

ARBITRATION

BETWEEN:

THE BOARD OF GOVERNORS OF THE UNIVERSITY OF CALGARY

- and -

THE ACADEMIC STAFF ASSOCIATION OF THE UNIVERSITY OF CALGARY

Wage Rate Arbitration for 2019-20

AWARD

BEFORE:

Andrew C.L. Sims, Q.C. Arbitrator

REPRESENTATIVE OF UNIVERSITY OF CALGARY

Timothy Mitchell Counsel
Rebecca Silverberg Co-Counsel
Jacqueline Lacasse Associate Vice-President Labour
Relations
Elena Tyminski Manager Academic Labour Relations
Bruce Evelyn Vice-Provost (Planning and Resource
Allocation)
Florentine Strzelczyk Deputy Provost
Nathan Bowles Articling Student

REPRESENTATIVE OF TUCFA

Kristan McLeod Counsel
Sheila Miller Executive Director
Don Kozak Associate Executive Director
Hamid Habibi Professor, Prime Negotiator

Heard in Calgary on December 2, 2019

AWARD ISSUED on July 21, 2020

Our file: 8300

AWARD

The Academic Staff of the University of Calgary (“the University”) are represented by The University of Calgary Academic Staff Association (“TUCFA”). The question to be answered in this award is what is the appropriate across the board salary increase for the period running from July 1, 2019 to June 30, 2020. This is not the customary interest arbitration where a variety of issues are in dispute. These parties signed a collective agreement in April 2019. That agreement included the following:

Letter of Understanding: Wage Re-Opener for 2019

1. The Parties agree to a Wage Re-opener for July 1, 2019 – June 30, 2020.
2. The Parties shall commence negotiations to reach agreement on the Wage Re-Opener on (or around) one week following ratification of the Collective Agreement.
3. The only item open for negotiations shall be the across-the-board salary adjustment for academic staff members.
4. This Wage Re-Opener shall not be construed in any way as “opening the agreement” for negotiation on any other issues by either Party.
5. If the Parties have not been able to agree upon the above item within two weeks of negotiations on the Wage Re-Opener, either Party may give written notice to the other Party of its desire to submit resolution of the item to interest arbitration. The Parties agree, on a one-time basis, to a single arbitrator (Andrew Sims) for September 30 and October 1, 2019. The outcome of the interest arbitration shall be no less than a 0% across-the-board salary adjustment.
6. If an across-the-board salary adjustment is negotiated or awarded, it shall apply to academic staff holding Continuing, Contingent and Limited Term Appointments based on their rank salary in effect June 30, 2019. Any increase shall also apply to Sessional Appointees who have been, as of June 30, 2019, paid a salary rate above the minimum amount at each step.
7. If an across-the-board salary adjustment is negotiated or awarded, it shall apply to the minimum and maximum salary ranges in Schedule “A” (applicable to academic staff members holding Continuing, Contingent and Limited Term Appointments) and the minimum salary rates in Schedule “B” (applicable to academic staff members holding Sessional Appointments).

The parties met on May 19, 2019 to try to resolve the wages issue but were unable to do so. The matter is therefore before me at arbitration. There are no preliminary objections to jurisdiction. The hearing scheduled for September 30 and October 1, 2019 was postponed until December 2, 2019 as a result of the *Public Sector Wage Arbitration Act*.

The Parties’ Positions

The University

The University asks that I award on across the board adjustment in wages of -2%. This is outside the agreed upon mandate which, once again, reads:

The outcome of the interest arbitration shall be no less than a 0% across-the-board salary adjustment.”

The University explains that its proposal now is informed by the bargaining mandate it receives from Treasury Board and Finance through the Provincial Bargaining Coordination Office (“PBCO”). The University is, to a significant degree, dependent on public funding through grants, the quantum of which are under government control. As such, the University’s position, as directed by the PBCO, is that salaries should be reduced across-the-board by -2%.

At paragraph 16 of its brief the University said:

The University recognizes that the Wage Re-Opener explicitly states that the outcome of the present interest arbitration shall be no less than a 0% ATB salary adjustment. However, the University did not contemplate the actions of the new Government of Alberta which tabled *Bill 21: Ensuring Fiscal Sustainability Act, 2019* which introduced the *Public Sector Employers Act*. The University also did not anticipate the new mandate of -2% from the PBCO. Given that the University is a publicly funded institution in Alberta, the University ignores the government’s direction on this issue at its peril.

TUCFA

When the parties met in May 2019, TUCFA sought an increase that would equalize the academic pay for staff at Calgary with those at the University of Alberta. The University calculated this to cost 8.8% of payroll and an increase in cost of \$25.7 million over the year. However, coming into this arbitration TUCFA advised that it was now seeking a 5% across the board increase. It justifies this on several basis, again particularly based on comparability to salaries at the University of Alberta.

TUCFA seeks full retroactivity on any increases awarded. The University argues for no retroactive application whatsoever.

Costing for TUCFA’s Proposal

The University prepared the following table costing out TUCFA’s proposed 5% across the board increase. I have added to this a “cost per 1%” line for ease of reference.

TUCFA Salary amounts without UCQ As at July 1, 2019			
	Before Benefits	Estimated Benefits	Including Benefits
TUCFA – no sessionals	235,969,955	48,373,841	284,343,796
Sessionals	2,543,738	447,698	2,991,436
Total	238,513,693	48,821,539	287,335,232
ATB %	5.0%	5.0%	5.0%
Estimated increase	11,925,685	2,441,077	14,366,762
ATB per 1%	2,385,137	488,215	2,873,352

The Faculty Association's estimate of the cost of a 5% increase was somewhat less at 13,168,462. I find the University's figures more precise.

The University of Calgary in Context

The University of Calgary has a Board of Governors and it is governed by the *Post-Secondary Learning Act*, S.A. 2003 c.P-19.5. It employs about 2418 academic staff members, 1843 of whom are Continuing, Limited and Contingent Term appointees and a further 575 are sessional instructors (all excluding the faculty in Qatar). It has about 30,000 full-load equivalent students, 14 faculties, and offers over 3500 courses in over 250 undergraduate and graduate programs.

Not all Universities are equal, or even aspire to be equal. The University of Calgary is a comprehensive academic and research University. It is a member of the U-15 group of research intensive Universities in Canada. The U-15 group maintains that it fosters "the development and delivery of long-term, sustainable higher education and research policy, in Canada and around the world. It is said that, collectively the 15 research intensive Universities undertake 80% of all competitive university research in Canada and produce over 75% of all doctorates awarded in Canada, and hold 85% of Canadian University technology licenses and 81% of Canada University patents.

Universities are ranked annually and are both proud and competitive when it comes to such rankings. The Times Higher Education World University Ranking is one of the most significant,

but within Canada the annual Macleans ratings are also significant. The standing of Canadian Universities (including Calgary) on the 2020 Times rankings show, in the top 200.

18	Toronto
34	UBC
42	McGill
72	McMaster
85	University of Montreal
136	University of Alberta
141	University of Ottawa

Three more Canadian Universities follow in the 200-250 group:

University of Calgary
 University of Waterloo
 Western

These rankings are significant for the role they play when students (including international and graduate students) decide where they wish to study and when academics decide where they aspire to teach and research. These rankings support the view that Calgary is appropriately compared to the University of Alberta, but less so to other Alberta post-secondary institutions, and that the U-15 group is the most useful group for comparing the University of Calgary academic staff to those similarly situated in Canada.

The University fact sheet for 2019 reports, among other achievements, an 80.4% rate for employed grads working in fields related to their discipline, a 94.1% graduate employment rate and a 78% “good” or “excellent” first year student satisfaction level. It draws \$487.8 million in sponsored researching funding and is the 6th rated University in Canada on that account. It is also in 6th place in Canada in research performance.

Leading Up to this Arbitration

The parties agreed to the prior collective agreement (July 1, 2016 to June 30, 2019). The first year included a 1.5% across-the-board increase. For the second and third years, the parties adopted a “pick up” letter tied to both academic negotiations at the U of A and non-academic support staff agreements with the Alberta Union of Provincial Employees. It read, in significant part:

1. The comparator agreements are the provincial collective agreements listed below:
 - a. In the academic year beginning July 1, 2017 and ending June 30, 2018:
 - a. the Government of Alberta and AUPE, Locals 1, 2, 3, 4, 5, 6 and 12
 - b. In the academic year beginning July 1, 2018 and ending June 30, 2019:
 - a. the Government of Alberta and AUPE, Locals 1, 2, 3, 4, 5, 6 and 12;
 - b. the University of Calgary and AUPE;
 - c. the University of Alberta and AASUA, as it relates to full-time on-going academic staff.

2. If a general across-the-board salary increase for a comparator agreement exceeds 0%, the general across-the-board salary increase negotiated under that comparator agreement will be applied to academic staff members holding Continuing, Contingent Term and Limited Term Appointments (Schedule A, Article 1.3.1) and Sessional Appointments (Schedule B, Article 1.1);

3. If more than one general across-the-board salary increase percentage for a comparator agreement exceeds 0%, the highest such general across-the-board salary increase will be applied to academic staff members holding Continuing, Contingent Term and Limited Term Appointments (Schedule A, Article 1.3.1) and Sessional Appointments (Schedule B, Article 1.1);

The net result was that TUCFA members received no across-the-board increases for 2017-2018 or 2018-2019.

The parties thereafter signed a new collective agreement for a one year term. However, they left any across-the-board wage increase to be negotiated, failing which, it would be determined by this voluntary arbitration, as provided for in the letter of understanding set out at the start of these reasons.

The University notes that a couple of benefits were included in this new agreement, which it argued should be considered as “part of the package” along with the wage reopener:

- Professional expense reimbursement carry over provisions for continuing sessional instructors;
- Increasing the University’s contribution to 100% for Extended Health Care and Dental Care;

TUCFA asserts that to achieve this same agreement, it made concessions to the University. However, these were not particularized.

The University's 2% Roll-back Proposal

The University is the Employer in this bargaining relationship. It advises, in its brief:

By way of context, informing the University's position is the bargaining mandate it receives from Treasury Board and Finance through the Provincial Bargaining Coordination Office ("PBCO"). The University is, to a very significant degree, dependent on public funding through grants, the quantum of which are under government control (as described more fully in a subsequent section of this brief). As such, the University's position, as directed by the PBCO, is that ATB salaries should be reduced by -2%.

It goes on to say that its 2% rollback proposal reflects a fair comparison to other similarly situated academic staff (implicitly post-secondary institutions) that have received (i.e. been the subject of) identical bargaining mandates from the PBCO.

In seeking to justify its proposal's departure from the range contracted for in the agreement to arbitrate, it argues:

The University recognizes that the Wage Re-Opener explicitly states that the outcome of the present interest arbitration shall be no less than a 0% ATB salary adjustment. However, the University did not contemplate the actions of the new Government of Alberta which tabled *Bill 21: Ensuring Fiscal Sustainability Act, 2019* which introduced the *Public Sector Employers Act*. The University also did not anticipate the new mandate of -2% from the PBCO. Given that the University is a publicly funded institution in Alberta, the University ignores the government's direction on this issue at its peril.

The University was asked whether the legislation, which delayed arbitration and brought the PBCO and Ministerial directives into play in public sector bargaining, provided any authority to allow an arbitrator, under this wage reopener, to ignore the parameters set by the parties. It was unable to point to any such authority. I have examined that legislation and similarly can find no legal basis upon which I can alter the contractual mandate given me by the parties in their agreement.

The *Public Sector Employers Act* P-40.7, in its preamble says:

WHEREAS public sector compensation is the largest government expenditure, constituting over half of the Government of Alberta's operating expense;

WHEREAS the Government of Alberta is committed to preserving and protecting public services for Albertans, and fiscal restraint in public sector collective bargaining is key to achieving this objective;

WHEREAS the Government of Alberta is committed to ensuring that the costs of collective agreements bargained by public sector employers are aligned with the Province's fiscal realities; and

WHEREAS the Government of Alberta is also committed to respecting the autonomy of public sector employers and the importance of the collective bargaining process:

The Act's definition of employer includes the University of Calgary. See: S. 1(1)(c) The Act provides specifically that the Crown does not become an employer:

Crown not employer

6 Nothing in this Act makes the Crown an employer of a person of whom the Crown is not otherwise an employer.

The Act's primary mechanism is the confidential Ministerial Directive provided for in Section 3. Despite the breadth of what the Minister may, in camera, direct, there is no statutory power that allows the Government, the Minister, or the Employer to revoke or vary contracts already made. The *Public Sector Wage Arbitration Deferral Act*, S.A. 2019 c. P-41.7 allowed deferrals overriding agreed upon time frames, but did not otherwise affect the substantive terms of wage reopener agreements. On this, I have considered the Court of Appeal's reasons in:

Alberta Union of Provincial Employees v. Alberta [2019] ABCA 320

I note, from that decision and the legislation itself, "the recited purpose of Bill 9 was to give the new government more time to prepare for the arbitration [in that case the AUPE third year wage reopener] specifically by receipt of the Blue Ribbon Panel Report." See *AUPE (supra)* at p. 27.

Having found nothing and been referred to nothing that changes my contractual mandate, I find I cannot lawfully entertain a proposal for a 2% roll-back. In any event, I would not be persuaded, on the evidence before me, that such a roll-back would be appropriate for this bargaining unit. I refer below to three subsequent arbitration awards, as well as the Saskatchewan teachers award, that came to a similar conclusion.

Since this arbitration process was delayed to allow reference to the MacKinnon Report, I now turn to what it had to say of particular relevance to this bargaining unit.

The MacKinnon Report

The “Blue Ribbon panel” produced an influential report on Alberta’s spending position. It was left to others to evaluate and decide upon provincial taxation policy and other aspects of direct provincial revenue. Its comments on Alberta’s spending on post-secondary education include the following at p. 41:

Alberta spends significantly more per student full-time equivalent (FTE) than the three comparator provinces. Alberta spends \$36,500 per FTE while British Columbia spends \$31,300 (\$5,200 less), Ontario spends \$21,500 (\$15,000 less), and Quebec spends \$25,800 (\$10,700 less).

For Alberta, 77 cents of each dollar is used to deliver post-secondary programming. By comparison, British Columbia spends 87 cents, Ontario spends 77 cents and Quebec spends 67 cents on post-secondary programming. However, the big difference are in the amounts spent on administration. Alberta’s spending on administration at \$8,372 per FTE is slightly lower than Quebec but significantly higher than British Columbia at \$4,233 and Ontario at \$4,910. (*emphasis added*)

The MacKinnon Report, in several areas – particularly K-12 education and health care spending - found Alberta’s wage rates to be higher than elsewhere. No similar observations were made specifically with respect to post-secondary academic salaries.

The following passage is particularly significant, from p. 42:

Alberta’s future depends on having one of the most highly skilled and well-educated populations in the world. To achieve that, a clear direction is needed along with new approaches to ensure the necessary innovation and coordination occurs. The Panel suggests that the future funding model ensure a link between provincial macro goals and outcomes to be achieved by post-secondary institutions. The government should assess whether the current governance model can address the challenges facing post-secondary institutions in Alberta by exploring alternative models used in the rest of Canada and in other jurisdictions.

Recommendation 8: The Panel recommends that the government work with post-secondary stakeholders to achieve a revenue mix comparable to that in British Columbia and Ontario, including less reliance on government grants, more funding from tuition and alternative revenue sources, and more entrepreneurial approaches to how programs are financed and delivered. This includes lifting the current freeze on tuition fees.

I find this helpful because, if post-secondary institutions are to diversify their revenue sources they cannot simply do so through austerity and efficiencies. Much of the ability to attract research, government, and philanthropic grants depends directly on the quality of the faculty and the work they do. Much the same is true in attracting foreign students. The same is true of the University’s ability to capitalize on contributions and incentives that depend directly on the reputation (often the international reputation) of its faculty, individually or in teams.

The Applicable Principles

The parties addressed the factors that should be weighed in this interest arbitration. These fell into four general areas:

1. General v. Statutory Criteria – does it make a difference?
2. General principles
3. The Role of a Government's position in relation to interest arbitration
4. Timing and Retroactivity

Interest arbitration, over the years, has had to address drastic economic change, and governmental policy responses to such change. There is a tendency at times to look to salary arbitration for more than it is designed or equipped to handle. The principles described below emphasize arbitration's more modest role. This is not to discount the influence of the economy, public policy and similar matters; they play an important role in replication. However, arbitration implies and requires an independent assessment of the relevant factors, not simply an application of government policy, or an effort to balance the employer's budget unless otherwise justified.

General v. Statutory Criteria

An interest arbitration imposed by law as a substitute for the right to strike or lockout is subject to the criteria set out in Section 101 of the *Labour Relations Code*. This is a voluntary wage reopener arbitration. It was not required by law as a substitute. Only indirectly is it part of a "package deal" where other aspects of the bargaining need to be weighed into the balance. No other proposals are in play. To the extent there was a "package" it involved the agreement, in its entirety, of which this "wage reopener" was but one part.

In my view, this arbitration is not governed by statutory criteria. However, there is a well-recognized overlap between the statutory principles that are or were applicable in Alberta and the general principles of interest arbitration. For the purposes of this award, I have weighed the general and the statutory criteria and any difference in such criteria makes no difference to the end result in this case.

The Criteria for Interest Arbitration – General

Both parties refer to this arbitrator's 2015 decision in *Lakeland College*:

Principles of Interest Arbitration

Both parties addressed the well-known principles that arbitrators customarily apply when resolving interest disputes such as the one at hand. While the submissions have been reviewed in detail, only a summary is necessary. Even without statutory considerations, the approach is similar. It is not a precedent or rule based process. It has been described as “more legislative than judicial”. Replication is at the core of interest arbitration.

... the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and resort to a work stoppage in an effort to attain demands ... an arbitrator’s notions of social justice or fairness are not to be substituted for market and economic realities.

Re: Board of Trustees, School District 1 (Fernie) and Fernie District Teachers’ Association (1982) 8 L.A.C. (3d) 157 (Dorsey) at page 159

Replication does not mean the arbitrator must be guided by what particular parties say they would or would not agree to. Arbitrator Hope has said, of such a subjective approach:

Returning to the concept process of replication, it is essential to realize that a board of arbitration is not expected to embark upon a subjective or speculative process for divining what might have happened if collective bargaining had run its full course. Arbitrators are expected to achieve replication through an analysis of objective data from which conclusions are drawn with respect to the terms and conditions of employment prevailing in the relevant labour market for work similar to the work in issue.

...

The subjective approach has been rejected for the very reason that it is subjective. That subjectivity, in the context of an interest arbitration, would require a board of arbitration to speculate on where the parties may have ended up in the dynamics of collective bargaining if they had been permitted to exert a full range of economic pressure ...

The replication approach, or, as Professor J.M. Weiler describes it, the attempt to simulate the agreement the parties would have reached in bargaining under sanction of a lock-out or strike, relies on a market test which consists of assessing collective agreements in relationships in which similar work is performed in similar market conditions. The terms and conditions of employment thus derived are, as stated, referred to as the prevailing standard or prevailing rate.

Re: Beacon Hills Lodges of Canada and Hospital Employees Union, March 31, 1995 (1985) 19 L.A.C. (3d) 288, at 304-305

Board of Governors of Lakeland College v. Lakeland College Faculty Association [2015] Canlii 13387 (AB GAA) No. 9

Both parties also referred to structured lists that have been adopted for consideration in cases such as this. The list set out in the 2000 U of A case, in its original form, was used for hospitals; it has since been adapted for and used in several post-secondary academic situations.

Guiding Principles

Neither the collective agreement nor the Universities Act set out criteria to govern interest awards between these parties. The AAS:UA provided me with two prior awards from analogous bargaining relationships that summarize the customary factors to be weighed into an interest arbitrator's decision making.

In The Board of Governors of Keyano College and The Keyano College Faculty Association, Beattie, October 10th, 1991, the arbitrator adopted a ranked listing of factors from *Re Building Service Employees Local204 and Weiland County General Hospital* (1965) 16 L.A.C. 1 (Arthurs). This is as applicable to universities as it is to hospitals.

While the list is not complete, and while no single item is conclusive, we would give the following comparative factors great weight:

1. Wages paid in "comparable hospitals", i.e., those of similar type in communities enjoying a similar cost-of-living and average wage level.
2. Trends in cost-of-living and average wages in the locality where the hospital is located.
3. Trends in comparable hospitals.

We would also consider the following factors to be relevant:

1. Difficulties encountered by the hospital in recruiting and holding staff (some evidence of the hospital's failure to pay a level of wages high enough to attract workers on local labour market).
2. Trends in non-comparable hospitals and in non-hospital occupations, where deserving of special consideration.
3. Trends in hospital wages generally.

We would accord little weight to the following factors:

1. Wage levels in non-comparable hospitals.
2. Wage levels in non-hospital occupations, where there is not substantial identity of working conditions (e.g., hospital tradesmen cannot be compared with construction workers.)
3. Abstract appeals to "justice".

Arbitrator Beattie then commented (at p. 3) that "The primary factor governing arbitration boards is comparability..." Arbitrator Tettensor in the second case cited referred to comparability as "the touchstone of interest arbitration". His award canvassed a number of the other basic positions, such as the need for awards to "...attempt to replicate as closely as possible what the parties would have achieved through a negotiated settlement in an environment where the threat of work stoppage is available." He noted that public sector employees should not be expected to subsidize a community by accepting substandard wages and working conditions.

University of Alberta v. Association of Academic Staff: University of Alberta [2000] CanLii 29215

See also:

Northern Alberta Institute of Technology (NAIT) v. The NAIT Academic Staff Association (NASA) 2000 CanLii 29221 (Sims)

Grande Prairie Regional College and Grande Prairie Regional College Academic Staff Association (2004) CLAS 173 (Jones)

The Board of Governors of the Southern Alberta Institute of Technology v. SAIT Academic Faculty Association (unreported decision, June 26, 2012, Jones)

Red Deer College and Red Deer College Faculty Association (2014) CanLii 50286 (Smith)

For Universities, selecting, and giving appropriate weight to, comparable wage rates and, to a lesser degree across-the-board wage settlements, involves some unique factors. The “market” for academics is primarily national or international. Arbitrator Shime suggested the following ordered list of factors:

In conclusion, it is my view, that university salary determination should be based on the following factors in the order in which they appear:

- (1) Salary schedules and benefit comparisons with other universities in Ontario: see, *e.g.*, principles concerning individual compensation as agreed between McMaster University and the faculty association.
- (2) Salary schedule and benefit comparisons with universities outside of Ontario: see, *e.g.*, *University of Toronto and University of Toronto Faculty Assn.*, June 3, 1982 (Burkett) at pp. 34-6.
- (3) Comparisons within the education sector such as high schools and community colleges.
- (4) Comparisons with other professional salaries, *e.g.* -- lawyers, doctors, engineers, social workers.
- (5) Comparisons with the Consumer Price Index and Individual Composite Index as well as other relevant indices.
- (6) All comparisons should be based on total compensation which would include pensions and other benefits.

McMaster University and McMaster University Faculty Association [1990] O.L.A.A. 84 (Shime)

In that same case, Arbitrator Shime addressed two issues raised in this case; catch up arguments and merit increments. Of the former he said:

13 I cannot help but make this observation with respect to the bargaining that has occurred between these parties. Two of the past selections with arbitrator Kennedy have considered catch-up as a factor and this is the third situation in recent years where that has occurred. This issue of catch-up, as the parties perceive it, has thus created a two-level bargaining process. In the first instance the parties bargain about the present and in the second instance they bargain about the past, it is a most unusual process. It is as if they are driving forward while looking in the rear-view mirror. The concept of catch-up thus makes bargaining a more complex exercise than need be and seems to be an impediment to the parties constructing a positive relationship through self-resolution in the bargaining process.

14 Notwithstanding my scepticism about reviewing the past, I am prepared to give great weight to salaries negotiated in other universities. In very simple terms, I see no reason to pay people performing the same functions at McMaster University less than those at other universities. It seems to me that an assistant professor teaching biology at McMaster should not receive less than an assistant professor teaching the same course at another Ontario university. There may be some room for slight differences depending on local conditions, but those local situations do not derogate from the basic premise that persons of the same rank doing the same work at different universities should, by and large, receive the same or an equivalent salary and by salary I mean all benefits. In my view it is preferable to determine salaries and benefits by comparing salary schedules. Again, the most significant indicator of salaries is what free collective bargaining has produced for the same or similar positions at other universities.

On annual merit increments he said:

15 A comparison of the salary schedules, however, would not include consideration of the CP/M increment. In this, as with other merit schemes, I agree with the faculty, that the CP/M scheme is to consider experience or promotional growth related to an individual's improved performance over the course of his or her career. Thus the CP/M increment represents an individual or merit assessment whereas the salary grid or schedule represents a position assessment unrelated to individual performance. In this I agree with the decision of arbitrator Burkett in *University of Toronto and University of Toronto Faculty Assn.*, June 3, 1982, unreported.

It is a well-recognized feature of academic compensation that annual merit increments include an element beyond that usually involved in the public sector "grid progression" model. That element is a recognition that academics undertake an extra-long period of study in order to reach the necessary qualification level (usually a PhD) needed to obtain a university position. For those who attain that status, the annual increment system rewards ongoing performance, but is also in part a form of delayed compensation. This recognizes that earnings while obtaining degrees are customarily at a low level. It compensates for lost earning years not experienced by others in the general workforce. Many awards discuss this on the basis of total career compensation.

The comparisons of annual adjustments in interest arbitrations in the post-secondary world are almost universally based on percentage increases to wage rates, but not including any annual individual merit increment changes.

The Role of Government in relation to Interest Arbitration

The new Government, in 2019, found itself facing a huge deficit largely due to the fall in oil and gas prices that had previously been the cornerstone of provincial revenues. At the same time, its public sector labour legislation was mid-way through the transition required by the *Saskatchewan Federation of Labour (supra)* decision. It sought by a number of means and in an effort to reduce overall expenditures, to influence outstanding wage reopener provisions, most notably those

involved in the “subsequent decisions” described below. Past arbitration awards have addressed how interest arbitrations consider such influences. Two of the most well-known and customarily cited are as follows:

An arbitrator should not make decisions based on budgetary limitations and priorities set by the government, otherwise he would not be completely independent as he must always be.” This statement is relevant to the submission of the Institute with regard to its ability to pay increases of salaries to its Faculty members. It is common knowledge that all educational institutions are having difficulties in their financial affairs and it is axiomatic that the greatest input in the affairs of all educational institution is in its teaching and administrative staff. Hence any increase to salaries and allowances and benefits is bound to have a material and direct influence on the operational costs, so that in this case the deficit of this institution would be increased. The Government which supplies the greatest part of the income for this institution cannot expect it to continue a loss and to hold that out as barrier to justifiable increases for the employees of the institution. While the ability to pay is a factor to be considered in many situations, it does not have the same force or effect in public institutions and is not a proper basis to restrict an arbitration which must be made on objective facts.

Re Board of Governors of Ryerson Polytechnical Institute and Ryerson Faculty Association (1973) 4 L.A.C. (2d) 9 (Shime):

8 The University submitted that in the context of a replication model of interest arbitration, I should take this legislation and the accompanying policy statement into account in fashioning any award. UTFA was adamant that such a course would be de facto recognition of ability to pay as a relevant criterion in a public sector interest arbitration and would compromise the independence of arbitrators. My reasons for rejecting the University's submission are these:

9 This interest dispute is governed by a Memorandum of agreement between the parties which was initially made on June 28, 1977. It has been amended from time to time and the last consolidation of which I am aware is dated December 31, 2006. Included in Article 6 is this direction to the arbitrator: "attempt to reflect the agreement the parties would have reached if they had been able to agree". In my respectful opinion, because the parties in their bargaining should have known that an interest arbitrator would not take the legislation into account, the replication principle supports the opposite conclusion than the University is contending for.

10 The parties know that ability to pay has been rejected by interest arbitrators for at least 4 decades. Chief Justice Winkler, in his award cited the following passage from an award by Arbitrator Shime in *Re McMaster University*, [1990] O.L.A.A. No. 84:

"...there is little economic rationale for using ability to pay as a criterion in arbitration. In that regard I need only briefly repeat what I have said in another context, that is, public sector employees should not be required to subsidize the community by accepting substandard wages and working conditions...(internal citations omitted). ...[T]hus, for example, if I were faced with data showing that the salary scale for assistant professors at McMaster was less than that of other universities in Ontario, I would have no hesitation in increasing the amount to achieve the same standard for McMaster regardless of the university's fiscal position."

11 It is plain that what drives the Government's legislation and policy is its legitimate concerns about the huge provincial deficit and its impact on the Government's ability to provide services. Obviously "0%" public sector increases make funding of services easier. The full title to the

legislation makes this intent clear. This is a clear case of either requiring or asking public sector employees to subsidize the public because public services benefit the public as a whole. A more equitable approach to protect these services would be to spread the "pain" widely by measures which increase revenues (more taxes or user fees) although I recognize that such measures would be less popular than the one adopted by the government. I agree with UTFA that recognizing the "Act" as relevant would be a recognition of ability to pay as a relevant criterion and recognizing the policy statement would compromise my independence. I would appear a minion of government. Thus, in fashioning this award, I have not taken into account either the legislation or the policy.

12 On the other hand, the legislation and the policy may impact collective bargaining outcomes, particularly in a "strike-lockout" regime. Evidence of some "0" contracts was adduced. In the next round of bargaining between these parties, University sector comparables will probably be lower. Because University sector comparables should be considered, dispute resolution between these parties may be affected. And, interest arbitrators will consider these comparables regardless of the reasons which have contributed to the result because these will be relevant collective bargaining facts. However, there is no impact in this round because most Universities had settled for 2009-2010 and 2010-2011 before the Compensation Restraint Act was passed.

University of Toronto v. University of Toronto Faculty Assn. (Workload Grievance), [2010] O.L.A.A. No. 708 (Teplitsky)

Arbitrator Smith, considering statutory criteria, qualifying these statements, has said:

Fair and reasonable in this context for both is essentially market driven and financial. In general terms, employers cannot expect to pay less than the market pays and employees can't expect to receive more than the market pays. This is somewhat tempered by consideration of intangible and non-compensatory matters as the market data available for the general labour market may not reflect those matters and overstate the amount of wages and benefits that is fair and reasonable for employees and employers in the particular workplace which is the subject of compulsory arbitration.

With respect to the "*best interest of the public*" AHS argues that that direction requires analysis of the public's ability to pay for enhanced wages and benefits. Ability to pay as a concept is one more frequently argued in private sector negotiations and voluntary interest arbitrations, as inability to pay in the private sector means that increased wages and benefits will result in failure of the enterprise. It is a less utilized concept in public sector interest arbitrations as arbitrators have taken the position that public sector employees are not required "*to subsidize the community by accepting substandard wages and working conditions*" (*Newport Harbour Care Centre Partnership v. A.U.P.E.*, 113 CLAS 130). However, the jurisprudence also makes it clear that it is not in the public interest that public sector employees are shielded from the economic woes being visited upon their non-public sector neighbours who are being asked to bear the burden of paying taxes to support the public sector. In other words, the determination of appropriate compensation must always have regard to economic conditions.

Alberta Health Services and Alberta Union of Provincial Employees (unreported decision, July 19, 2016, Smith)

Timing and Retroactivity

A variety of factors delayed the hearing in this matter and this award. The Government, by legislation, put over all pending arbitrations in the public sector, to await the results of the MacKinnon Committee. Since then, the world has seen the impact of the COVID-19 crisis and the related economic turmoil and widespread lockdowns. This arbitration contemplated an arbitral assessment of what the parties might have been expected to agree to (despite each of their assertions to the contrary) at the point where they had tried to negotiate a settlement and failed. It is this time, and evidence at that point, to which I must look in arriving at an award.

Arbitrator Smith, in similar circumstances, addressed this in her recent AUPE – Government of Alberta award.

As a preliminary observation about 2019 data, it is clear that earlier forecasts available for 2019 were more positive than what actually occurred. Delays in this arbitration process enabled the Crown to point to the deterioration in the economy which continued right up to the final Crown submissions on December 6, 2019 ... certainly there were significant delays caused in large measure by the Crown's desire to delay negotiations and the arbitration. Without those delays the data relied on for 2019 would have been more positive and potentially created a different result. The application of the replication principle considers what would have been achieved in negotiations relying upon the data available at the time those negotiations would reasonably have occurred. Instead we have a delay which allowed the accumulation of more data which is different from what was available when negotiations and this interest arbitration would generally have occurred.

This timing issue has been considered before, both as a matter of principle and in answer to requests that arbitrators consider new trends or decisions rendered after their hearing. These were canvassed in an earlier decision by this arbitrator, where it was held:

90 The Faculty Association argues that this more recent evidence provides a rebuttal to the University's arguments about its financial position, its projected deficits, and its susceptibility to a possible 5% or 2.5% rollback. This information, it argues, fits into the "exceptional circumstances" category. However, these were all factors the Faculty Association argued in any event were not relevant or not of great weight given the comparable settlements, at the original hearing.

91 The University's position that, if the hearing opens up for this type of "update" then it has to open up for other economic developments as well, has considerable force. By the time the submissions about new evidence were received, oil had gone down further in price, and the economic side effects broadened. Two University settlements came in considerably below the College settlements. It is by no means clear that the Faculty Association's request would, overall, assist its position. In my view, the authorities are clear that the focus of these proceedings should be on replicating the bargain the parties might have ended up making through free collective bargaining at the time that bargaining might reasonably have come to fruition.

92 Evidence of what similarly situated parties did at that time is the best evidence, tempered by the

trend in economic circumstances that would have guided reasonable parties as they considered their next best option to arriving at an agreement. One such option, however, is not to submit it to arbitration in the hope that circumstances will improve or deteriorate by the time of the hearing, and even less to seek to argue such changed circumstances after the hearing. The request for additional evidence is denied.

Mount Royal University v. Mount Royal Faculty Assn. (Salary Increase Grievance), [2016] A.G.A.A. No. 14 (Sims)

I have based this award on circumstances that prevailed in mid to late 2019, not on more recent events. To the extent those more recent events alter the parties' situation, they will no doubt have to face the resulting, and probably difficult, choices in collective bargaining for their post July 1, 2020 agreement.

I find no principled reasons why the award in this case should be other than fully retroactive and the University advanced little beyond its challenging financial situation to justify such a result.

Uncertain Times for the University

The University argues that the time frame relevant to this award has been one of uncertainty for the parties, due to new legislation and a change in government. I cannot disagree. The University has faced legislative change in relation to its independence as an employer, to the collective bargaining regime to which it is, or will be, subject and to changes to its funding arrangements.

For Faculty Associations like TUCFA, these changes, to them somewhat unexpectedly, continued them, for a few years, as statutory bargaining agents but exposed them, on short order, to strike or lockout regimes. Customarily, bargaining agents will accumulate resources over several years to be able to sustain a work stoppage, if necessary. The changes here allowed them very little time to prepare their resources to deal with any such events.

The University argues that the changes to the statutory scheme governing the parties show a purpose. This purpose it argues should be taken into account in assessing the principles that govern this arbitration. I do not propose to canvass all these changes for two reasons. First, having been involved in the review of the legislation I am familiar with what was advocated for, considered, and ultimately enacted. Second, the full impact of the new legislation was delayed in several respects, and its full force post-dates this agreement to arbitrate, and the arbitration process itself. Indeed, this agreement itself may well have been an effort by these two parties to bridge the uncertainties of the transition process.

A summary will suffice. Changes were made to Alberta's public sector laws more generally, and then specifically to post-secondary bargaining, following the SFL decision, and its impact on arbitration which had previously served as a substitute for the right to strike or lockout.

Saskatchewan Federation of Labour v. Saskatchewan [2015] 1 S.C.R. 245 (S.C.C.)

See also:

Mounted Police Association of Ontario v. Canada (Attorney General) [2015] 1 S.C.R. 1

Following consultation, new legislation was enacted. The Labour Relations Board, after contrasting the former *Post-Secondary Learning Act* provisions with the more traditional "*Wagner Act*" style provisions in the *Labour Relations Code* summarized the 2017 changes as follows:

... the government passed an *Act to Enhance Post-Secondary Academic Bargaining*, amending both the *PSLA* and the *Code* effective May 4, 2017. The essence of the amendments are:

- the *PSLA* continues to create academic staff associations;
- the *PSLA* continues to authorize the Board of Governors to designate employees as academic staff members;
- the *Code* now designates the academic staff associations as the bargaining agent for academic staff members under the *Code*, with exclusive authority to negotiate a collective agreement and to bind the academic staff to the collective agreement;
- the *Code* caused agreements negotiated under the *PSLA* to continue as collective agreements under the *Code*; and
- the parties are now subject to subject strike and lockout in place of mandatory interest arbitration.

[15] The result of the amendments is post-secondary institutions are now subject to all provisions of the *Code* (including the right to strike and lockout) except for Part II, Divisions 4 through 9. Part II, Divisions 4 through 9 are focused primarily on certification, revocation and voluntary recognition. These sections are scheduled to apply to academic staff members effective July 1, 2022, or later if the government so determines.

University of Lethbridge Faculty Association v. Board of Governors of the University of Lethbridge [2018] ALRBR 155 at 12-13

The conclusion the University urges from these changes is expressed at paragraph 37 of its brief.

... the intention of the legislature in adopting Bill 7 was to promote collective bargaining free from apparent potential employer interference and to provide access to strike and lockout options that had been recognized as protected aspects of the constitutional freedom of association. It was not to disregard the collegial governance structure established under the *PSLA* or the context in which the interest arbitration award will be decided and implemented.

It went on to conclude, at para. 41:

Accordingly, it is submitted that the Arbitrator in this matter may consider the full range of case law referenced above and arising from past interest arbitrations affecting public post-secondary institutions and is not confined to case law decided under the Code.

I come to that conclusion without need to explore further the legislative changes. What the parties agreed to and must be presumed to have intended, was for an interest arbitration, based on the approaches interest arbitrators have customarily taken in such circumstances.

Internal Comparators

The University's non-academic staff, to the extent they are unionized, fall under an Alberta Union of Provincial Employee's collective agreement. Since 2015, AUPE employees have fared better than the academic staff, as shown in the following table.

% Wage Settlements 2015-2019

	2015	2016	2017	2018	2019
TUCFA	2.00%	1.00%	0.00%	0.00%	Opener
AUPE	2.00%	2.25%	2.25%	0.00%	0.00%

The University argues that the non-academic AUPE employees are not an appropriate comparator group because their work is so different and because the wages many AUPE employees earn are much lower, some at or near minimum wage.

A more appropriate internal comparator, in the University's view, are those employed as part of its Senior Leadership Team and its Management or Professional Staff group. Those groups have been without any across-the-board increase for five years (2015-2019). However, TUCFA notes that there remains upward mobility within this group, generally more so than mobility through the academic ranks. The MaPS group received a one-time 2% lump sum payment in 2015. I noted above the MacKinnon report's comments on the administration costs in Universities. I note as well that there is a marked difference in the scope of those for whom TUCFA bargains and those bargained for by the University of Alberta Faculty Association, the later a larger group encompassing more administrative type positions.

External Comparison – Other Universities

TUCFA maintains Alberta post-secondary institutions, and most particularly the University of Alberta, provide the most relevant comparisons. It refers to the following extract:

46 The Faculty Association began its submission on this point by acknowledging that “drawing salary comparisons with other publicly funded, non-baccalaureate, post-secondary institutions, Alberta would appear to be self-evidently a valid comparable for use in negotiations.” We agree. Indeed, it is the single most significant factor. Similarly placed faculty in similar institutions in the Province operate with the same legislation, funding and tuition regimes, perform analogous work, possess comparable qualifications and pursue similar career paths.

Red Deer College and Faculty Assn. of Red Deer College, Re, 2003 Carswell Alta 2462, 73 C.L.A.S. 346 (Sims)

While the University places greater emphasis on its internal comparators, it agrees that comparisons to post-secondary institutions and Alberta and Canada are appropriate.

The University of Alberta

The University of Alberta remains the key comparator. The University of Calgary arbitration award from 2001 said, at p. 20:

The University of Alberta in Edmonton is the most directly comparable University to Calgary. They both operate under the same tax and provincial funding regime and, while the U of A is larger, each has a broad range of professional facilities within its academic staff complement. ... The Universities TUCFA chose for comparison purposes vary slightly from those chosen by the University. However, the results paint much the same picture. MacLeans Magazine’s ranking of Medicinal/Doctoral Universities covers the top 15 Universities in that category. It excludes some of the smaller liberal arts institutions, particularly from the maritime provinces.

University of Calgary and TUCFA (unreported decision, 13 Aug 2001) (Sims)

The University recognizes the U of A as the primary, and an appropriate, comparable but not a perfect one. It argues that it:

... has a larger student body and more academic staff employed than the University; and most notably, the University of Alberta has historically offered more generous benefits and a higher minimum salary for some academic staff (although the ranges are largely comparable). Overall, the University and the University of Alberta are distinguishable institutions (i.e., based on the size and age of the universities, and the greater number of full professors with uncapped salary earnings at the University of Alberta that drive up compensation).

I have weighed these differences. I agree the uncapped earnings are an issue, which is why I place greater weight on the comparisons at specific ranks and on the percentile figures. TUCFA's data showing higher overall salaries at the U of A provides a strong case for some increase. I find the comparisons stronger today than in the past as the University of Calgary has grown in size and stature. It is also increasingly true as the Province seeks to rationalize and alter University funding by using performance indicators that apply to similarly situated post-secondary institutions.

TUCFA's original proposal was to bring its academic salaries up to those at the University of Alberta. It provided the following chart comparing the across-the-board increases in each institution from 2005-2019. The results of the disparity in annual settlements, it argues, has meant that the U of C's faculty have failed to keep pace with those at the U of A, leading to a cumulative difference of 9.45%, based on Calgary's average annual increases of 1.86% compared to the U of A's 2.53%.

Year	University of Calgary	University of Alberta
2005	3.00%	3.50%
2006	3.00%	3.50%
2007	4.00%	3.90%
2008	4.50%	4.00%
2009	4.50%	4.75%
2010	0.00%	4.75%
2011	2.00%	1.75%
2012	2.00%	2.00%
2013	0.00%	1.65%
2014	0.00%	1.65%
2015	2.00%	1.50%
2016	1.00%	1.00%
2017	0.00%	1.50%
2018	0.00%	0.00%
2019	-	0.00%
TOTAL	26.00%	35.45%

It one looks particularly at the more recent settlements – 2013 forward, one can see an appreciable difference in the settlements. For all except 2015, when Calgary received 0.5% more, the U of A has had the same or greater settlements; 3% for the U of C for 2013-2018 and 7.3% for the U of A.

TUCFA provided a table comparing base rates for the various academic ranks (with some caveats over the comparability of some positions).

Comparison of Current University of Calgary and University of Alberta
--

Academic Staff Base Salary Scales by Rank			
Rank	University of Calgary	University of Alberta	Difference
Professor	\$103,020	\$113,499	10.17%
Associate Professor	\$87,567	\$91,209	4.16%
Assistant Professor	\$74,174	\$78,458	5.78%
Lecturer/Instructor	\$57,691	\$63,152	9.47%
Assistant Librarian/Librarian I	\$59,752	\$62,231	4.15%
Associate Librarian/Librarian II	\$71,084	\$86,744	22.03%
Librarian/Librarian III	\$79,325	\$102,364	29.04%

The University provided a fuller chart, covering 2017-2018 and 2018-2019 showing the actual figures and the percentage differences between the U of C and the U of A rates.

% U of A ahead of U of C Average and Median Salary Comparison U of A and U of C (2017-2019)					
Rank	Reference period	Average	Median	10th Percentile	90th Percentile
Full Professor	2017/2018	9.48%	8.49%	10.37%	10.96%
	2018/2019	7.11%	6.68%	7.43%	8.09%
Associate Professor	2017/2018	5.02%	6.59%	7.88%	-0.56%
	2018/2019	2.64%	5.53%	3.99%	-3.92%
Assistant Professor	2017/2018	6.96%	6.10%	1.79%	4.79%
	2018/2019	3.06%	2.08%	0.44%	-2.44%
All ranks combined (including Deans)	2017/2018	18.42%	17.53%	17.41%	14.90%
	2018/2019	15.36%	15.48%	13.10%	12.79%

Base rates alone provide an insufficient basis for comparison because of the differences in demographics within academic ranks, the difference in the qualifiers for and amounts of grid level increases, and differences in the top end of the salary scales. More helpful are the average and median salaries by rank (data provided for 2013-2017) and the 10th percentile and 90th percentile comparisons over the same period. At the top end, (maximum salaries) for Assistant and Associate Professors (leaving aside librarians) Calgary is not behind the U of A. However, TUCFA argues that this is offset by the "... considerably higher increment values and the increased opportunity U of A's faculty have to obtain these increments during their careers". The U of A increments range from \$2,175 to \$3,847 while the U of C's range from \$1,200 to \$2,700. The maximum number of increments at the U of A is 3.0 whereas at the U of C it is 2.4. I note as well that some of the anomalies between the two Universities stem from the historical differences

between them as to whether mandatory retirement at age 65 was permitted and their provisions for a top-end cap on increments.

In summary, TUCFA argues that “University of Alberta academic staff have higher starting rates, enjoy higher raises as they progress through their salary scales, and reach the top of their salary scales sooner.

TUCFA argues that the per course rates for sessional instructors in each institution show a similar disparity with base and top rates at the U of C running at \$6,232 and \$6,943 and at the U of A running between \$6,315.20 and \$7,016.89 at base with higher top scale ranges depending on course load. It is TUCFA’s position that these salary differentials are not offset by better benefits at the U of C. The University did not provide evidence to counter that assertion.

As the chart above shows, the base rates for librarians are significantly lower at the U of C than the U of A.

The University does not really dispute the salary gap between faculty at the U of C and the U of A. When TUCFA, at the start of bargaining, proposed parity based on increases since 2010, the University itself calculated the difference at 8.8%. I am more persuaded by the base rate differences, however, it is clear that a significant differential in favour of the University of Alberta rates has developed over time and exists now.

The University’s position is that the across-the-board wage increases have been freely negotiated over the years and that TUCFA has not, historically, insisted on wage parity between the two Universities. Now is not the time, it argues, to reverse that approach, given the political and economic climate. The University says:

Even if TUCFA can establish that wage parity with the University of Alberta is appropriate given the comparable nature of these two institutions, it is certainly not appropriate to remedy such disparity over the course of a single year, and in light of the present political and economic climate, the recently announced 2019 AB Budget and the University’s mid-year budget cuts.

University of Calgary brief para. 95

I accept the University’s point that a full move to parity could not realistically be expected in one year, particularly not this year. That point does not preclude some modest move in that direction.

External Comparables – Other Alberta Post-Secondary Institutions

The University provided the following table showing the across-the-board salary increases (settlements or awards), for 2015-2016 through to 2019-2020. It is taken from the Government of Alberta's Collective Agreement Wage Table:

Post Secondary Education

University	2015-16	2016-17	2017-18	2018-19	2019-20	Average
SAIT	3.15	3.05	0.00	0.00	0.00	1.24
Lethbridge College	2.50	1.90	1.90	0.00	0.00	1.26
ACAD	2.50	1.00	Opener	Opener	-	1.75
Northern Lakes College	2.25	2.50	0.00	0.00	-	1.19
Mount Royal University	2.00	1.80	1.80	0.00	0.00	1.12
NorQuest College	3.00	2.75	2.50	2.50	0.00	2.15
Bow Valley College	2.25	2.00	0.00	0.00	Opener	1.06
Lakeland College	2.00	1.90	TBD	-	-	1.95
Keyano College	2.50	2.00	0.00	0.00	0.00	0.90
Medicine Hat College	2.00	1.80	1.80	0.00	0.00	1.12
University of Alberta	1.50	1.00	1.50	0.00	0.00	0.80
Grande Prairie Regional College	2.00	2.00	0.00	0.00	-	1.00
Red Deer College	2.000	2.00	1.00	0.00	-	1.25
Olds College	2.00	2000*	0.00	0.00	0.00	0.50
Portage College	2.25	0.00	0.00	0.00	0.00	0.45
Athabasca	1.75	2.00	2.00	0.00	0.00	1.15
NAIT	2.50	1.50	0.00	0.00	-	1.00
Grant MacEwan University	2.25	2.25	0.00	0.00	-	1.13
University of Lethbridge	0.95	1.60	1.80	0.00	0.00	0.87
Concordia	1.83	1.50	1.50	0.00	0.00	0.97
University of Calgary	2.00	1.00	0.00	0.00	Opener	0.75
Average Settlements	2.15	1.78	0.83	0.13	0.00	1.12

*Olds College provided a lump sum of \$2000 in 2016/17. Not included in average.

TUCFA provided across-the-board data for a longer period (2005-2019) for the seven Universities but not the Colleges. It argues that this data shows that the U of C, cumulatively, has received 7.36% less than academic staff at the other Universities and have had 0% increases more

frequently. In reviewing this data, I have noted that there is some incomplete data. I also note that Mount Royal and MacEwan only became full-fledged Universities in the latter half of this period. Some salary increases granted there were justified at the time by the need to recruit people with higher qualifications in order to achieve accreditation for their expanded academic programs. The award in this case will keep the U of C well within the range of increases over 5 years as shown in this table.

TUCFA argues that, since 1978, the parties have never agreed to three consecutive 0% wage adjustments. That is clearly so, but that is not persuasive in itself. The same might be said of other bargaining units. The University has said it cannot agree to a third year at more than 0%. Neither party's protestations add value to the task at hand.

The U-15 Universities

Both TUCFA and the University accept that the U15 Group of Canadian Research Universities is an appropriate external comparator group, excluding medical and dental faculties. The University focusses more on their respective across-the-board salary increases rather than base salary levels. It did provide three useful charts tracking the salaries of full-time full, associate, and assistant professors in each of the U-15 Universities, excluding medical and dental staff, in constant 2018 dollars. While the University is correct in saying these charts do not support an 8.8% or even a 5.0% across-the-board increase, they do show the comparative position of the University of Calgary declined over the 2014-2018 period.

TUCFA refers to the U of C's own recognition of the deteriorating ranking among its peers, quoting from page 9 of its 2019 Annual Report.

Labour Environment

The Government of Alberta's 2017 announcement to reduce the size and cost of government through a policy of hiring restraint continued in 2018-19. The announcement extended a wage freeze that had been in place for government managers since April 1, 2016 through to September 30, 2019. In response to government direction, the University of Calgary froze salaries for the senior leadership team and management and professional staff in 2017-18 and 2018-19. The Board of Governors also secured agreements with its academic and support staff unions that provided no across-the-board salary increases for 2018 or 2019. Unfortunately, these policy directions had a differential impact at the University of Calgary, since we had been fiscally prudent with salary settlements over the past decade. Consequently, the salary freezes have reduced our salary rank among provincial and national peers. (*emphasis added*)

I find that the U-15 data shows that the University of Calgary's relative salary levels have declined somewhat in recent years, in comparison to the other U-15 Universities, more than sufficiently so to justify the amount of this award.

Recruitment and Retention

The University maintains neither recruitment nor retention is an issue. The number of academic staff has increased each year since 2015. Its turnover is low, compared to other employee groups, but that is an area where non-faculty managerial staff and non-academic staff provide no meaningful comparison. For academic staff (excluding the Qatar faculty), turnover was 4.0% in 2017, 4.9% in 2018 and 3.2% in 2019.

The University's exit survey show that 52% of those leaving retired, 30% "experienced a change in life circumstances (i.e. relocation) and 14% left to pursue a new career opportunity. Its position is that even its proposed 2% reduction will not impair its ability to recruit and retain faculty.

I agree that this is not a factor itself justifying an increase, but turnover in numbers alone is not the only factor in recruitment and retention. While difficult to measure, wage rates are one factor that influences who comes to a University and who chooses to move elsewhere. This is not insignificant for a University aspiring to be one of the very best in the country, and one hoping to enhance its funding by increasing its research grants and its donations. It needs to attract and keep the best faculty possible and it is in the public interest that it do so.

Stability of Employment

University faculty have so far been shielded from the job losses experienced by persons employed in other areas of the community. So far there have not been layoffs or pay cuts. This stability of employment is a factor to be considered in arriving at an appropriate award. However, as has often been noted in awards in this sector, unlike others, academics rarely share in the highs of a "high and low" economy.

This factor is tempered somewhat by the Government's most recent policy and funding messages. The longer-term projected reduction in University funding, the inelasticity of student fees and the rather vague references to Universities having to rely upon "other sources of revenue" cast a cloud on this presumed stability of employment.

The University recently announced that 250 jobs will be impacted by the funding cuts imposed by the Government. It went on to say:

Specifically, 100 jobs will be eliminated through attrition by the closing of vacancies, retirements and resignations, and 150 support staff (AUPE) and management and professional staff (MaPS) will be abolished through two rounds of layoffs starting at the end of November and concluding in mid-January. Further layoffs in IT are anticipated in March 2020. For clarity, there are no involuntary impacts to TUCFA members by the current round of position reductions.

The Faculty Association notes that this announcement refers to “no involuntary impacts ...” There may well nonetheless be some impact. The University says that in 2014 it had to respond to a financial crisis by job reductions.

This announcement, combined with both the Government’s and the University’s description of what, budgetarily, lies ahead, suggest that the promise of stable academic employment may be waning. If it does not result in cuts in programs, and it may well, attrition plus an increasing student per academic ratio may nonetheless result in an increasing compression of academic work.

The Alberta Economy and Job Market

The University correctly notes that “the time frame relevant for the purpose of [this] award has been characterized by considerable turmoil and uncertainty in the global, Canadian and Alberta economies”.

The University provided data underscoring the undeniable fact that the Alberta economy, and particularly that of Calgary, had been very hard hit over the last few years. The single biggest factor in this has been the precipitous although sometimes erratic drop in the international price for oil, exacerbated by the lack of pipeline capacity with its consequent price discount.

This data shows that the 2015-2016 recession was one of the longest and deepest in Alberta’s post-war experience. However, it is important to note that it was preceded by a period of high oil prices and a very rapid oil sands development that had overheated the economy and particularly the employment market, making the subsequent fall look even more dramatic both in the statistics and in the community at large.

The Government’s own (pre-COVID-19) prediction is that it would take an additional two years for real GDP numbers to return to pre-recession levels. The 2015-2016 recession saw a 7.74%

decline. The University data, blending the forecasts of the various banks and government, dated between February 2019 and October 2019, show an average GDP growth of 2.2% for 2018 and forecasts of 0.8% for 2019 and 2.1% for 2020. This covers the relevant time in terms of when the parties might reasonably have been expected to settle this agreement.

Low and uncertain oil prices also resulted in and continue to result in low oil sands investment and drilling activity. Drilling activity was down 30% year-over-year. The pipeline capacity issue led several companies to defer proposed new greenfield projects. These various pieces of negative news have had a particularly profound effect on the economy of the City of Calgary creating a very significant loss of those jobs that supported drilling and the engineering work for proposed new infrastructure. That, in turn, has resulted in massive vacancies in Calgary's downtown offices with a consequent pressure on its City finances, particularly on its residents, as the commercial sector's share of the tax burden fell. This, at a time when unemployment in the City was rising to levels not seen for a very long time.

Economic data and projections are a moving target, particularly when one looks back during a turbulent period. I have considered and found particularly helpful for the relevant period the Alberta Government's Treasury Board and Finance document published in October 2019, taken from the Economic Outlook Chapter of Budget 2019. While I have taken this into account, I do not propose to summarize what is already a considerably condensed description of the economic outlook at the time. I just note a couple of the key indicators.

TUCFA points to the average hourly wage rate in Alberta from Statistics Canada which show a seasonally unadjusted increase of 5.41% for July 2017 to September 2019. Public sector increases should not be taken to be indicative of the entire community.

Cost of Living Indexes

Inflation and the changes in the buying power wages represent has always been a significant factor in wage negotiations and arbitration. The University provided actual and projected CPI data for 2018-2020 as reported or forecast by the Government and the major banks between August 2019 and October 2019. They average out as follows: 2018 + 2.5%, 2019 + 1.9%, 2020 + 1.9%. The University puts forward certain criticisms of these raw figures as cost-of-living indicators, but still says using a 0.5% reduction gives a better indicator. That however, suggests that, at a 0% increase for 2019-2020, academic staff would see the purchasing power and value of their salaries decrease by 1.4%.

TUCFA provided the following chart that compares Alberta CPI to TUCFA across-the-board increases for 2010 to the mid-2019. The University counters once again with the fact the TUCFA increases have been freely negotiated, in contracts that provide other benefits. Nonetheless, it does show a significant decline in purchasing power that I find relevant to this award.

Comparison of Alberta CPI Increases and Academic Staff Percent Wage Increases at the University of Calgary			
	CPI Percent Increases		Academic Staff Percent Wage Increases
Year	CPI	%+	
2010	122.7	0.99%	0.00%
2011	125.7	2.44%	2.00%
2012	127.1	1.11%	2.00%
2013	128.9	1.42%	0.00%
2014	132.2	2.56%	0.00%
2015	133.7	1.13%	2.00%
2016	135.2	1.12%	1.00%
2017	137.3	1.55%	0.00%
2018	140.6	2.40%	0.00%
2019	*142.9	*1.64%	-
	Total	16.36%	7.00%
		Difference	-9.36%

This data contrasts this with the non-academic staff increases of 15.75%, 15.8% at the University of Alberta and 16.4% at Mount Royal. In support of the validity of its comparison to the U of A, TUCFA notes that single-family homes in Calgary (as at September 2019) cost, on average, 26.42% more than in Edmonton.

TUCFA also provided 2014-2019 CPI versus academic increase data for comparable out of province Universities, showing that each fared better in comparison to the cost of living compared to faculty at Calgary. I note that each of these Universities has a similar merit increment system. The University of Saskatchewan lost 2.16% to CPI inflation compared to Calgary's 7.40%. For that same period Dalhousie (Nova Scotia) gained 1.06% over CPI inflation and the U-15 Universities in Ontario ranged from minus 3.94 at Western to plus 5.01% at Ottawa, all ahead of Calgary's minus 7.4%.

Unemployment Rate

Pre-recession Alberta's unemployment situation was enviable, but with the recession it rose to 8.1%, the highest of the Ontario West provinces. This rate declined to 6.6 in 2018 and employment rates were, in 2019, expected to accelerate. The University summarized the forecasts by the banks and government to suggest 6.6% for 2018, 6.9% for 2019 and 6.8% for 2020. This is relevant to the period of time in question, but has obviously since been frustrated by the COVID-19 crisis.

The University's Financial Position and Changes in Post-Secondary Funding

The University's financial position brings many of the relevant factors for interest arbitration into play. As the University rightfully says, it is faced with a period of uncertainty and turmoil. It has been prudent over the last few years and achieved a relatively healthy balance sheet. The parties disagree on just how much this was due to salary restraint involving academic staff, and whether and if so how such things as endowment funds should be weighed. Nonetheless, until recent developments, at least the University's operating surplus was healthy and it had a significant accumulated surplus.

The University acknowledges that its fiscal year end revenue over expenses figure was \$99.4M. However, it points out that this was primarily driven by the donation of the W.A. Ranch and other significant donations. It recognizes too that while it has a net asset balance of \$1,826.7 million, \$991.1 million of this consists of endowments which must be maintained in perpetuity yielding only income.

The drop in oil and gas prices, the economic downturn, and the change in Government with its change in priorities, has resulted in the University of Calgary facing a very significant cut in its Campus Alberta grant and in its infrastructure funding. The question for the University is how to meet this dramatic change in circumstances. It is faced with several messages from the Government, either directly or through the Government's general acceptance of the views of the MacKinnon panel. It has been told that it should alter its revenues so that less comes from Government and more from student fees. It has been told that it should seek alternate sources of external funding, from philanthropists and from increased research and similar grants and perhaps from capitalizing on the fruits of its research.

At the same time it is being told that it will in future be funded by Government on the basis of performance and that inevitably will involve the use of comparable institutions to provide the basis for such comparisons.

The University says, of the 2019 budget:

48. Of the industries affected by the 2019 AB Budget, the public sector, and post-secondary students and institutions, are among the hardest hit. The province argues that if Alberta matched its post-secondary education spending to other provinces, it could save \$700 million per year.

More significantly, it points out the major changes in approach to the Government's Post-Secondary funding model.

49. Thus, the Government of Alberta will be modifying how post-secondary institutions are funded – a move that will force post-secondary institutions to seek funding from sources other than those historically relied on (for example, Campus Alberta grants). ... Alberta will be moving away from increases based on historical funding and will start to fund post-secondary institutions based on outcomes and needs.

These changes will have a profound impact on post-secondary institutions throughout the Province. The University asserts that, as the Ministry's operating budget is cut, the sector will lose 12.5% of its funding and perhaps more. Provincial grants to the U of A and U of C will be cut by 6.9% for fiscal 2019-2020.

These changes clearly signal the Government's wish that (a) Universities must find alternative sources of revenue and (b) that future funding will be based on performance and outcomes. Alternative revenue can now include increases in student fees. However, increasing fees has its limits, and its side effects. There is a point at which increased fees decreases a University's competitive position vis-à-vis other Universities, both for Canadian and International students. They can also heighten the notion of "the student as consumer" and the degree to which such consumers of education project their own, difficult to satisfy, demands onto the University and particularly its academic staff.

The move to performance-based budgeting of necessity involves measurement and comparison. For the University of Calgary, the most direct comparisons will be to the University of Alberta. This makes it harder to justify an 8.8% or similar differential between the two institutions.

The University also notes the pressure added to its funding by the suspension of the Provincial IMP Grant Program (expected to yield \$22.5 M) previously given and used for maintaining its

infrastructure. It has also lost, for a one year period, provincial funds to compensate for the cap on student fees; the cap continues for a year, the compensatory funds do not.

All that is significant to how the University chooses to respond to this challenge. It is also, to a degree, something that would have, in mid 2019, and will in the future, influence how TUCFA's members view what is an appropriate bargaining position. It is by no means obvious that salary reductions will be the option favoured by either side. This is particularly so if the result is salary levels that reduce Calgary below those institutions to which they have customarily compared themselves. There are other approaches, perhaps involving a reduction in staffing levels, or the elimination of programs, that will find more favour than salary reductions or restraint to the point where the academic staff member's buying power is eaten up by ongoing inflation. Another approach, suggested by the MacKinnon panel, is a readjustment in the amount spent on administrative costs. I only note this, but I have no independent basis on which to suggest this should be a favoured option.

The academic salary component of the University's budget is sufficiently large that it is easily seen as a target for reductions. However, academic salaries, whether under an arbitration regime or a free collective bargaining regime, still involve market factors and the comparisons that at least partially drive expectations.

The customary factors, described above, remain applicable, although balanced against the affect prevailing economic conditions have on expectations and what might reasonably have been expected to have been agreed to at the appropriate time. To go beyond that and to be overly swayed by the wishes of the Government to deflate wage levels generally is, as described in cases like *Ryerson (supra)* and *University of Toronto (supra)* to "make decisions based on budgetary limitations and priorities set by the government". This is slightly different than the priorities set by the University itself after considering its wider options and its collective bargaining obligations.

In my view, TUCFA's proposals, give the economic conditions at the time, and the difficult choices faced by the University which will inevitably affect its members, were unrealistically high. However, I also view the University's position, at 0% (or -2%) as unrealistically low.

Subsequent Arbitration Awards

Following this hearing, three arbitration awards were issued and forwarded for consideration. They were all wage reopeners provided for the later or last years of collective agreements. They are not academic bargaining units.

They are:

United Nurses of Alberta and AHS, Covenant Health etc. (January 10, 2020, Jones)

Alberta Teachers' Association and Teachers' Employer Bargaining Association (January 10, 2020, Jones)

Alberta Union of Provincial Employees and The Crown in Right of Alberta (January 31, 2020, Smith)

In the *ATA* case, the *ATA* sought 3% from April 1, 2019 with a cost for the year of 0.9% and 3% for the September 2019 - August 30, 2020 year. The group representing the School Board Employers sought a 2% reduction from the date of the award. The *ATA* argued that the arbitrator had jurisdiction only to award an increase, not a reduction. Arbitrator Jones found he did not have to decide the jurisdictional objection to a decrease (para. 59) since he found no such reduction was justified in any event (para. 56-58). The majority of the Board awarded 0% increase for the April 1, 2019 to August 31, 2020 period. In its conclusion, it said:

[75] I want to emphasize again that I have rejected any suggestion that the employers do not have the ability to increase the salary grid. The issue is not whether the provincial government could (or should) increase taxes in order to increase salaries in the public sector, but rather a realistic appreciation of the compelling general economic conditions in the province, taking into account the current comparative continuity and stability of teachers' employment and the lack of any other relevant public sector settlements that would indicate a general tendency to either increase or decrease salaries.

In the *UNA* case, the arbitration board had to decide whether a third year wage adjustment was appropriate, to run from April 1, 2019 – April 1, 2020. The underlying three year agreement included a no-layoff commitment that lasted through the last year. Legislation had delayed the arbitration process (as here) from early in 2019 until the end of 2019. The parties agreed that the arbitration board should consider the list of statutory criteria in Section 101 of the *Labour Relations Code*. The Union sought a 3% increase. The Employers, on the basis of a revised mandate from the then new Alberta Government, sought a 3% roll-back effective as of the date of the arbitration award.

The Board rejected the Employer's request for a roll-back and referred to the lack of any examples of such a result in free collective bargaining. It adopted the words of Arbitrator Peltz:

On this approach to replication, we observe that the government acting reasonably would accept the reality that it cannot, without unacceptable consequences, force public sector units to roll back wages at this time.

Saskatchewan Teachers' Federation v. Saskatchewan School Boards Assn. (Renewal Collective Agreement Grievance) [2018] SLAA 9 at para. 73

The *AUPE* award arose from a three-year contract from April 1, 2016 to March 31, 2020. It provided that, failing agreement, any across-the-board increase for the third year, and a market adjustment issue for Correction Officer 3s, should be arbitrated. The re-opener arbitration was to be held earlier than it was, but delayed by legislation, Crown motions and Court applications. The Crown's position was originally 0% but was altered to a 2% rollback in November 2019, a change said to be justified by the then recently issued MacKinnon report. The Crown argued that it had concluded that "public sector compensation in Alberta exceeds that in comparator jurisdictions with no better outcomes for service." The Union sought a 6.5% increase. Without commenting on what that concession on the Union's agreement to a third year reopener, the Union, in fact, had the benefit of a job security provision throughout the third year of the contract.

The Board found that, while it had sufficient authority, under the re-opener provision, to consider a rollback, it decided not to accede to that request. After a detailed review of the economic factors involved, which I have also considered, the Board awarded a 1% increase.

Conclusion

Having considered all these factors, I award an across-the-board increase of 1.7% retroactive from July 1, 2019 – June 30, 2020. This is based on all the matters put before me. However, I highlight the following.

I find this increase is justified by a comparison to the salaries in place for similarly placed academic staff at the University of Alberta. The justification of this comparison is increasing as the Province establishes a funding structure that will inevitably compare the institutions' performance, the one to the other. I do however, in light of the prevalent economic circumstances in mid-2019, agree that it would have been unrealistic to expect to bridge the gap between the two institutions, either by 8.8% or by the reduced proposal of 5%.

One of the unfortunate by products of policy or pattern bargaining across public sector workforces, and across the Province, is that it tends to put at a relative disadvantage institutions and employees that have already worked to constrain expenditures, as has the University of Calgary and TUCFA in the past few years. It precludes consideration of the type of market forces that produce an equilibrium between institutions and allows little or no recognition of each institution's history or current needs.

The U-15 survey comparisons are also supportive of this increase. The data establishes that the University of Calgary's ranking in comparison to that group has declined. These comparisons represent the dominant market for academics in Canada. I agree with TUCFA that this data shows a significant downward trajectory in comparison to similar institutions.

An increase is also supported on the basis of the projected cost-of-living changes over the year of the award, and by this institution's comparison to CPI over several years. Academic staff perform a whole range of important teaching and research functions. Academics gain little when the economy is booming in comparison to employees in other industries. It is not inappropriate for that reason that their salaries increase, for this year, to at least compensate them for their decreasing purchasing power.

This process (and others) was delayed to allow consideration of the MacKinnon Report. Its conclusions about public sector employment generally are not specifically directed at academic staff. Indeed it suggests the cause of higher per student costs primarily lies elsewhere.

This award is based on what objectively might have been agreed to in mid-2019. It does not address the disruption that has occurred due to COVID-19 which would have formed no part of either parties' predictions at the relevant time.

I thank the parties and their counsel for their cooperation throughout and for their comprehensive briefs and submissions.

DATED at Edmonton, Alberta this 21st day of July, 2020.



ANDREW C.L. SIMS, Q.C.