IN THE MATTER OF THE *NEW BRUNSWICK INDUSTRIAL RELATIONS ACT*, CHAPTER 1-4

REPORT OF THE CONCILIATION BOARD appointed to inquire into a dispute between:

UNIVERSITY OF NEW BRUNSWICK

- and –

ASSOCIATION OF UNIVERSITY OF NEW BRUNSWICK TEACHERS

MEMBERS OF THE CONCILIATION BOARD APPOINTED BY THE HONOURABLE DONALD ARSENEAULT, MINISTER OF POST SECONDARY EDUCATION, TRAINING AND LABOUR

Andrew C.L. Sims, Q.C. .... Chair
Douglas Lorimer .... Nominee of AUNBT
Morgan Cooper.. Nominee of UNB

REPRESENTATIVES OF THE UNIVERSITY OF NEW BRUNSWICK

David Clark	Counsel and Chief Spokesperson
Barbara Richards	UNB Bargaining Team
Ryan Johnston	Counsel, UNB Bargaining Team
Tim Walker	UNB Bargaining Team
David Coleman	UNB Bargaining Team
Larry Guitard	UNB Bargaining Team
Dan Murray	UNB Bargaining Team

REPRESENTATIVES OF ASSOCIATION OF UNIVERSITY OF NEW BRUNSWICK TEACHERS

Lloyd Waugh	AUNBT Chief Spokesperson
David Bell	AUNBT President
David Mombourquette	Counsel
Rick McGaw	AUNBT Bargaining Team
Jula Hughes	AUNBT Bargaining Team
Jennie Hornosty	AUNBT Bargaining Team
Miriam Jones	AUNBT Bargaining Team
Charlene Mayes	AUNBT Bargaining Team
Steve Turner	AUNBT Bargaining Team
John Neilson	AUNBT Bargaining Team

HEARD in Fredericton, New Brunswick, on May 12, 13, 25, 26, 2010 and August 11, 12 and 13, 2010 Written Submissions filed September 3 and October 7, 2010

ISSUED on January 12th, 2011.

RECOMMENDATIONS OF THE CONCILIATION BOARD

This recommendation involves salaries for full-time academic staff at the University of New Brunswick. Those staff belong to a bargaining unit represented by the Association of University of New Brunswick Teachers. On May 5, 2010, the parties agreed to be bound by and to give effect to our recommendations, pursuant to s. 69(1) to (5) of the *New Brunswick Industrial Relations Act* (reproduced below).

This Conciliation Board was appointed on February 18, 2010 by the Honourable Donald Arsenault, Minister of Post-Secondary Education, Training and Labour. At the outset, and following considerable work by the parties and a conciliation officer appointed by the Ministry, ten issues remained in dispute. The parties, during the Conciliation Board's process, were able to resolve a further nine of those issues. What remains in dispute is the wage increases, if any, to be paid in each year of the agreement's term, plus certain language changes to Article 36B.07.

The parties went into bargaining each proposing a four year term, to run from July 1, 2009. Issues have since arisen about the appropriate term, which are discussed below, basically with the University still seeking a four year agreement but with the AUNBT now advocating for a three year term.

Existing Salary Provisions

The University's academic staff are paid under a fairly typical academic salary structure. There are a series of classifications each with a salary floor and ceiling. This includes the Lecturer, Assistant, Associate, and Full Professor ranks as well as Instructors, Librarians and related classifications. Each employee's total pay is adjusted by several components. Adjustments have been made historically on July 1st, and more recently at six monthly intervals with a January 1st raise as well.

Each year, there has been a negotiated Economic Adjustment that applies to all salaries, and to the floors and ceilings for the various ranks. Individuals also receive a PTR Adjustment (on account of "progress through the ranks"). As academics move from classification to classification they may also receive a promotional adjustment. There are then a few situations where discretionary or market adjustments are also made.

The last collective agreement included the following Article 36B.07 dealing with the economic adjustment.

> 36B.07 Economic Adjustment (EA):
>
> The two Parties have negotiated collective agreements since 1982 that have contained salary and salary scale adjustments related to the Consumer Price Index (CPI). The Parties have also been tracking the results of these adjustments by comparing the average salaries at UNB (as reported to Statistic Canada) to a comparable group of 13 Canadian Universities.
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> The Parties agree that it is desirable to maintain a competitive position on the national market in order to attract and retain quality faculty in the academic staffing of the University programs. The comparison group of Canadian universities for purposes of defining a competitive salary was selected as being similar in size and scope of programs to UNB and include: Memorial, Dalhousie, Carleton, McMaster, Ottawa, Queen's, Windsor, York, Manitoba, Saskatchewan, Regina, Calgary and Victoria.
>
> In order to enhance planning in terms of academic programs, the Parties agree that it is desirable to maintain a salary model which provides a predictable salary bill over the lifetime of the collective agreement. To achieve this the Parties have agreed to fixed percentage increases for economic adjustment recognizing that these increases are meant to in part account for cost of living effects and the need to be competitive with the comparison group.

The economic adjustments negotiated in the last round of bargaining were:

- July 1, 2005 an increase of 3.25%
- November 1, 2005 an increase of 1.00%
- July 1, 2006 an increase of 2.25%
- January 1, 2007 an increase of 1.25%
- July 1, 2007 an increase of 2.25%
- January 1, 2008 an increase of 1.25%
- July 1, 2008 an increase of 2.50%
- January 1, 2009 an increase of 1.25%

There is a significant history to Article 36B.07, addressed in more detail below. In brief, the parties have, for many years (more or less, depending on one's point of view), used as their benchmark the average salaries of the listed comparable Universities. In the last agreement this link was modified, although the parties maintain different views on why and to what extent this was done. Suffice to say for now, the Association seeks to shore up the link to comparable Universities while the University seeks recognition that the salaries paid at such institutions are but one of several factors to be weighed in getting to an appropriate economic increase.

The Parties' Closing Positions

At the close of the board's hearings, following considerable efforts towards compromise, the parties still remained significantly apart in their positions on appropriate Economic Adjustments. The University's position is for a four year term, and the Association's for a three year term, as follows:

	University	AUNBT
July 1, 2009	0%	4%
January 1, 2010	0%	
July 1, 2010	0.5%	4%
January 1, 2011	0.5%	
July 1, 2011	1.25%	6%
January 1, 2012	1.25%	
July 1, 2012	1.5%	End of contract
January 1, 2013	1.5%	

In each case, these are economic increases to be applied prior to individual PTR increases.

These positions developed over time. The University's opening position offered 2.5% over 4 years (1.0% in year 3 and 1.5% in year 4), and AUNBT sought 17.2% over four years (8.6% in year 1, 3.6% in year 2, 2.5% in year 3 and 2.5% in year 4).

The AUNBT's stated intent in these negotiations is "to return to an average salary comparable to other Canadian Universities of similar character." The University describes its "compensation philosophy" as follows:

> UNB is strongly of the view that the AUNBT's financial compensation philosophy is not sustainable and cannot be supported by the University's operating model. Many of the factors that drive the compensation levels of each of the Group of 13 universities are outside the control of UNB. Each of these institutions have different financial circumstances and operate in different provinces with different levels of prosperity. As approximately 75% of UNB's operating expenditures are on salary and benefits, UNB's compensation philosophy must be driven predominately by factors within its control. Accordingly, UNB's compensation philosophy is to provide compensation levels sufficient to attract and retain high quality faculty taking into account the following factors:
>
> a) Group of 13 as one of the comparators
> b) Compare to similar sized university with similar programs in areas with similar demographics
> c) Cost of living
> d) Financial circumstances of the University, so as to determine the level of adjustment that can be supported by the University's operating model.

Our decision adopts neither approach. We do not accept the AUNBT's proposition that the University' vision as a national comprehensive university will be undermined unless a weighted average formula target is adopted. Nor, however, do we accept the primacy the University assigns to its own "ability to pay". We accept that comparability plays an important role in replicating the agreement the parties might otherwise have made for themselves, but comparability is not parity. The identification of a comparator group does not exclude an analysis of other important economic indicators.

We accept to a degree the AUNBT argument that at least some of the solutions to the University's overall wage bill (its salary mass) lies in setting priorities based on the number and allocation of staff rather than solely on restraining increases that might otherwise be justified in the circumstances.

We appreciate the University's assertion that, while UNB is not yet in a financial crisis, its financial situation is not sustainable. The "we will reduce your grants and you can increase your fees" approach to University funding has reached, and indeed gone beyond, its limits. The Canadian model for funding Universities may well be unsustainable, but the solutions are not all on the expenditure side; and paying less (relatively speaking), for salaries is not of itself going to render that model sustainable. There appears to us to be much wisdom in the comments in the MacDonald Betts Report referred to below.

> … it is obvious that trying to do more with less is not sustainable. Only by doing less, can UNB ensure its place as a national comprehensive university. In order to do that, however, the university must make key, focused decisions within a strategic framework.

Our task is to set appropriate wage rates using well established, although not scientific and not formulaic, approaches. As many cases have said, the result must be an award that replicates as best can be done, the likely result of free collective bargaining.

Preliminary Issue – Term

The *New Brunswick Industrial Relations Act* places some limitations on the term of a contract awarded by processes such as this. Section 79(8) provides:

> 79(8)The arbitrator or arbitration board shall, in respect of every award made under subsection (5), determine and specify therein the term for which the award shall be operative and, in making its determination, he or it shall take into account,
>
> *(a)* where a collective agreement applicable to the bargaining unit is in effect or has been entered into but is not yet in effect, the term of that collective agreement, and
>
> *(b)* where no collective agreement applying to the bargaining unit has been entered into,
>
> (i) the term of any previous agreement that applied to the bargaining unit, or

> (ii) the term of any other collective agreement that to the arbitrator or arbitration board appears relevant,
>
> but no award, in the absence of the application thereto of any criterion referred to in paragraph (a) or (b), shall be for a term of less than one year or more than three years from the day on and from which it becomes binding on the parties.

The AUNBT argues that this section does not allow us to impose a term of more than three years. The University says firstly that the award it seeks will expire less than three years from the day "on which it becomes binding on the parties" which, in its view, is the date of this award. The AUNBT counters that this reference is to any start or retroactive date provided for in the award, not the award itself. Secondly, the University argues that this Board has discretion to and ample reasons to make a four year award because 79(8)(b)(i) applies. In support of its argument, the University refers to two cases dealing with very similar federal legislation:

> *Canada (Treasury Board) and Professional Institute of the Public Service of Canada (Forestry Group Bargaining Unit)* [1976] C.P.S.S.R.B. No. 2 (Brown, Vice Chair)
>
> *C.E.P. v. Canada (House of Commons)* [2009] P.S.L.R.B. 150 (Bedard, Vice Chair)

Section 79 refers to arbitration boards. Section 69(1) and (2) plus section 69(5) means that it also applies to our process. However, as the AUNBT notes, 79(7) is not one of the subsections specifically made applicable to conciliation boards with an arbitration mandate. This, it says, is relevant in that it is 79(7) that alludes to an award becoming binding on the parties.

Notwithstanding that argument, in our view section 69 achieves the same effect. It provides:

> 69(1)Where a conciliation board has been appointed and at any time, before or after it has made its report, the parties so agree in writing, the recommendations of the conciliation board are binding on the parties and they shall give effect thereto.
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> 69(2)An agreement to be bound by the recommendations of a conciliation board under subsection (1) is effective when filed with the Minister or when filed with the board for transmission to the Minister.
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> 69(3)Where the Minister is requested to appoint a conciliation board, if all the parties bargaining collectively offer or undertake in writing to be bound by, and give effect to, the recommendations of the conciliation board, each of those parties is bound by, and shall give effect to, the recommendations of the conciliation board if it is appointed.
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> 69(4)An award under this section may be retroactive to the date of appointment of a conciliation officer or mediator, or to such earlier or later date as may be fixed in the award of the conciliation board, as the case may be, but in no case shall the award be retroactive, where no collective agreement was in operation, to a day before the day on which notice to bargain collectively was given by either party, or, where a collective agreement was in operation, before the expiration date of the agreement or the expiration date of a provision therein subject to revision under the agreement.
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> 69(5)Where the parties agree to be bound under this section by the report of a conciliation board before the board has reported, subsection 77(2) and subsections 79(4) to (6) and (8) to (10) shall

> apply mutatis mutandis and subsection 131(2) shall apply to the proceedings and the award of the conciliation board as if such board were named therein.

An agreement to be bound by the recommendations of a conciliation board can only mean, in our view, an agreement to be bound by the recommendation as and when made. Section 69(4) allows those binding recommendations to be made with retroactive effect, within limits. We interpret section 79(8) as meaning the date of our recommendations, if the parties have already agreed to accept them.

If we are wrong on that section 79(8)(b) nonetheless gives us a discretion to exceed any three year maximum where, taking into account the criteria in 79(8)(b), we believe it appropriate to do so. Term of any previous agreement, we find, has the same meaning as term in section b(ii). In both cases it refers to term in the sense of length rather than in the sense of “provision” (although we can see the parties might in some cases say, in one agreement, that the next agreement will last, for example, for four years).

The history of the terms of agreement between these parties suggests a regular and recent use of four year terms. While other terms have been used, four years has been the most frequent. It is the term the parties each proposed in this round of bargaining up until the last few weeks. That itself does not fit within the criteria of 79(8)(b)(i), but it reinforces the influence of past practice. If it is necessary for us to decide, we find we have the discretion to provide for a four year term because the conditions in section 79(8)(b)(i) are met.

Having said that, we accept the AUNBT’s point that the apparent mischief the three year presumptive limit is designed to avoid includes an inappropriately long restriction on the right to begin collective bargaining when the parties may face uncertainty into the future.

The case law supports our interpretation. The date the award was binding on the parties was set by legislation in the *Forest Group* case (*supra*), so while supportive, it is still distinguishable on that point. Paragraph 37 addresses the second point:

> 37. There is no dispute that, pursuant to subsection 73(1), the Arbitration Tribunal must take into account one of the applicable criterion, set out in paragraphs (a) or (b) of the subsection provided that any of those criteria exist. The criterion set out in paragraph (a) is not relevant as the prerequisite condition for its application is absent. That is, the parties had not previously entered into a collective agreement, which is either in effect or not yet in effect, covering the Forestry Group bargaining unit. The criteria set out in paragraph 73(1)(b), however, are relevant, as the prerequisite condition for taking one or other of the criterion into account has application in the present case. That is, no collective agreement applying to the Forestry Group bargaining unit has been entered into by the parties. Accordingly, the Arbitration Tribunal was under an obligation, in specifying the term that the arbitral award was to be operative, to take into account one of the criterion set out in clause (i) or (ii) of paragraph (b), provided that one of those criteria existed.

In the *House of Commons* case (*supra*) the Board addressed the equivalent to Section 79(8)(b)(i) criteria, saying, for that case:

> 44 The Board considers that, in this case, paragraph 58(1)(b) of the *PESRA* should not apply. First, no pattern can be identified from the parties' negotiation history given that they have agreed to both two-year and three-year agreements, and the Board fails to see why it should rely only on the last agreement. Second, the Board does not consider that the only collective agreement reached with another parliamentary bargaining agent is relevant with respect to subparagraph 58(1)(b)(ii) of the *PESRA*.

This illustrates that, if the criteria can be met, the term becomes discretionary. We take the AUNBT's point that the result in the *House of Commons* case was for the Board to exercise its discretion to create a term that coincided with the end of a government restraint period, which is at least analogous to the "uncertain future" argument.

In our view, therefore, the law does not limit our ability to recommend either a three or a four year term; the two options now advanced. If reasons were needed to go to four years, and we do not believe they are, the reasons alluded to above are sufficient to justify that step.

Our judgment is that a four year term is the appropriate recommendation to make, having regard to the recent use of four year terms. All bargaining and almost all interest arbitration involve projections into an uncertain future. Collective bargaining is an expensive, time and resource consuming, process. Both parties, until close to the end of our process, advocated for a four year term. The University has difficult financial challenges to manage and the additional year allows some added predictability. We think replication favours a four year term.

Approaches to Interest Arbitration

By each agreeing to accept our recommendations as a conciliation board, the parties have put us in the same position as an interest arbitration board. Both provided submissions on the principles such boards have adopted in fashioning awards. We do not propose to go over these principles in great detail since they are fairly well established. Except in relation to "ability to pay", the parties' differences are mostly in emphasis, not substance.

The paramount principle (absent statutory criteria to the contrary) is replication.

> … 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 the resort to a work stoppage in an effort to obtain demands … and arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities.
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> *Re Board of School Trustees, School District 1 (Fernie) and Fernie District Teachers' Association* (1982), 8 L.A.C. (3d) 157, (Dorsey) at page 159

> In compulsory arbitration of this type, it is the duty of the arbitrator to strive for a resolution of the issues which will be consistent with the result which the parties might reasonably have expected had the collective bargaining process not been interrupted by the legislation. That is, the arbitrator is not to mediate the differences, nor is he to wear the mantle of a crusader for social change and impose his notions of what is fair and just. Rather, it is his obligation to apply the evidence objectively so that his award will reflect what probably could have been attained in a freely negotiated settlement. The award should then be consistent with labour relations realities.
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> *CUPE and Saskatchewan Health Care Association* (Halvorson, J., May 17, 1982)

This goal of replication makes it unlikely the process will result in breakthroughs the parties themselves would have been unlikely to agree upon. Some describe it as a conservative process, but this can be a loaded term. It simply means that interest arbitrators recognize that, in free collective bargaining, neither side usually gets everything they want. The compromises made towards the end of a dispute often involve less change than either side's original proposals anticipated.

Replication and comparability are related but distinct processes. As the Chair of this Board said in:

> *Northern Alberta Institute of Technology v. Alberta Union of Provincial Employees* [2009] C.L.B. 1756
>
> … interest arbitrators should apply the replication principle, using agreements entered into by others as a key indicator of what these parties might have ultimately accepted in a free collective bargaining situation. While replication is not the same as comparability, the latter is the best guide available in assessing the former. Arbitrator Picher summarized the comparability approach as follows:
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>> … the exercise becomes primarily comparative. It is reasonable to assume that the parties would have made a collective agreement generally comparable to others in the same industry and geographic area. A first point of reference, therefore, is the collective agreement which have been freely negotiated between similarly situated Union and employers within the same industry and within the same or similar locations.
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>> *Crane Canada Inc. and Teamsters Local Union 419*, unreported decision, September 9, 1988 (Michel Picher) at p. 9
>
> What is fair and reasonable overall is itself a function of the economic and social climate as much as it is a weighing, in isolation, of the merits of individual proposals.

Arbitration is not a scientific process capable of being reduced to a formula, but neither is it arbitrary. The University urges, and we accept, that a party asserting a particular position carries the onus of presenting cogent evidence to support its position. Particularly in relation to questions like recruitment and retention, generalized assertions like "if you don't pay $X people will leave" carry little weight. Replication is not determined by what parties proclaim in bargaining that they would "never accept." Indeed, such assertions may well be why they need third parties to make their agreement for them.

The need for evidence and objective criteria does not equate to an issue by issue approach where benefits are awarded because they seem individually attractive and well supported. Collective bargaining involves choices between desirable benefits and the same is true in interest arbitration. Agreements are settled on a package basis. This remains true where all that is left for the arbitrator to decide is money, since that is inevitably done against a backdrop of other negotiated terms. Arbitrator Paul Weiler commented on this in an interest arbitration in the health sector:

> I have always thought it essential not to look at any such item in isolation. With rare exceptions any such proposed improvement looks plausible on its face. The Union can point to some number of bargaining relationships where this point has already been conceded. It may even be true that, taken one by one, no single revision will actually cost that much. But, cumulatively, these changes can mount up substantially. Thus sophisticated parties in free collective bargaining look upon their settlement as a total compensation package, in which all of the improvements that year are costed out and fitted within the global percentage increase which is deemed to be fair to the employees and sound for their employer that year. In fact, the general wage hike itself generates corresponding increases in the vast bulk of the compensation package represented by the wages, since it increases the regular hourly rate upon which holidays, vacations, overtime and other premiums depend. This means that in any one negotiating round only limited room is left available for improvements in the scope and number of these contract revisions, and the Union must establish its own priorities among these various fringe items.
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> These facts of free collective bargaining must be kept in mind if arbitration is, indeed, to try to replicate the results in which would be achieved in the former setting. The reasons is that the arbitration model does not inherently require the parties to make these tough choices in their negotiating positions. Inside the bargaining unit, for example, one group of employees may want higher pensions, another segment seeks longer vacations, a third is interested in a new dental plan, while others simply want as much higher take-home pay as possible (depending on their respective positions, ages, family situations and so on). In the arbitration context, the Union does not have to worry that if it asks for too many things at once, the result will be a painful work stoppage, indeed, the Union may be tempted – as also the employer which has its own diverse constituencies which it does not want to alienate – to carry all of these initial demands forward to the arbitration hearing, in the theory that it has nothing to lose by asking. And, indeed a party may even hope that the more improvements it does ask for, the more will be given. Certainly it is essential to the integrity of arbitration that these latter assumptions not be reinforced.
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> *Re: Hospital Labour Disputes Arbitration Act, 65 Participating Hospitals and CUPE*, unreported award, June 1, 1981 (P. Weiler)

There are well understood dangers of arbitrators stray too far from what the parties might be expected to have negotiated on their own. The senior adjudicators at the B.C. Labour Relations Board, in *Yarrow Lodge,* reviewed these in some depth:

> The essential ingredient, and indeed the very essence, of free collective bargaining, is the ability of each party to compromise. The "corrosive" or "chilling" effect that compulsory arbitration has on

> collective bargaining is that the parties become increasingly less willing to compromise. If, at the end of the day, each of the contracting parties knows that a third party will decide the final terms and conditions of employment, one or both will not want to disclose their final position. This is because to move, a party may be giving up ground unnecessarily, when an arbitrator finally decides to "split the difference". Thus compromise is actually seen as prejudicial. Further, by not moving, the party still has something available for the sake of "compromise". Moreover, the negotiators for each side do not have to make the tough compromises which may prove politically difficult within their own constituencies. The tendency therefore will be not to compromise, and instead hand the problem over to the arbitrator who will, of course, be blamed for any adverse decision. Indeed, not to take such a course of action will be painted as politically naive. This is the corrosive or chilling effect of compulsory arbitration on negotiation.
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> Further, not only do the parties avoid compromise, but their proposals are framed in relation to the position which they intend to take at arbitration and what they perceive to be the arbitrator's past awards. The result is a "narcotic effect" upon negotiations, in which the parties become increasingly reliant upon arbitration to settle their agreements rather than engaging in meaningful collective bargaining. Instead of compromise providing the momentum for the conclusion of a collective agreement, it is, once again, seen as only prejudicial.
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> The "catalyst" effect is simply this: the economic losses imposed on both parties by strikes or lockouts provides the best catalyst to resolve the differences between them. The proverbial eleventh hour settlement is the result of the parties' serious efforts to avoid strikes and lockouts. The removal of the right to strike or lockout removes this pressure on the parties to compromise.
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> The "cathartic effect" is defined as follows: a strike or lockout provides the parties with the opportunity to "clear the air" or "blow off steam": It further tests the strength and seriousness of the collective bargaining positions of the parties, although the impact of this private dispute has a public cost.
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> *Yarrow Lodge Ltd. et al v. Hospital Employees Union and CEP Local 448* [1993] BCLRBD No. 463; 21 CLRBR (2d) 1 (Lanyon)

The parties to this dispute began bargaining under a regime that, subject to Ministerial discretion, allowed strikes and lockouts. It is an industry that is sensitive to timing. The public, and more particularly the student body, are likely to be seriously affected by a strike or lockout during term time. However, faculty are likely to be particularly affected, and the public and student body less so, by a lockout during the summer months. AUNBT was less than enthusiastic when the Minister intervened to appoint a conciliation board. However, they felt themselves vulnerable to a summer lockout, which they assert, is the reason they agreed to be bound by this Board's recommendation.

The University suggests the arbitration process in this case may have a “narcotic effect” that could undermine the normal give and take that can and should take place during collective bargaining. That has not been our experience. Rather, what we see is the impact of a longstanding reliance on bargaining at other Universities to set a parity style wage level. This has probably led to a bargaining culture more used to following trends set elsewhere than coming to a “made at home” bargain. It has also led to a sense that the University of New Brunswick's well established status as a respected academic institution on the national stage will be threatened if this wage parity with other national comprehensive Universities is not maintained.

Replication, like collective bargaining itself, requires a careful consideration of many factors. The case law is replete with lists of factors. The Shime *B.C. Rail* decision listed several which have been augmented, as noted in the following review:

> *B. Relevant Criteria*
>
> *1. General Considerations*
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> [27] Over the years, interest arbitrators throughout Canada have developed a catalogue of relevant criteria to ensure that the process in which they are engaged will be firmly seated on a principled and rational basis. All of these, in one formulation or another can be said to be but variations of a set of criteria first articulated by Arbitrator Shime almost a quarter of a century ago in *General Truck Drivers and Helpers Union, Loc. 31 and British Columbia Railway Co*. (1 June 1976), a decision which surprisingly, given its influential stature, has never been fully reported. An expansive discussion of the case is found in the Award of Chief Justice Richard of the New Brunswick Court of Queens Bench acting as Arbitrator in *Re C.U.P.E. and New Brunswick* (1982), 49 N.B.R. (2d) 31. It reiterates the Shime criteria and gives excerpts from the Shime Award justifying the irrelevance (pp. 38-41). These are:
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> 1. Public sector employees should not be required to subsidize the community by accepting substandard wages and working conditions;
> 2. Cost of living;
> 3. Productivity;
> 4. Comparisons -- internal;
> 5. Comparisons -- external;
> 6. Comparisons -- external not in the same industry but work of a similar nature.
>
> [28] Neither Arbitrator Shime nor those who followed claim this list of criteria to be exhaustive. Nevertheless it can be said to be programmatic, and other criteria identified in the jurisprudence have been built upon the basic structure outlined in the General Truck Drivers and B.C. Railway case. Thus Justice Richard added as relevant factors the current state of the economy, the required awareness of the relation between the private and the public sectors, and the profile of the labour force there being considered which comprised full-time and part-time employees. Other arbitrators too have catalogued developing economic conditions at the macro, meso and micro levels as critical factors to be taken into account in the setting of the wage rates by the interest arbitration process.
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> *Halifax (Regional Municipality) and I.A.F.F. Local 268* (1998) 71 L.A.C. (4th) 129 (Kuttner)

The point is, there are many factors to examine. Lists of criteria are helpful but are neither exhaustive nor of universal application. The parties addressed us on many matters all of which we have considered and weighed. Different factors and comparables carry different weight, but no single factor is determinative.

In the end result, these considerations reinforce the need to adopt replication as the appropriate touchstone, recognizing that free collective bargaining offers upsides and downsides for all parties, and that several influences customarily play into any freely bargained result.

Ability to Pay

The parties' submissions on the principles behind interest arbitration differ most significantly on "the ability to pay." We do not propose to canvas the long-standing debate on this issue, or review in detail every case submitted to us. It is enough to highlight a few of the key elements.

The Association relies heavily on the concept most often attributed to Arbitrator Shime, and quoted by him as follows:

> 17. I am also in agreement with the faculty that 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: see, e.g. *General Truck Drivers etc. v. B.C. Railway Co.* (1973) (Shime) *Re University of Manitoba*, May 16, 1979 (Williams). Thus, 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.
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> 18. The universities are funded by the provincial government. In recent years the funding has not been as generous as it might be, which no doubt has eroded the salaries of university professors. If arbitrator selectors were to consider the funding level of universities for the purpose of salary determination, they would in effect become handmaidens of the government. Arbitrator/selectors have always maintained an independence from government policies in public sector wage determinations and have never adopted positions which would in effect make them agents of the government for the purpose of imposing government policy. Their role is to determine the appropriate salary range for public sector employees regardless of government policy, whether it be funding levels or wage controls.
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> *Re McMaster University and McMaster University Faculty Association* [1990] 13 L.A.C. (4e) 1999, [1990] O.L.A.A. No. 84

It is not uncommon to see this concept expressed in combination with an assertion of arbitral independence from government. This is partly because, if interest arbitration is to be used as, and to retain credibility as, a fair and reasonable alternative to strikes and lockouts, then it cannot be, or be seen as being, an indirect way of imposing Government's fiscal ambitions on unwilling employees. This is increasingly so as government's become more and more sophisticated in influencing the options open to, and the choices made by, nominally autonomous but fiscally dependent institutions like Universities that lack their own taxing powers or other methods for controlling their revenues. The reality and the perception is that government itself is, to a considerable extent, if not the employer, then at least the proverbial "ghost at the table."

Some criticize the "public sector employees should not be required to subsidize the community" principle as outdated or too reliant on comparability to the exclusion of other relevant factors.

However, the original statement said "… by accepting <u>substandard</u> wages and working conditions." Arbitrator Shime's original quotation also continued:

> This position should not be considered as suggesting that the source of funds from the community is inexhaustible or that there are not political realities to be considered prior to the taxing power being exercised.

It has long been recognized that comparability is an aid to replication. We accept the approach of Arbitrators Ready and Freedman, quoted in the following extract:

> However, we believe that it is equally correct to say that the economic climate within which the Employer must operate and the economic impact of an award cannot be ignored. In the 1995 decision of Martin H. Freedman, Q.C., with respect to the *Regina Police*, the learned arbitrator at page 37 made the following comments, with which we must agree:
>
>> In his 1994 Regina Award, Arbitrator Ready acknowledged that the "ability to pay" argument (or more appropriately, the "inability to pay" argument) was difficult to use as a criterion in interest arbitration in the public sector. It is our view (and it appears that Arbitrator Ready shared these sentiments) that <u>an interest arbitrator when attempting to replicate what the result of collective bargaining would have been must take into account the economic environment, because the parties themselves must do that</u>. Certainly the general economic environment affects wages and labour settlements within the same local economy, whether that is the City of Regina or the Province of Saskatchewan or elsewhere. <u>The economic environment is relevant, and a factor, and the parties do take those considerations into account</u>. We think that it is important to take into account Regina's economic reality, and also the broader situation of Saskatchewan, in coming to our conclusions. (*emphasis added*)
>
> …
>
> In our opinion, it would be erroneous for an interest arbitration board not to take into account the general economic climate and the economic impact of a potential award when the board deliberates.
>
> *Re Regina (City) and Regina Professional Firefighters Assn., I.A.F.F. Loc. 181*, unreported decision issued 23 December 1997 (Priel)

Justice Winkler, chairing an arbitration at the University of Toronto in 2006, adopted the reasons of the Shime *MacMaster* award. However, he also continued, at paragraphs 16-18:

> [16] However, the determination of the appropriate compensation does require the arbitrator to have regard to some market and economic factors.
>
> [17] There is a single coherent approach suggested by these authorities which may be stated as follows. The replication principle requires the panel to fashion an adjudicative replication of the bargain that the parties would have struck had free collective bargaining continued. The positions of the parties are relevant to frame the issues and to provide the bargaining matrix. However, it must be remembered that it is the parties' refusal to yield from their respective positions that necessitated third party intervention. Accordingly, the panel must resort to objective criteria, in preference to the subjective self-imposed limitations of the parties, in formulating an award. In other words, to adjudicatively replicate a likely "bargained" result, the panel must have regard to the market forces and economic realities that would have ultimately driven the parties to a bargain.

> [18] This reasoning brings us full circle to revisit the common ground between the parties regarding the commitment to the pursuit of excellence. As both parties are surely aware, more than mere lip service to the ideal is required for the due administration and execution of a commitment to excellence.
>
> *University of Toronto v. University of Toronto Faculty Assn. (Salary and Benefits Grievance)*, [2006] O.L.A.A. No. 782 (Winkler)

Arbitration traditionally lacks the timeliness of free collective bargaining. Reliance on comparable settlements rather than crystal ball predictions inevitably creates something of a delay, but this is true whether the economy is in an upswing or a downturn. Any such delay should not be mistaken for inattention to market realities.

The University refers us to the following comments of Arbitrator Kuttner on the concept of ability to pay:

> (i) Ability to Pay
>
> Traditionally, the argument against accepting ability to pay as a guiding criterion in determining public sector wages has been premised on the theory articulated by Arbitrator Shime that "public sector employees should not be required to subsidize the community by accepting sub-standard wages and working conditions". But one must be cautious not to conclude from that principle that there is not a ceiling to the economic burden which the citizenry can be expected to bear under a "deep pocket" theory of the public employer's ability to pay. True, we may not be able to point to a balance sheet as proof of such inability, but one need only take note of the not uncommon phenomenon of the citizens' tax revolt to recognize that for the public employer, as for the private, there is a bottom line. The more modern commentators and the contemporary arbitral jurisprudence are both more finely attuned to the overarching significance of broader economic realities to particular bargaining relationships in the public sector. In this regard, one cannot ignore that the early ability to pay doctrine was rooted in Keynesian economic theory and its tolerance for deficit financing which, although once orthodox has now become heresy -- so much so, that governments of whatever stripe across Canada have abjured it as they strive for the balanced budget.
>
> *Halifax Regional Municipality and Halifax Regional Professional Firefighters Association, I.A.F.F. Local 268 (supra)*

Arbitration boards are not unaware of changing public attitudes to taxation, public service, balanced budgets, and so on. However, an antipathy to deficit financing does not, of necessity, equate to a wholesale public acceptance of pure Monetarist theories either. We will leave that debate to the late Messrs. Keynes and Friedman. What we do accept is that such government policies and public attitudes influence the Canadian labour market. Using replication as the model, such factors have to be taken into account, and routinely are taken into account, precisely because the parties themselves take them into account in free collective bargaining. This happens particularly as arbitrators look not only at absolute dollar wage levels, but also at developing trends in year-over-year increases, regional differences, comparable conditions of employment, job security and so on.

Thus, while arbitrators are in no way the handmaidens of government policy, they nonetheless must take account of what is happening elsewhere, not because governments say they must, but because other parties, in arriving at settlements, respond to such influences.

The concept of ability to pay in interest arbitration plays another important function. Unless an employer pleads an inability to pay, arbitrators have excluded submissions that question management's choices about how to raise or spend the employer's revenue. This recognizes that it is management that manages the institution, not the Union or interest arbitrators.

Where an employer does claim an inability to pay, then evidence about choices made, and the employer's various available options, do come into play. This too reflects the realities of free collective bargaining. The more an employer's finances are truly acute, whether due to a funding government's willingness to fund or tax, or otherwise, the more employees are likely to be impacted by the results of unmanageable wage settlements through things like program closures, layoffs of support staff, deteriorating infrastructure and so on. Unions that accept the employer's accounting as transparent, and its choices as valid, do make compromises, particularly where they share a common vision of their future. Further, in those cases where the parties experience a work stoppage, or "get down to the wire", options that may have been dismissed earlier often give way to compromise and to the adjusted priorities such compromises entail.

A National Comprehensive University

It is common ground between the University and its faculty that, as an institution, it is and will remain a national comprehensive University. The memorandum of understanding reached during mediation expressed this as follows:

> The parties agree that, for the purposes of collective bargaining, it is important to establish a comparison group of Canadian Universities selected as being similar in size and scope to the University of New Brunswick. It is also important to revise that list periodically in order to ensure the group remains comparable over time.
>
> The parties agree that the University of New Brunswick is and will strive to maintain its status and reputation as a national, comprehensive, institution. Comparable Universities to the University of New Brunswick:
>
> - Will offer a similar scope of programs over a wide range of undergraduate and graduate faculties including Professional Faculties,
> - Will be institutions of relatively similar size,
> - Will have a similar research profile,
> - Will be one for which reliable objective data is available, and
> - As a group will be geographically representative of such Universities in Canada.

This distinguishes UNB at one end, from the very large research intensive Universities such as UBC, McGill or the University of Toronto. However, it also recognizes that UNB is much more than an undergraduate regional institution of limited focus. It has a strong research component, offers a wide range of academic programs and houses faculties for all the major professions. The 2006 MacDonald Betts report (about which more is said later) describes and reinforces this vision of UNB, albeit with an important description of the challenges ahead. In its section "Turning Vision to Action" it says:

> UNB is a national comprehensive university. It is the provincial center for graduate studies and research, and for the professional programs which require accreditation. It sets and upholds standards that will attract students and faculty from around the world.
>
> The university could continue on the path of trying to maintain the status quo. That decision, by default would set the future direction of the university.
>
> Given the demographic challenges, UNB must be able to attract more students and faculty from other national and international destinations. UNB must provide something better than they can get elsewhere – programs and an environment that will set the institution apart from other universities nationally and even internationally.
>
> This means that UNB must ensure its national competitiveness. From the findings of this review, it is obvious that trying to do more with less is not sustainable. Only by doing less, better, can UNB ensure its place as a national comprehensive university. In order to do that, however, the university must make key, focused decisions within a strategic framework. Given demographic and fiscal conditions, it is imperative that those key decisions be made now.

It is this common intention that AUNBT seeks to actualize through relatively equal wage rates. It points to Justice Winkler's comments about common vision and its relationship to replication in the 2006 award at the University of Toronto:

> [8] It is obvious that in the context of this dispute, the two principles are inextricably interrelated. Any attempt to replicate an agreement that might have been reached between the parties has to take into account the fact that the parties would be bargaining on common ground with respect to their mutual, commendable devotion to the excellence and reputation of the University.
>
> *University of Toronto and University of Toronto Faculty Association* (*supra*)

We accept that any University's reputation is built on the quality of its faculty. While there are other factors that make a University a good place to study or a desirable place to teach and research, the "professional mix" is paramount and the influence of quality academics, in the broadest sense of the term, is both all pervasive and indispensible.

Faculty are not immobile. Tenured faculty at times seek and secure what they see as more advantageous positions elsewhere, particularly if they seek new research opportunities or aspire to decanal duties. However, initial recruitment of top scholars remains a significant factor in maintaining and refreshing a top quality faculty complement. There is no doubt that compensation, both immediate and career long, is an important, although not the only, consideration a top flight graduate will consider in choosing between Universities.

Competition for faculty is not only to seek out and retain the best and the brightest. It is also to attract the particular people, with the skills and interests the University needs, for its particular programs. It is to build Faculties where “the whole is greater than the sum of the parts”. It follows that the availability of some applicants or even sufficient applicants in a general sense is not the whole answer to the need to maintain competitive academic salaries.

These factors lead us to take very seriously AUNBT’s strong feelings about the importance of maintaining salaries within the competitive range represented by comparable institutions. However, this falls short of establishing a need for a lock-step formula wage parity system. Other factors also influence such decisions, although less easily quantified or lined up for comparison, despite the annual best efforts of MacLean’s magazine. They include geographic factors such as region, size of city, and climate. They include economic factors such as cost of living, housing stock, and prices. They include quality of working life factors like staff-student ratio, class sizes and the availability of library, laboratory or research facilities. They include a variety of intangible factors including the quality and sense of pride and community of the existing academic community.

The Comparator Group

The reference to a comparator group of Canadian comprehensive Universities arose from a Conciliation Board report in 1980 chaired by G. Christopher Collier. A strike was imminent prior to that Board’s appointment. The Employer, at that time, as now, urged the Conciliation Board to recommend salaries based on other Maritime Universities, while the AUNBT argued that comparisons were more appropriately made to similar sized comprehensive Universities in Canada. The Board accepted the AUNBT approach and used this group as a guide.

In 1995, the parties went further and agreed to a formula that linked UNB salaries to the average of this group. That formula was described by the 2008 Joint Committee on Economic Adjustments:

> The stated objective in the 2001-2005 Agreement was “to have the UNB average salary falling into a band of 2% about the group average salary.” The Agreement provided for annual adjustments calculated as the three-year average CPI, plus or minus any adjustment needed to bring the average UNB salary within a band from -2% to +2% of the projected group average salary, plus specified lump sum adjustments. In each of the four years covered by that agreement, the

> calculated competitive adjustment was CPI plus an adjustment to bring the UNB average salary to 98% of the group average, plus the specified lump sum adjustments. Because these were applied in January and July with respect to an average of the year before, salaries never actually reached the band.

As a result of bargaining, in 2005, the formula was removed, and the existing Article 36B.07 (set out above) negotiated in its place. The parties differ on whether these 2005 changes were to eliminate the link to the comparable Universities, or to set fixed wages designed to preserve the underlying comparability. The AUNBT says the parties adopted the change in 2005 precisely because the formula, based on insufficiently current data, would fail to bring UNB within the formula's plus or minus 2% range. AUNBT's view is that the fixed amount increases were to achieve that goal not to remove it. The University views the changes in 2005 as a deliberate and radical departure from the formulaic approach used over the previous decade.

We do know that the last collective agreement provided for a joint committee "to review the ongoing status of UNB salaries with the comparison group referred to in 36B.07." This group (3 members from the AUNBT and 3 from the University) met and submitted a report on August 8, 2008.

That report was able only to issue certain statistical data, and then only up to 2005-2006. Using Statistics Canada data, it concluded that, for 2005-06, the then agreed upon comparator group weighted average salary was $95,831 compared to UNB's $91,162 leaving UNB 5.12% below that average figure. That same data, subdivided by rank, showed the Professor's group 9.1% behind, the Associate Professors 15.0% behind and the Assistant Professors group 7.3% behind. These rank based figures differ from the all ranks figures due to the use of weighted averages, the different distribution between ranks, and the inclusion of ranks below Assistant Professor. The individual average salary listings in this report also show a fairly wide spread between them with Regina at $77,619 at the low end and Queen's at the top at $105,197. Much the same spread prevails today.

In this round of bargaining the University initially proposed a significant change to this language which eliminated all the wording in Article 36B.07, including any reference to the comparator group. The AUNBT objected strongly to this, which led the University to propose the following, continuing, but rendering less significant, the reference to the comparator group. Further, it adds, as a factor for consideration, "the economic circumstances of the University" which the Association views as an express reference to "ability to pay" as a criteria. The proposal reads:

> The two Parties have negotiated collective agreements since 1982 that have contained salary and salary scale adjustments related to the Consumer Price Index (CPI). The Parties have also been

> tracking the results of these adjustments by comparing the average salaries at UNB (as reported to Statistics Canada) to a comparable group of 13 Canadian Universities.
>
> The Parties agree that it is desirable to maintain a competitive position on the national market in order to attract and retain quality faculty in the academic staffing of the University programs. A comparison group of Canadian universities to assist in determining competitive salaries includes: Memorial, Dalhousie, Carleton, McMaster, Ottawa, Queen's, Windsor, York, Manitoba, Saskatchewan, Regina, Calgary and Victoria.
>
> In order to enhance planning in terms of academic programs, the Parties agree that it is desirable to maintain a salary model which provides a predictable salary bill over the lifetime of the collective agreement. To achieve this the Parties have agreed to fixed percentage increases for economic adjustment recognizing that these increases are meant to in part account for cost of living effects, the desirability to be competitive with the comparison group and similar sized Universities with similar size and scope of programs while recognizing the economic circumstances of the University.

The parties differed strongly on whether reference to a comparator group should be the prime criteria, or only one of several. Beyond this, they also disagreed on whether the group, first formulated in 1980, in any event remained appropriate. The comparable universities selected in 1980 were said to be "similar in size and scope of programs to UNB." Over 30 years, some Universities had grown larger. The weighted average approach yielded results unduly centered on the Ontario experience. This Board, in its mediation phase, was able to assist the parties in revising the group. They adopted a Memorandum of Understanding, (Appendix A), that adopts a new list and defines a common view of what a "comparable national comprehensive University" entails. The redefined list of comparable Universities adds Concordia (although with a caveat about its statistics), Guelph, Waterloo and Simon Fraser and deletes Ottawa, Calgary and York.

Historical Link to Comparator Group

AUNBT's data shows that UNB salaries tracked the comparator group average until the early 1990's. AUNBT agreed to departures from the averaging formula once in the early 1990's and once again in the late 1990's, as they put it "in the interests of the University and with the strong resolve that they would be corrected in subsequent collective agreements."

The formula, used between 1996 and 2005, calculated the average UNB salary as of September 1, each year and compared this to projected group average salaries based on a weighted average approach. The Average Consumer Price Index (a 3 year rolling average for the year ending in November) was then calculated. The annual economic increases was then based on this CPI figure plus any amount necessary to bring UNB up to 98% of the group figure or minus any amount necessary to bring it down to 102% of the group. The adjustment thus calculated would then be implemented 50% on the next January 1st and 50% on July 1st.

The University maintains that, despite reference to the comparator group over this 30 year history, in fact UNB salaries have not reflected any direct link for much of that time. AUNBT concedes that it agreed to the two lower settlements based on special economic circumstances. Data shows a fluctuating relationship between Average UNB Salaries and the weighted average of the former comparator group ranging from 9% below in 1980-81 to almost equality between 1984 and 1989 and then again 1997. The average appears never to have been actually met, but over 26 years the relationship appears to have run about 4% short of the weighted average, or 2% short of the 1996-2005 formula's lower range. The formula, when used, brought UNB up to the 98% figure. It never served to bring it down to the 102% figure.

Use of Comparables Now

The AUNBT argues that the link, by formula, to the comparator group "resulted in stable relations for decades." It asserts that the parties rarely ever discussed any other comparator group. The parties have historically relied on this one group not only for salary levels but for workload.

The University argues that, despite the historical reference to this group, and for a while to a formula, the wage rates have not, in fact, met the weighted salary average formula in the way the AUNBT asserts. It therefore disputes this 30 year history of a link.

The AUNBT's position is that the new agreed upon group of 14 sets the appropriate benchmark for UNB salaries. It views the weighted average as the appropriate, or at least the best available, mechanism for making the comparison. It adjusted its proposals with a view to bringing faculty up to parity with that weighted average if not during this agreement, soon after.

In contrast, the University views the agreed upon group of comparable national comprehensive Universities as just one comparable group and believes that others should also be considered. It views comparability as only one of several factors to be considered in arriving at an economic adjustment. The University raises several objections to the use of any formula to link the salaries paid at the comparable universities to those to be paid at UNB. It invites us to look at the salaries paid at the comparable universities in a number of different ways. These arguments tended to weave into each other. The net result is something of a statistical blizzard, all of which we have weighed, although we find some statistics more useful than others.

At this point, we need to emphasize points made to the parties during our processes.

We fully understand that AUNBT believes that the best method of setting wage rates for staff at UNB is to adopt a formula that tracks the average salary paid elsewhere. We equally understand that the University is opposed to any formulaic approach, wishing to retain to itself the freedom to seek, through collective bargaining, a compensation package it believes is appropriate to its own circumstances and dependent on factors over which can exercise some control.

The parties bring their differing views on the “formula issue” into their submissions on what it is appropriate for this Board to consider. The AUNBT’s view is that the use of comparability as a criteria for interest arbitration should lead us to identify the appropriate comparable group. Since this has been agreed to historically, and now in a revised form for the future, we should be persuaded to fix UNB wages so they reach the weighted average of that comparable group.

The University believes other factors need to be considered. These include other comparable groups, other factors that influence collective bargaining settlements like CPI, recruitment and retention, the state of the economy generally, and its own economic circumstances. We need to separate these issues somewhat.

The University opposed the use of any weighted average or other formula, citing several reasons for its position. Some of its objections go to how to use available data, or just what any formula should be. Some go to whether there should be any formulaic link at all. First, it argues the weighted average gives a bias in favour of larger schools. This objection is significantly diminished with the adoption of a revised comparator group excluding the larger Universities and with an expressed intention to keep included institutions to those of a similar size.

Second, the University argues that its size, nature, location and funding circumstances as well as the local cost of living factors are different from other Universities. Third, the formula fails to recognize changes like faculty demographics, and rank structures.

Fourth, it argues that the formulaic approach neuters the few opportunities it has to manage its salary mass. For example, if it engaged in an early retirement program to renew its faculty and reduce its operating costs, a strategy Universities including UNB have used in the past, it would trigger a general wage increase. The reduction in the average cost, due to a more junior faculty mix, would simply result in a higher economic adjustment, eating up any savings.

Fifth, the formula assumes historical growth rates that may be unrealistic because they fail to account for things likely to put a downward pressure on University salaries and supply and demand for faculty. Statistics also fail to account for special initiatives like unpaid furloughs (as used recently, for example, in Alberta) which nominally maintain wage rates.

To illustrate the effect of weighted average approach the University compared the 2006-2007 UNB figures to the former comparable group, the MacLean's Group of Comprehensive Universities and a group of Maritime Universities. For the comprehensive group, with the weighted average UNB was 3.9% behind, whereas with a simple average it was only 2.8% behind. Using the MacLean's Group the figures were 2% and 0.32% behind. When compared to Maritime Universities the UNB was ahead by 6.7% on the weighted average and 9.2% ahead with a simple average.

Very few faculty collective agreements use formula's that base their economic increases on a defined comparator group. It is clearly not a common mechanism in Canada, its use currently limited to Lakehead, Trent and Windsor.

Almost all parties to bargaining look to similarly situation institutions and employee groups. However, few tie their collective bargaining futures to specific links. We are not persuaded to, nor are we specifically asked to, return to a 1995-2005 mathematical formula approach. While we think it useful for these parties to continue to identify and track those similarly situated faculty groups in other comprehensive national universities, we do not recommend any formulaic link beyond that.

The parties were able to agree upon a memorandum of understanding to identify, describe, and as needed update, the notion of a comparable national comprehensive university. To link that Memorandum of Agreement to the collective agreement clause, we had decided to award the following revised language for Article 36B.07:

> 36B.07
>
> Economic Adjustment (EA):
>
> The parties have negotiated collective agreements since 1982 that have contained salary and salary scale adjustments related to the Consumer Price Index (CPI). The parties have also been tracking the results of these adjustments by comparing the average salaries at UNB (as reported to Statistics Canada) to a comparable group of Canadian Universities.
>
> The parties agree that it is desirable to maintain a competitive position on the national market in order to attract and retain quality faculty in the academic staffing of the University programs. The Canadian comprehensive national universities agreed to be comparable, and the means of keeping that group current are contained in the Comparable Group of Canadian Universities Memorandum of Understanding.

There is logic to the choice of the new group of 14 universities. They better reflect those institutions most likely to compete with UNB for academic staff, and they are similar institutions. We therefore give greater weight to comparisons to that group over the former group (although there is overlap), the MacLean's Group, or to the all Universities group.

The next question is how does one look at that group and what they pay. The parties have clearly, in the past, used the weighted average as the most useful benchmark. However, we believe it is important to look at the entireties of the compensation packages offered by these institutions. If the purpose is to keep UNB competitive with this group, then issues like floor and ceiling amounts, PTR provisions, caps and so on are all also significant. Other aspects of compensation are also significant, whether they be temporary concessions like furlough days that reduce costs and income, or enhanced benefits that increase the value of the overall package.

Just what conclusion the parties each draw from a look at wage levels at the agreed upon comparable universities will always be a matter of some debate. Neither the simple average nor the weighted average has any intrinsic preeminence; both are just mathematical applications of the same basic data. Perhaps more significant is the range of salary levels represented within the group. The parties have in the past chosen to aim for the "middle of the pack", but that will be a choice decided over time by the parties through their priorities, circumstances and bargaining choices.

Wages paid to faculty within the universities in this comparator group will themselves change over time. Looking at actual remuneration, and gauging ones competitive position based on that, should not be confused with a separate issue, which is to look at the way salaries (and salary structures) change over time; usually expressed in annual economic increases.

In order to assess trends in year-over-year economic increases it is useful to look at a broader group of comparators. The all University group provides an indication of where settlements are trending generally across the country. A look at the Universities, large and small, within the Atlantic Region give valuable indications as to how the region may be similar to or different from other regions in the country. Each of these groups are "comparable" in that they operate and bargain in a similar post-secondary funding and tuition fee environment.

Economic Climate

In the fall of 2008 Canada along with much of the world's economy suffered a major crisis. The parties' submissions were subfused with different attitudes to these events and their significance for the University of New Brunswick. The University characterized this as the worst depression since the stock market crash of 1929. The AUNBT cites the view of the Chief Economic Analyst from Statistics Canada that:

> … the 2008-09 recession in Canada was not long or severe in comparison with recent recessions (not to mention the Great Depression) and that this recession was mild in Canada relative to other countries.

There were two significant and undeniable effects of the downturn. Government revenues declined, although at different times and to different degrees in the various regions of Canada. At the same time there was an increase or at least a refocusing of spending aimed at economic stimulus. These effects led governments, again at varying times and to many degrees, to institute austerity measures.

The University urges us to look at settlements, whether at comparable institutions or not, from the perspective of when they were negotiated. Settlements negotiated before late 2008 or shortly after, but before its profundity sank in are, it suggests, quite different. They are different because those events altered people's perceptions of the economy and they are different because the recession triggered the different provinces to react with a variety of restraint initiatives varying in time and nature but all having a restraining impact on settlements.

The University provided considerable detail on steps, some legislative, others persuasive, taken by various Provinces including New Brunswick to restrain public sector wage increases generally or University settlements specifically.

In British Columbia in 2010 the government provided no additional money for compensation increases for agreements expiring in 2010. It directed two-year agreements with no net increases in compensation. Simon Fraser University extended its agreement for two years with no economic increases. In Alberta, the Athabasca University faculty agreement was extended for two years without an economic increase. The University of Calgary agreement was extended for one year with a 0% increase. The preexisting University of Alberta agreement, which provided for a 4.75% increase for 2010-2011, was modified to allow 6 furlough days, yielding savings of between 2.33% and 3.06%.

Ontario announced, in March 2010, that it was planning a two year wage freeze for public sector employees. Different Universities sought to respond to this in different ways, some quite drastic in terms of cutbacks and program reduction. Just how this will impact on collective bargaining and arbitrated settlements remains to be seen. The AUNBT maintains that it is as yet unclear just how much settlements will respond to those government initiatives. It points to active opposition by the Universities, CAUT and OCUFA to the Ontario approach. One arbitrator has rejected the unilateral imposition of furlough days and an arbitration at University of Toronto exceeded the levels the government had urged upon the sector.

In New Brunswick the government announced in early 2009:

> a wage restraint policy [to] freeze wages for two years and [will] apply to … employees in … the public service … The government anticipates [municipalities and universities] will take appropriate steps to manage their wage bills in a manner similar to the province.

The University takes this announcement very seriously and it is one justification for its 0% settlement proposal for the first two years. The AUNBT suggests this edict is generally not being followed in free collective bargaining in the municipal arena. The bigger question for the University is whether the cost of violating these "voluntary" guidelines will result in further cutbacks in, or at least a refusal of any increases in, the provincial funding upon which it is dependent.

The Province of New Brunswick, like the University, faces the challenge of maintaining the revenue necessary to provide services in the context of a declining population. It has pledged to restrain expenditures to 0.6% - 0.7% per year. Its projected budgets over the four years of this agreement's operation are $754 million for year 1, $749 million for year 2, $681 million for year 3 and $553 million for year 4. These deficit levels do not bode well for significant increases in provincial funding to post secondary education.

The Challenges Facing the University

Universities are an evolving form of public sector institution. Unlike large U.S. institutions generously endowed by corporate benefactors a century ago, Canadian Universities have hitherto depended very heavily on public sector funding. Over the last two decades, particularly, there have been shifts in the kind and level of government funding. Firstly, governments across Canada have pushed Universities to rely far more heavily on private sector support and on increasing student fees. Private sector support is limited and often more easily obtained for bricks and mortar expenditures than for operating costs. There is a limit to how much student fees can generate. This is because students increasingly price shop. Too high an increase can reduce enrollment (and thus government grants) counterproductively. Governments have also begun to place limits on the amount of such increases, sometimes without adjusting direct subsidiaries to make up for any shortfall in revenues created by fee caps. All this is made even more complex when government subsidiaries are increasingly tied to targeted projects or performance envelopes.

The University devoted a significant portion of its initial brief to detailing what it views as an unsustainable operating model for both UNB and for Canadian Universities generally. It provided the Board with two significant reports that address this issue in some depth. The first, by Alexander L. Darling, was prepared specifically for this process and is entitled "The Operating Model of Canadian Universities – A Model Under Stress." Its basic thesis is:

> … that, in the present climate, the standard operating model makes it extremely difficult for universities to respond to demands for higher faculty salaries.

The second is the 2006 MacDonald-Betts report "Report of the Financial Review for the University of New Brunswick." While the Darling Report is more current, it is also more argumentative and less contemplative than the earlier MacDonald Betts Report. Both however detail clearly major issues facing Canadian Universities. They also both identify areas where these issues are more acute at the University of New Brunswick, something particularly relevant when looking at otherwise comparable institutions.

The University provided the board with its detailed budget materials, current, historical and *pro forma*. The Board heard evidence from very senior University officials about the budget and the accounting principles and assumptions built into these documents. The AUNBT had a full opportunity to question them on the submissions made and testimony given, all of which we found helpful in understanding the difficulties being faced and the limited options available.

The MacDonald Betts Report is written in "key message" format, and it is at least some of these messages the University urges us to weigh. They indicate the existence and the causes of UNB's major financial limitations. The report identifies its mandate as follows:

> The Financial Review Committee was struck at the request of UNB President John McLaughlin to conduct a high level review of the basic operational model at UNB and the financial framework that supports it. As a national comprehensive university with significant internal and external challenges that are affecting its sustainability, the review will help identify and assess options for the university going forward. By identifying a number of pertinent themes and issues, it will also help position the university in relation to the upcoming provincial review on post-secondary education in New Brunswick.

Decline in Government Funding

The most significant point, for virtually all Universities, is:

> The dramatic decline in provincial funding over the past two decades has shifted the relative burden of revenue to students. With tuition reaching maximum competitive levels, the ability to continue this shift is not feasible.

At the time of the 1980 Conciliation Board report, UNB received 80% of its funding from the Province and 12% from tuition fees. Thirty years later the breakdown is about 53% grants and 40% tuition fees.

UNB's evidence is that its Provincial grants over the last 20 years have fallen further than for other Canadian Universities, the all Canada percentage falling from 57.9% down to 42.1% of revenue (from 1991-2005) while UNB's fall from 57.1% to 36.9% over the same period. Provincial operating grants per student show (for three year averages from 2005-2008) New Brunswick in 7th place at $8,299 per student and UNB specifically at $8,590 per student. Nova Scotia is lowest at $6,877 and Newfoundland highest at $13,531.

Population Changes

The next point, of particular significance to UNB, is that, despite a period of increasing enrollments in the mid-90's which eased budget pressures, it now faces the prospect, along with other Maritime Universities, of slowing enrollment due to population and demographic changes. This will affect both of its main revenue sources; government grants and tuition fees. The UNB's full-time equivalent figures for student enrollment rose to about 11,100 between 2004 and 2006. From there, its enrollment has declined each year down to 9,200 in 2009-2010. This represents a $13 million per year revenue loss to the University. Projections, based on projected grade 12 enrollment figures, show steady decreases over the next eight years of about 2% per year. UNB must either compensate for this decline in its student source by attracting students from elsewhere (which makes competitive fee levels even more important) or adjust its ongoing budget to deal with lower student numbers and thus lower overall budgets.

Infrastructure Deficit

The University, along with other quasi-governmental organizations face an infrastructure deficit. Reducing facilities maintenance has been one of the easiest short term responses to government funding cutbacks (and by governments themselves in response to the twin sirens of "balanced budgets" and "tax reduction"). But deferring maintenance, even in the medium term, increases the cost of emergency maintenance and adds a long term liability. Unmaintained properties eventually deteriorate and then need major investment through restoration or replacement.

The government has reduced its annual base funding for infrastructure renewal by over half from the current fiscal year, bringing expenditures to a level of only half that recommended and about $3 million per year below what is considered minimal.

Pension Shortfalls

The UNB pension plan as of July 1, 2009 shows a funding rate between 73.6% and 67.1% (actual value vs. market value). We are reluctant to draw too much from this given the market fluctuation experienced since that time, as shown by the market value changes in the University's endowment funds. Pension shortfalls clearly have the potential to put pressure on the University budget. If employee contributions also have to be increased significantly to address pension shortfalls, that reduces the employee's net income and, indirectly at least, may fuel increased wage demands.

MPHEC Policies

The University's funding is tied to the Maritime Provinces Higher Education Commission. It has an operating deficit policy. Its policies include a "poison pill" provision:

> When an institution has accumulated a deficit subsequent to 1974-75 in excess of 2.0% of annual operating grants, the following policy applies:
>
> - Any such accumulated operating deficits must be reduced by a minimum of 2.0% of the next year's operating grant, up to the amount of the accumulated deficit. Institutions have the option of using operating funds or presenting a proposal for the use or Restricted Operating Assistance allotments for this purpose.
> - Should an institution not reduce its accumulated operating deficit by such an amount in any given year, the Commission will subsequently suspend consideration of that institution's request for new programs and new capital projects.

The Commission advised the University in late February 2010 that:

> a certain level of flexibility will be exercised in the application of this policy in 2010-11 given the current economic situation. Further details on this issue will be forthcoming over the new few months.

This policy is one of the key reasons the University is particularly vulnerable to the impact of the AUNBT's wage demands over the first two years of the agreement. This policy is also a classic illustration of the indirect controls exercised by government funding agencies over Universities as autonomous bodies.

Contingencies and PTR Increases

In its initial position, the University treated the PTR (progression through the ranks) increases in a way that suggested they were much like the annual economic adjustment. The AUNBT took issue with this on principle and the debate on the point raised a further issue.

The Association was of the view that the University's budgeted wage cost is, and has for some time, been too high in that it added in the cost of PTR increments without accounting sufficiently or appropriately for what it viewed as the equal and offsetting saving from staff turnover.

During the course of our proceedings the root of this disagreement became apparent. It involved the manner in which the University provides for, and the necessity of, contingencies within its budgetary projections.

The academic salary model provides annual increments for academic staff. There is a year over year economic increase and increases as they progress through the academic ranks. Each year, certain members of the faculty will leave the institution, and new faculty will be hired. Those who leave tend to be at the higher ends of the scale, and those hired to replace them at the lower end. Of course, at the individual level, it depends on when and why the individual leaves, whether due to normal or early retirement, sickness or death or accepting positions elsewhere. Hiring too varies, depending on whether the new faculty member is a new or an established academic. The University budgets for the projected cost of PTR increases (i.e. other than across the board wage increases) for known existing staff. It only offsets the projected savings for a turnover of staff where it can predict with some certainty who will leave and when. Its ability to predict this has decreased somewhat with the abolition of mandatory retirement at age 65.

The Association took issue with the University asserting that its wage costs would increase each year not only by the amount of the general wage increase, but by the added costs involved in each individual's PTR increase. The amount PTR's (for about 490 faculty since 110 are at their maximum), is $2,534 yielding individual 2% increases annually.

The Association's position is that the cost of these PTR increases has predictably and historically been offset by the turnover of senior for junior staff.

The University's reply is that, while such savings from turnover may well materialize, they are too uncertain to include as reliable predictions within its budget. It recognizes that each year it does not expend its entire wage account for this reason. However, any such savings have been redirected to other unexpected contingent expenditures. Its view is that any such contingent savings in its wage costs are not "available funds" because they are needed to cover other individually unpredictable, but on a budget-wide sense predictable, costs elsewhere in its operations.

The information that emerged from the evidence on these issues persuaded us that there are indeed annual savings from staff turnover. These savings depend on many factors and are not easy to predict. They depend on decisions such as when to retire, whether to hire at above floor rates, or whether to leave vacancies open. Nonetheless, we recognize that the normal situation is that such savings go some significant way to offsetting the annual cost of PTR increases.

The University compares its PTR's to other Universities, but we note that, by paying PTR's in two installments rather than one, it achieves a 25% reduction in its annual dollar cost not achieved by others who provide the increase in a single amount.

PTR increases are also different from annual economic adjustments. The academic salary model, at least for tenured or tenure track academics in Canada, almost universally contemplates a fairly low salary at the outset of the person's career building over 30 years or so to a significantly higher level. Academics, usually requiring PhD's before they start, have usually spent many years without pay or with low pay, preparing for their academic careers. There is a deferred income aspect to the Canadian model. It provides opportunities at times to withhold or accelerate advancement, based on performance. However, an academic's "wage prospects" are inevitably assessed on a career long basis.

In this they are not unlike other occupations where rank or step systems reward length of service. It is not customary for arbitration boards to view these annual PTR increments as part of the economic adjustment. They are nonetheless recognized both as a significant part of career long remuneration and as a significant component of the University's cost structure.

Budget Flexibility

Beyond its argument about the irrelevance of “ability to pay”, AUNBT argues that the University has in any event funds available that are sufficient to cover what it views as a fair economic adjustment. It emphasizes that there are choices to be made about how any available funds are to be spent. It suggests it is not, by so doing, criticizing any particular expenditure, neither is it suggesting there are pools of uncommitted money lying around unused.

The Association’s first point is that the overall University budget includes contingencies amounting to almost 5% of the full-time salary bill for the members of the faculty bargaining unit. We do not disagree with this, and have already noted the validity of the Association’s point about the transparency of the contingency figures specifically embedded in the salary components of the budget. Beyond that, however, we do not find this particularly helpful. Contingencies, while uncertain as to their individual elements are nonetheless a fact of economic life. Certain expenditures arise or occur in unexpected ways and have to be paid for. It is prudent and accepted practice that budgetary provision be made for such events. Nothing before us suggests the University’s budgeting for contingencies is quantitively out of line with common practice or represents an unallocated source of funds.

In the Board’s view it is not inappropriate to provide for contingencies nor is it inappropriate to exclude from projected savings those matters that are as yet too uncertain to be relied upon. However, for the purposes of assessing the cost and impact of wage adjustments, a measure of transparency is required. This is so that funds budgeted in one place that will in all likelihood not be needed there (i.e. for wages) but will be needed elsewhere, are not treated as if they were a real cost of employing faculty.

After these factors were argued out before us, we accept the Association’s position that a significant portion of the cost of providing step increases will predictably be offset by the normal processes of mobility; primarily retirement and new hires. In making this finding we in no way discount the University’s need to provide for contingencies in its budget documents; it is just that these contingences; embedded within the salary components, are not appropriately considered direct salary costs. We agree that, if they are not embedded under that heading, no doubt they may need to be provided for elsewhere with no overall net savings in available funds.

Second, the Association points to the discretion the Board of Governors has over approximately $19 million in funds. This consists of $17 million in internally restricted funds and a $2 million undesignated surplus in the University’s self-administered fringe benefit plans.

Third, the Association maintains that University revenues over the 10 years up to 2007-2008 have risen by over 5% annually, and that similar growth can be expected in the future. Whether this proves to be true or not depends on the uncertain factors the University identified; enrollment rates in a Province with a declining population of University age citizens, government grants and the mechanisms by which they are calculated and so on. The University's budget estimates are much less optimistic and they provide demographic support for their concerns.

Fourth, the Association asks us to conclude from the 2008 decision to build the Currie Centre Athletic Facility that this is an organization with "fiscal flexibility". We agree with this proposition to a degree; however, we have already noted that both government and private fund raising is often easier for "bricks and mortar" projects like this one. In addition, projects for long term infrastructure like this are always subject to the criticism that the money might be better used elsewhere. We are not going to second guess this University decision, and note that the project took advantage of one time infrastructure funding and is already under construction.

Fifth, the Association argues that the University has the flexibility to use attrition to save any funds necessary to support general wage increases. It suggests the 6% turnover in the full-time academic staff allows the Employer the discretion to leave positions open, either temporarily or on a permanent basis, leaving those faculty who remain to teach the student population. Similarly, it points to the existing and potential future use of term employees for teaching duties, achieving further cost reductions to fund general increases. The 6% turnover however, does not occur in a way that always allows existing staff to fill the void. Academic staff are highly specialized and the programs the University offers, and the areas in which it has developed a reputation, are to a large degree dependent on maintaining this specialist capacity.

The University's flexibility to use attrition to control total wage costs has also been altered by its agreement to remove mandatory retirement. This will mean that some of those who might have been thought likely to retire may not do so, which will restrict attrition options somewhat, albeit only for a few years.

Clearly a higher staff student ratio is one mechanism the University can use to adapt its financial position over time. We do note however the appropriate caution in the MacDonald Betts Report that simply taxing each Faculty in an unplanned way to achieve savings is not a good substitute for a well developed strategic framework. As the report noted at p. 37:

> The academic plan must be based upon the university's strategic framework and the priorities set within the academic plan should drive the use of available financial resources. Without this, the university continues to face a system of ongoing across-the-board cuts.

> …
>
> The current budgeting process is a traditional one and is not driven by well-defined academic, research, financial and operational plans based on the overall strategic framework.

The AUNBT makes the point that the level of economic adjustment does not of necessity translate into a similar increase in the University's salary expenditure. It argues that the last collective agreement provided for a 16% salary increase over four years, yet the actual full-time salary bill increased by only 3.75% from $51.6 million to $53.6 million. This is past evidence to support what the AUNBT say the University can do now which is grant economic increases paid for in part by staffing reductions and attrition. We have accepted that some such flexibility exists, particularly given the low staff-student ratio at UNB. However, AUNBT cannot, at the same time assert that a 40 person decline in the number of full-time faculty, over the last 5 years, is an indication of a decline in spending on the academic mission, particularly in the face of a significant decline in student enrollments over the same period.

Internal Comparables

Beyond the AUNBT bargaining units, there are several employee groups within UNB. The Administrative, Professional and Technical group is not unionized. It has had an economic adjustment freeze effective July 1, 2009 and lasting until June 30, 2011 with inflation based adjustments contemplated for the two years after that. The full-time faculty outside the unit, involving Deans and similar officials, traditionally receive the same economic adjustment as the full-time faculty in the bargaining unit. The Graduate Teaching Assistants are newly organized and are in bargaining.

There are two groups of support staff; one in Fredericton represented by the UNB Employees Association and the other in St. John represented by CUPE. The Fredericton agreement was negotiated effective July 1, 2008 and has three annual increases of 2.5% expiring June 30, 2011. The St. John's agreement was also effective July 1, 2008 and provided for 2.5% in 2008, 0% in 2009, 0% in 2010 and 2.5% in 2011. It expires on June 30, 2012.

Salaries Paid at the Group of Comparable Universities

The most recent Statistics Canada data on the average salaries paid at the now agreed to Universities (except Concordia) is as follows, for 2008-2009:

Queen's University at Kingston	714	$121,528
University of Waterloo	975	$119,267
McMaster University	738	$116,699
University of Guelph	798	$113,494
Simon Fraser University	981	$106,423
Carleton University	809	$107,553
University of Windsor	526	$110,601
University of Saskatchewan	701	$107,290
Dalhousie University	728	$104,124
University of Manitoba	858	$103,551
University of Victoria	739	$101,509
Memorial University of Newfoundland	714	$ 96,828
University of Regina	438	$ 85,812
Group Weighted Average	9719	$108,132
Simple Average of 13		$107,283
UNB	579	$102,125

This places UNB 5.9% short of the weighted average. Similar all-rank figures for earlier years, using the weighted average calculations, show the following variances from the average:

2003-04	-4.3%
2004-05	-4.4%
2005-06	-5.1%
2006-07	-3.9%
2007-08	-5.1%

The group shows a fairly wide range, with Queens at 142% of the lowest figures paid at Regina. That of itself is not particularly significant to UNB. It simply illustrates that, within such an agreed upon group, there is a significant spread between the various institutions; they are not just all huddled around either the simple or the weighted average figures. The figures suggest that, to the extent the 2008-2009 year is typical, size of institution and wage levels appear to have some correlation. Region, as well, appears to be a source of difference.

Current year over year settlements at the agreed upon group

The latest settlements at the universities within the agreed upon group are listed below:

MEMORIAL UNIVERSITY

2009-10	8%
2010-11	4%
2011-12	4%
2012-13	4%

DALHOUSIE UNIVERSITY

2009/2010

Increase Mentor Charge	3%
Career Development Increment (subject to withholding)	2,109.00
Comparability Adjustments for Associates Professors and Professors	$500.00
Promotion salary adjustment to those promoted to Associate Professor on	$1,000

2010/2011

Increase Mentor Charge	3.4%
Career Development Increment (subject to withholding)	2,181.00
Comparability Adjustments for Associates Professors and Professors	$500.00
Promotion salary adjustment to those promoted to Associate Professor on	$1,500

CONCORDIA

2009-2010	$3.2%
2010-2011	$3.2%
2011-2012	$2.0%

CARLETON

2009-2010		$400.00
	plus	1.5%
	plus	0.74%

QUEEN'S UNIVERSITY

May 1, 2008 – April 30, 2011

The across-the-board increase in all salaries

3.2% effective May 1, 2008
3.2% effective May 1, 2009
3.2% effective May 1, 2010

McMASTER UNIVERSITY

2009-2010	$275 to 750 + 3%
2010-2011	$275 to 750 + 3.25%

GUELPH

2009-2010	4.75%
2010-1022	4.84%

WATERLOO

2009-2010	$425 + 3.0%

UNIVERSITY OF WINDSOR

2008-2011

2008-2009 – 3%
2009-2010 – 3%
2010-2011 – 3%

UNIVERSITY OF MANITOBA

April 1, 2007 – March 31, 2010

Effective April 1, 2009 first a market adjustment of $500 to base salaries followed by a 2.9% increase

REGINA

2009-2010	6%
2010-2011	6%

UNIVERSITY OF SASKATCHEWAN

2009-2010

July 1, 2009 increase of 5.25%

2010-2011	$300 + 4.5%
2011-2012	$300 +4.0%
2012-2013	$300 + 4.0%

SIMON FRASER UNIVERSITY

2009-2010	3.5%
2010-2011	0%
2011-2012	0%

VICTORIA

2009-2010	3.5%

Atlantic University Settlements

The national comprehensive universities provide the comparable group most similar to the UNB in terms of the type of institution in which faculty work and the level and scope of activities they perform. The parties own bargaining history over an extended period, and their own continuing agreement supports this comparable group as the market in which University of New Brunswick salaries compete.

However, in looking at the level of year over year settlements, other Universities, and particularly the smaller Maritime Universities that compete for the same students and rely on similar funding arrangements provide a useful indication of the type of year over year settlements being negotiated within the region. They also provide evidence of the salaries paid to academic staff elsewhere in the region. The 2006 figures for average salaries show a weighted average of

$89,503 and a simple average of $87,412 compared to UNB's then figure of $95,481. Three Atlantic Universities; UNB, Dalhousie and Memorial are included in the agreed upon comparable national comprehensive universities group. These are the three largest, the others having faculty complements less than half the size of UNB. The smallest, UNB's direct neighbor St Thomas, has a total of 106 faculty compared to UNB's 579.

We have considered these average salary levels and the annual increases negotiated at the various institutions. We accept that Memorial's year over year increases over this period are something of a unique case in that its settlement followed an extended period of enforced restraint followed by a promised catch up justified and paid for by significant provincial prosperity. The relatively recent Acadia University settlement provided for a $500.00 per year economic adjustment.

Salaries in New Brunswick

The AUNBT takes issue with The University's characterization of the New Brunswick economy as unduly under strain following the economic downturn. It suggests the University is playing on stereotypes rather than reflecting actual economic results. Reported public sector settlements it suggests have in fact risen somewhat following the recession to 3.85% for January-March 2010. In the same period, the average private sector settlement was reported at 4.77%. AUNBT suggests that, in fact, New Brunswick has fared better economically that that of most other provinces.

The parties provided the board with details of the public sector and private sector settlements in New Brunswick up to the Jan 1st and March 31st, 2010 period. They provide some support for the proposition the AUNBT advances that municipalities are not following the provincial government's call for restraint. However, the University of Moncton non-academic agreements reflect much the same results as the internal UNB comparables.

AUNBT provided several examples of the increases provided to other publicly funded groups in New Brunswick. Its figures from NB Power, NBCMC, and Deputy Minister because of changes in reporting protocols are too imprecise to be of much assistance. The negotiations between the Province and the various bargaining units of its own staff are as yet in an inconclusive state. Settlements involving crown lawyers, parole officers and stenographers negotiated in 2010 each included two year wage freezes.

Fee-for-service family physicians average payments are the second highest in the country, at $255,314, behind only Alberta at $296,068. Similar figures show the same relative standing. Physicians recently negotiated a four-year agreement with the Province at 3.75% per year. The University notes however, that thereafter, those parties agree to follow this with a two year freeze.

Nurses negotiated a three year agreement running from June 1, 2008 to December 31, 2010 with semi-annual increases of 2.5%, 1.5%, 2.0%, 1.5%, 2.0% and 2.0%. Teachers negotiated a 4 year agreement from March 2008 to February 2012 also with semi-annual increases of 2.0%, 2.0%, 2.0%, 1.5%, 2.0%, 2.0%, 2.0% and 1.0%. The University suggests these figures should be discounted because they were negotiated before the economic downturn.

Consumer Price Index

The University suggests that the cost of living increases, as reflected in CPI index changes are low. In looking at its own operating budget experience changes, the University shows CPI figures from 2.4% for 2007-2008, 1.9% for 2008-2009, 1.9% for 2009-2010. The Bank of Canada projects a 2% increase for 2010-2011. The University suggests that there is now sufficient CPI data to guide the first and second years of this agreement. Specifically, it argues that CPI change in the 12 month period from December 2008 – November 2009 was 0.29% Canada wide, but only 0.04% for New Brunswick. For the 8 months from December 2009 to July 2010 the figures were 1.3% Canada wide and 2.2% for New Brunswick. It argues that, as settlements in times of fiscal hardship, its proposed 0% and 1.0% figures reasonably maintain income levels against inflation.

The University's data on the CPI changes over the last 10 years, when compared to the economic adjustment under the UNB faculty agreement show a growth in salaries that exceeds the cumulative CPI growth (Canada wide, all item) by 20.69%, in the last four years exceeding CPI by about 1.5% per year, or 1.75% per year when compared to the CPI New Brunswick figures. AUNBT views the University's figures as overstated in terms of its members salary growth. It notes that New Brunswick personal income growth has been 48.5% over the same period, in its view somewhat more than faculty increases.

The relative CPI numbers between cities is significant in that the comparable Universities with lower average salaries correspond roughly speaking to the cities with lower CPI and vice-versa.

From a base of 100 for Canada, St. John (Memorial) is 97%, Halifax (Dalhousie) 99%, Ottawa (Carleton) 103%, Winnipeg (Manitoba) 94%, Regina (Regina) 95%, Vancouver (Simon Fraser) 101%.

The AUNBT asks us to ignore these intercity differences. They point to specific instances where costs are higher, but more fundamentally object that “no one gets hired on the lower cost of living pitch.” They characterize the UNB’s reliance on cost of living as trading on false regional stereotypes. We have noted the Statistics Canada caveat as to the use of this data.

The University points to lower house prices in New Brunswick which gives an expense advantage to those who locate at UNB. However, on AUNBT notes, this is a mixed blessing as the likelihood of faculty making a tax free capital gain on any residence they buy is also lower than elsewhere.

Recruitment and Retention

The annual attrition rate at UNB is quite low (an average of about 32 of the 600 or so faculty leaving each year). The University’s evidence is that it has not experienced any significant problem finding replacements. The elimination of mandatory retirement will, it predicts, reduce this attrition rate further, at least for a few years.

One factor arguably relevant to UNB’s ability to attract faculty is its relatively low staff student ratio in 2007-2008 at 16.2 compared to the former comparable group figure of 19.9.

The AUNBT points to this as a source of flexibility that can be used by the University to meet its wage demands. The University points us to the analysis on this area in the MacDonald Betts Report which notes that:

> UNB is operating with less overall resources than with other national comprehensive universities, and
>
> UNB has chosen to invest in academic programs and the choices are reflected in the university’s cost structure.

Referring to statistics for 2001-2003, the cost per student FTE in the comparable group was $24,100 compared to UNB’s $19,243. The same report noted the high ratio of full professors at UNB, currently at 43% compared to 35.7% at other Maritime Universities and 33.3 in the then group of 13.

Research Intensity

The University asserts that:

> Larger institutions generally attract larger amounts of research money which attracts higher caliber researchers which drives higher levels of compensation.

It provided data showing a rough correlation between sponsored research amounts and average salary. However, the value of this is significantly called into question because the top seven Universities have medical schools which seriously distort the funding figures. There is merit to the AUNBT's critique of this as well, when they argue that:

> High salaries are required to attract high caliber researchers, who then attract research funds: after all, it is faculty and not the University that compete for research funds.

Issues Settled Prior to Conciliation

We have considered, in reaching our recommendations, the progress the parties made in negotiations, and the cost of some of the significant items agreed upon. In particular, we have considered the estimated costs of abolishing mandatory retirement, although note the parties widely divergent views on just what this cost will be. The new step for the instructor ceiling and the step added to the senior instructor floor is predicted to cost $400,000 annually over the life of this agreement.

Award

In making this recommendation we have taken into account all the considerations listed above. We have provided for increases on a half yearly basis, as did the last collectively bargained settlement. We have also recommended no economic adjustment in the first year of the agreement. We are persuaded that to do so is appropriate given the internal University comparables, the University's budget situation and in particular the inability to make any offsetting adjustments for a year that is already passed. We also see force to the arguments about carrying forward an unfunded structural deficit and its potential ongoing impact on the current grant funding formula.

Having considered all these issues, the parties' submissions and related data, we award:

(a) Term. The agreement will provide for a 4 year term, effective from July 1st, 2009 to June 30th, 2013.

(b) Economic Increases. Effective:

July 1, 2009	0%
Jan 1, 2010	0%
July 1, 2010	1.75%
Jan 1, 2011	0.75%
July 1, 2011	1.75%
Jan 1, 2012	1.75%
July 1, 2012	1.75%
Jan 1, 2013	1.75%

(c) Language for Article 36B.07

Amend article 36B.07:

> 36B.07
>
> Economic Adjustment (EA):
>
> The parties have negotiated collective agreements since 1982 that have contained salary and salary scale adjustments related to the Consumer Price Index (CPI). The parties have also been tracking the results of these adjustments by comparing the average salaries at UNB (as reported to Statistics Canada) to a comparable group of Canadian Universities.
>
> The parties agree that it is desirable to maintain a competitive position on the national market in order to attract and retain quality faculty in the academic staffing of the University programs. The Canadian comprehensive national universities agreed to be comparable, and the means of keeping that group current are contained in the Comparable Group of Canadian Universities Memorandum of Understanding.

The Conciliation Board retains jurisdiction to ensure that these recommendations, combined with the matters agreed to before and during our process, are properly reduced to a final and binding written collective agreement. In closing, the members of the Board would like to that the spokespersons, bargaining committees and their counsel for their courtesy and co-operation throughout this process.

This is the unanimous recommendation of the Conciliation Board made on January 12th, 2011.

ANDREW C.L. SIMS, Q.C.
Chair

Morgan Cooper

MORGAN COOPER
Nominee of UNB

DOUGLAS LORIMER
Nominee of AUNBT