum salaries at the small, primarily undergraduate universities in Maritime Canada shows that Mount Allison at 140,473 sits in third place, behind St. Thomas University at 145,842 and Université de Moncton at 140,676, \$2,195 above the average. The average rate of increase for those eight universities for 2013-14 (the first year of our three-year term) was 2%. St. Thomas University had a 2% increase for 2013-14. The average rate of increase for these eight universities for 2014-15 (with neither Acadia nor U de M settled) was 1.83%, with St. Thomas University at 1.75%. It is to be noted that MSVU, SFX and SMU all had a 2%

rate of increase for 2014-15. The four small, primarily undergraduate Maritime universities that have settled for 2015-16 show an annual rate of increase of 2.06%, with St. Thomas University at 1.5% for 2015-16.

As noted, the Association, although including the small, primarily undergraduate Maritime Canada universities, also includes the University of New Brunswick (because it is the major New Brunswick university) and a number of primarily undergraduate universities from outside the Maritimes. These include Trent, Laurentian, UOIT, Nipissing, Lakehead, Bishop's, Brandon, UNBC and Winnipeg, for a total of 18 comparator universities. If the Winnipeg rate of increase for 2013-14 (4.04%) is ignored as an outlier, the average 2013-14 rate of increase for the remaining 17 universities (with UNB adjusted to 3.5% to reflect the recent Keller award) is 2.22%. If the UOIT rate of increase for 2014-15 (4.95%) is ignored as an outlier, the average 2014-15 rate of increase for the remaining 13 universities (with no settlement reported for Trent, Acadia, Laurentian or UNBC and with UNB adjusted to 4% to reflect the recent Keller award) is 2.1%. Only five of these universities show 2015-16 settlements. If the 6.72% increase at Winnipeg is ignored as an outlier, the average rate of increase (with 5% inserted for UNB to reflect the Keller award) for 2015-16 is 2.8%.

The Association makes a case for catch-up, i.e. above normative salary increases, on the basis of the minimum or "scale floor" rate relative to its group of comparators and more particularly within the U4 league (Acadia, U de M, Bishop's and Mount Allison). While it is important that the minimum rates be competitive for purposes of

recruitment, reliance upon minimum rates for purposes of determining the appropriateness of a catch-up salary increase is problematic. This is so because, apart from the absolute rate (which in this case does not appear to be seriously out of line), the number of steps in the progression to maximum and the quantum of each step must be taken into account in order to determine if the grid requires a special adjustment. In this case, the Mount Allison grid has two fewer steps than the average of the other small Maritime Canada undergraduate universities and its step size (that is a function of the maximum rate) is second only to UPEI at \$2,850, almost \$200 per step above the average. When the floor is considered as part of the grid as a whole, I am unable to conclude that catch-up is required on the basis of the minimum or scale floor salary at Mount Allison. Accordingly, the objective, as I see it, is to award salary increases that reflect salary movement within the comparator groups, as appropriately weighted, through the relevant three-year period and thereby to maintain the relative salary position of the Mount Allison faculty.

Having regard to the foregoing and taking into account the increased University pension contribution, I have decided that increases of 1.75% for the 2013-14 academic year, 2% for the 2014-15 academic year and 2.25% for the 2015-16 academic year would allow the Mount Allison Faculty to maintain pace and place with regard to salary and, thereby, be within the range of what is fair and reasonable in all the circumstances.

There is no argument that the librarians be treated differently in terms of percentage across-the-board increases. Accordingly, the librarians are to receive the same across-the-board percentage increases as the full-time faculty.

The parties have agreed to increase the proportion of the salary scale floor paid for each course taught on a stipendiary basis in each of the last two rounds of bargaining. It is reasonable to assume that, if the parties had been able to resolve their collective bargaining impasse in this round without third-party assistance, another small increase would have been agreed upon. Accordingly, I am prepared to increase the proportion of the salary scale paid for each course taught on a stipendiary basis from 8.75% to 9% effective from the commencement of the winter semester of the 2014-15 academic year. This is not to say that this percentage must be increased with each and every round of bargaining.

#### STUDENT EVALUATION OF FACULTY

The University's demand that student evaluations of teaching (SETs) be utilized for purposes of faculty evaluation, promotion and tenure proved to be a particularly problematic issue for the parties. The predecessor collective agreement makes SETs a consideration for tenure and promotion where the faculty member voluntarily submits them as part of his/her dossier. Approximately 90% of faculty voluntarily submit SET results in support of promotion or tenure and 50% submit the statistical results as part of the evaluation process. The University Senate, a majority of whose members are

faculty, passed a policy for the evaluation of teaching on September 22, 2009, revised March 2012. This policy sets goals and guiding principles for student evaluations of teaching.

The University considers SETs to be an important component of faculty assessment and evaluation and, therefore, has proposed that the inclusion of the statistical results arising from SETs be required as one source of information when considering a faculty member for tenure, promotion or evaluation. The University recognizes that SETs are but one source of relevant information and do not by and of themselves constitute the sole basis for the evaluation of teaching. The University advises that the Senate endorsed the use of student evaluation of teaching in its September 22, 2009 Policy for the Evaluation of Teaching. The University argues that the voluntary use of SETs by individual faculty members does not sufficiently inform University decision-making. Furthermore, it is pointed out that in 2013, the Mount Allison Students' Union passed a resolution endorsing a change in the practice with regard to the use of SETs at Mount Allison University that accords with the University's proposal before me. The University tendered evidence that it maintains shows that the use of SETs is mandatory at the majority of other Maritime universities. Finally, the University relies on the Canadian Association of University Teachers' (CAUT) 2007 Teaching Dossier document that states, in part, "There is no question that student response and student opinion provides significant information about teaching and learning and, as a consequence, must be considered in any legitimate evaluation of

teaching." The University seeks to have SETs made a required component of the information matrix used in teaching evaluation.

The Association is "firmly opposed" to the University's proposal to make the reporting of the statistical results of SETs mandatory for evaluation, tenure and promotion. The Association cites a number of reasons for its opposition.

- The University proposal does not accord with replication because it has been raised in previous rounds and has never found its way into the collective agreement.
- The proposal is a "breakthrough" item and, as such, contrary to the gradualist approach that governs interest arbitration decision-making.
- There is no university in Atlantic Canada that requires the mandatory submission of SET statistical data for a regular formal process of post-tenure evaluation (although SETs are mandatory at other Maritime universities for other purposes, i.e. tenure application and promotion).
- The standard teacher evaluation questions to students approved by the Senate do not produce a meaningful result in that they test student agreement with various statements.

- The deans may not be equipped to apply sound statistical principles in considering SETs.
- The use of student course evaluation results in hiring, tenure and promotion decision-making that "will select for white males, dressed in suits, for whom English is their first language, teaching easy courses."
- There is an ongoing debate in the scholarly literature and among academics as to what exactly SETs are measuring and what a greater emphasis on their use would imply for the quality of education offered to students.
- SETs are disproportionately influenced by students' beliefs and attitudes.
- The CAUT, contrary to the impression sought to be left by the University in its submissions, stated in the same 2009 publication relied on by the University that, "...students cannot provide much of the essential information needed to undertake a thorough evaluation of teaching. Students are rarely in a position to comment, for example, on the role a particular course plays within a larger curriculum of a program nor are they able to judge the degree to which course content reflects the state of knowledge within a discipline....information is better

sought from colleagues, department curriculum committees, program coordinators and, most importantly, individual academics."

- If faculty believe job performance will be assessed on the basis of a student survey, they will be inclined to modify their behaviour in order to curry favour with students.

While I have used the acronym SET (student evaluation of teaching), the Association takes issue with this terminology. The Association argues that "anonymous student questionnaire (ASQ) is more reflective of the reality as the student evaluations stem from a specific list of questions that are answered anonymously. I have taken note of this difference in terminology and the reason therefore. The use of the acronym SET is not intended to in any way discount the fact that students are responding to predetermined questions and are doing so anonymously.

It is readily seen from the foregoing that this is a complex, multifaceted and divisive issue that goes to the heart of what Mount Allison University is as an institution. While the use of SETs was contested in the adversarial context of collective bargaining and while I have the authority to rule, it is this arbitrator's view that, before a result is imposed by an outside third party, the parties themselves should be given an opportunity to re-engage on this issue. There are a sufficient number of variables, e.g. how students evaluate, how these evaluations are computed and by whom, the

purpose(s) (evaluation, promotion, tenure) for which student evaluations are used and their weighting within the overall evaluation process, to allow for wide-ranging, solution-oriented discussion. I am confident that parties who share a deep-seated commitment to doing what is in the best interest of the University will come to a consensus even if that consensus is to put in place a trial arrangement as distinct from a permanent arrangement. Accordingly, this award will remit this issue back to the parties with a direction that a joint committee be struck for the purpose of resolving this issue, with the arbitrator remaining seized to rule upon it on the basis of the submissions presently before him if no agreement is reached by June 30, 2015 or such later date as may be agreed to by the parties.

#### DEFERRED SABBATICAL

The University position has merit. Article 23.18 allows the University to defer sabbaticals with certain limitations, one of which is in respect of an eligible employee who is within two years of "normal retirement." At the time this limitation was incorporated into the collective agreement, normal retirement age was the mandatory retirement age of 65. The purpose of the limitation upon deferral was to allow for compliance with article 23.26. Article 23.26 requires an employee taking a sabbatical to return to the University the following year. Mandatory retirement is no longer required at age 65 such that, having regard to the purpose for which the article 23.18 limitation was incorporated, greater specificity is now required in order to link the time

of an employee's sabbatical to the time of his/her retirement. The University's proposal does this without otherwise amending the clause and, therefore, maintains the purpose for which this limitation was incorporated. Accordingly, it is to be awarded.

#### PERCENTAGE IN LIEU OF BENEFITS

The purpose of the percentage in lieu of benefits is to provide to employees who are not eligible for benefits monies to defray the cost of obtaining individual benefits or to offset the cost of purchasing drugs or obtaining dental care. There are presently employees of this University who hold two positions: one under which there is an entitlement to group benefits; and one under which there is no entitlement. These employees, therefore, absent an express exclusion, would receive both group benefits and the percentage in lieu under article 28.05(a). The University seeks to prevent what it maintains would be a double payment for the same purpose. Given the purpose for which the percentage in lieu is paid, the University's position has merit. It should not have to provide benefits to an employee and at the same time pay that same employee the percentage in lieu. Accordingly, it will be my award that language be incorporated into the collective agreement that prevents this from happening. The parties have agreed that the percentage in lieu will be 2% of gross salary effective July 1, 2013, increasing to 3% of gross salary effective July 1, 2015.

## RETURN TO WORK ISSUES

There are a number of issues before me arising from the terms upon which the strike ended and the return to work took place. In this regard, the Association, having amended its position in its October 17, 2014 submission, seeks the following:

- The University agrees to pay the full amount of the employees' contributions to benefits for the period of the strike.
- Each member of the full-time MAFA bargaining unit shall receive a one-time gross payment of \$1,800.00, with the exception of: (a) those who were on sabbatical or other paid leaves and continued to be paid by the University during the strike; and (b), those who were paid by the University during the strike.
- Each member of the part-time MAFA bargaining unit shall receive a one-time gross payment of \$1,000.00, with the exception of those who were paid for their MAFA duties by the University during the strike.
- \$100,000.00 of the savings generated by the strike will be placed by the University in a bursary fund to benefit students, in recognition of the disruption the strike has had on the lives of students.

Regardless of whether the University realized a financial windfall from the strike, in respect of which I make no finding, it would be unusual, to say the least, for a third party to direct an employer to compensate its striking employees for loss of wages incurred as a result of withholding their labour in the form of a lawful strike. It is one thing for the parties themselves to agree, as one of the conditions upon which a strike is to be ended, to payments of this type (sometimes described as a signing bonus). It is quite another matter for a third party to award these types of payments where the parties have submitted their dispute to binding arbitration. The right to strike or lockout (except to the extent that it may be abridged in the interest of the greater common good, i.e. public health and safety, is a right that is fundamental to the functioning of a free and democratic society. However, it is a right that ought not be exercised without due regard to the merits of one's position and to the consequences. While I presume that the exercise of the right to strike in this case was exercised after careful deliberation, the fact remains that the primary purpose of a strike/lockout is to force the parties to agreement through the economic and other pressures that are brought to bear. In this case, the faculty must be presumed to have known that, subject to offsetting strike pay (which the Association correctly argues is delayed compensation already earned), they would suffer a loss of earnings and would most certainly have make-up work to do upon their return while, at the same time, the University officials would come under pressure from the community and from its students and, in the process, the University itself could suffer a loss of reputation. The secondary purpose of a strike/lockout is, because of the

economic and other disruption that it causes, to militate against future reliance upon the exercise of the right. To compensate striking employees for their strike-related losses or to force the University to make payments to charitable organizations after the fact would serve to lessen future resistance to the use of the right and, if the right is exercised in the future, make it more difficult to reach a compromissory result. It follows from the foregoing that, while parties themselves may choose to include such payments in the terms of a voluntary settlement of a strike/lockout, a third party should not award them.

### RETROACTIVITY

The Memorandum of Agreement establishes the terms of retroactivity. The Memorandum provides that "any wage increase or benefit improvement...shall be made retroactive to July 1, 2013...." By necessary implication, any non-benefit improvement is not to be retroactive. In the normal course, wages and other direct monetary payments, i.e. shift premium, weekend premium, lead hand premium, etc., are made retroactive on the basis of paid hours while benefits, vacation and non-monetary improvements are made effective from the date of implementation of the renewal collective agreement. These parties, by making benefit improvements retroactive, have extended the usual scope of retroactive items. In this regard, the parties are in disagreement as to whether articles 12.06(e) and 16.32(b) are to be made retroactive.

Article 12.06(e) provides for credit towards course release for supervising an honours thesis. The credit is to be banked and used towards future course release. The parties agree that the earliest that this course release credit could be used would be in the 2015-16 academic year. Clearly, the earning of this credit is a benefit, easily tracked on the basis of the assignments made and carried out, that creates no administrative difficulty if it is made retroactive. Accordingly, I read the terms of retroactivity contained in the Memorandum of Agreement as including article 12.06(e).

Article 16.32(b) is intended to provide compensation for a week of preparation at the start of the term. With the start of the term already past and without any certainty as to whether the extra preparation for which the clause is intended to compensate was performed, there are both equitable and administrative difficulties in making it retroactive. Accordingly, I am not convinced that the parties intended article 16.32(b) to be retroactive within the meaning of article 2.3 of the Memorandum of Agreement. Accordingly, article 16.32(b) shall be effective from the date of this award on a go-forward basis.

Having regard to all of the foregoing, I hereby award as follows.

# A W A R D

The parties are hereby directed to enter into renewal collective agreements for the three-year term commencing July 1, 2013 to June 30, 2016 that contain all the terms and conditions of the predecessor collective agreements, amended to incorporate:

## Under Full-Time Collective Agreement

1. All matters agreed between the parties prior to the date hereof.
  
2. Increases to the full-time salary scale for both faculty and librarians, applied in the usual way, as follows:

Effective July 1, 2013	1.75%
Effective July 1, 2014	2.00%
Effective July 1, 2015	2.25%
  
3. Provision for a joint committee comprised of two members from each side for the purpose of considering and resolving the issue of the extent to which, if any, student evaluations of teaching should be utilized for purposes of faculty evaluation, promotion and/or tenure. The joint committee is to commence its

deliberations no later than 30 days from the date hereof and is to report by June 15, 2015 or such later date as may be agreed to by the parties. I remain seized to adjudicate this matter on the basis of the submissions and documentation presently before me should the parties fail to agree.

4. An amendment to article 23.18 to read as follows:

The Employer shall grant sabbatical leaves to those eligible at the time requested. However, after taking into account the welfare of its departments and programs and the library, any advice received pursuant to Clause 23.17, the amount of money it has or expects to have in its budget for hiring replacements for those on leave, and the welfare of its operations as a whole, and after discussing the matter with the employees involved, the Employer may postpone a leave for one (1) academic year only. However, the Employer shall make a reasonable effort not to defer sabbatical leaves, and shall not defer the leaves of more than 50% of those declared eligible for leaves in a given year under Clause 23.16 or the leaves of those who have submitted their notice of retirement pursuant to Article 31 if a deferral would not allow the employee to fulfill Clause 23.26. Normally, no more than one employee in the library or one

faculty member per academic department or program shall be on sabbatical leave at the same time.

Under Part-Time Collective Agreement

1. All matters agreed between the parties prior to the date hereof.
2. An increase to the part-time stipend for a three-credit course from 8.75% to 9% effective January 1, 2015.
3. The incorporation of the parties' agreement with respect to a percentage in lieu of benefits under the part-time collective agreement on the basis that the percentage in lieu does not apply to those also employed in a full-time capacity by the University and thereby eligible for benefit coverage.

Under Both Collective Agreements

Retroactivity is to be as per paragraphs 2 and 3 of the February 15, 2014 Memorandum of Agreement with it understood that article 12.06(e) is to be considered a "benefit" retroactive to July 1, 2013. Article 16.32(b) is to be effective from the date hereof.

I remain seized until the parties enter into formal collective agreements.

Dated this 17<sup>th</sup> day of November 2014 in the City of Toronto.

*Kevin Burkett*

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KEVIN BURKETT