

**IN THE MATTER OF AN INTEREST ARBITRATION
BEFORE ARBITRATOR ELI GEDALOF**

BETWEEN:

THE UNIVERSITY OF TORONTO FACULTY ASSOCIATION

(the “Association” or “UTFA”)

- and -

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

(the “University Administration”)

THE ASSOCIATION’S REPLY BRIEF

September 27, 2022

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UTFA Reply Interest Arbitration Brief

1. In response to the Administration's interest arbitration brief dated August 17, 2022, the Association submits that the Administration's proposals and arguments must be rejected for the reasons that follow.

- I. **GENERAL COMMENTS ON THE UNIVERSITY ADMINISTRATION'S SUBMISSIONS**

2. By way of preliminary comment, the Association submits that the Administration has misconstrued the applicable principles of interest arbitration and the appropriate sectoral comparators. Moreover, the Administration has mischaracterized the Association's proposals, and the principle of local collegial governance at the UofT, in order to paint the Association's proposals as somehow "radical" and "rigid". That is, the Administration has essentially set up a "straw-person" argument.

- a) **The Administration fundamentally misstates the principles governing interest arbitration**

3. At paragraphs 33-43 of its brief, the Administration argues that the Association's proposals must fail because it is "inconceivable" that UTFA members would engage in a strike over UTFA's proposals—in particular over proposals that affect workload and Teaching Stream faculty—and therefore the Association's proposals are not supported by the "replication" principle.
4. The Association submits that the Administration's arguments are based on a fundamental mischaracterization of the replication principle. In particular, the speculative and subjective approach asserted by the Administration should not be applied at the UofT, where faculty members and librarians are not certified and where there is no history of strikes or lock-outs.
5. While replication theory holds that an interest arbitrator should seek to replicate the agreement which the parties themselves would have reached by process of free collective bargaining, interest arbitrators have widely held that they should *not* engage in a purely subjective and artificial assessment of whether a union would go on strike or whether an Employer would engage in a lock out:

The parties have also relied on the replication theory which holds that compulsory interest arbitration is a substitute for negotiations and settlements in the private sector where there is an ultimate resort to a strike or lock-out. That was the theory that was prevalent in the early days of public sector interest arbitration, but matters have now evolved. Arbitrators did not self-construct or imagine a scenario where the parties arrive at an outcome

that is determined by a freely negotiated settlement which includes the possible use of economic sanctions i.e. strike or lockout. Arbitrators articulate the replication principle but also resort to other settlements and other comparable data as well as economic data. Also, where there is a regime of interest arbitration requiring the parties to arbitrate their differences in arriving at a collective agreement, over time, the strike/lock-out replication principle has sequed into comparable situations. Interest arbitration has never been a practical analysis or application of the replication theory only; all cases also rely on other comparisons. There may be an exception and that is the very first arbitration cases in a cycle of bargaining under on interest arbitration regime may look to settlements in private sector negotiations where there is a right to strike as well as economic data, but once there are other awards in the sector, particularly with larger employers, there is a reliance on those awards as well. Ultimately, the replication theory blends with the comparability theory....

Parkview Manor Health Care Centre v Christian Labour Association Of Canada Local 304, 2020 CanLII 108883 (ON LA) (Shime) at 3, **Tab 1** of UTFA's Reply Book of Documents.

6. As noted by Arbitrator Hope, the subjective approach proposed by the Administration has consistently been "disdained" by interest arbitrators:

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

We pause to note that the nominee for the employer dissents from this decision. In particular, it is his view that the process of replication does invite a subjective approach and that these parties, particularly the employer, could not be expected to reach agreement in collective bargaining to the implementation of the HLRA — HEU master agreement as the basis for a collective agreement in this relationship. He would prefer us to find, on the basis of the opinion of the employer, that the employer would press certain of the union demands to a strike and that the bargaining unit would not support a strike on those issues. On that reasoning, the nominee for the employee would prefer to reconcile the dispute by a compromise between the bargaining positions of the parties based upon our assessment of how those issues would likely have been resolved if arbitration had not intervened.

The majority do not agree with that approach to the resolution of an interest dispute and prefer the one adopted by interest arbitrators in the numerous

decisions canvassed in Royal Arch. In particular, the majority is of the view that a board of arbitration in an interest dispute is required to act adjudicatively and to respond to objective criteria. The subjective approach has been consistently disdained in this province and elsewhere...

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

Interest arbitration awards should reflect the standard received by employees performing similar work in the relevant labour market. When arbitrators speak of replicating the result of collective bargaining, that is the context in which they speak. That reasoning was summarized by Professor J. M. Weiler in *Grandview Private Hospital ...* as follows:

Interest-dispute arbitration under section 73 of the *Labour Code* [the predecessor legislation to the *Essential Service Disputes Act*] is intended to provide a procedural substitute for strike within a process of free collective bargaining. An arbitrator must look at labour market realities, i.e. the relative economic and bargaining positions of the parties, *in attempting to simulate the agreement which could have been reached by the parties under the sanction of a strike or lockout.* The best evidence of this hypothetical agreement is the pattern of development in other comparable hospitals in the community, especially those collective agreements voluntarily concluded. (Emphasis added.)

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

Re Beacon Hill Lodges of Canada and Hospital Employees Union, 1985 CanLII 5413 (BC LA) (Hope) at 303-305, **Tab 2** of UTFA's Reply Book of Documents.

7. Contrary to the Administration's assertions, arbitrators have held that the principle of replication must be satisfied on an objective basis. As Arbitrator Burkett articulated in his oft-cited description of interest arbitration principles, replication involves consideration of objective criteria:

The terms replication, gradualism and demonstrated need are used to describe the guiding principles of boards of interest arbitrations. Replication refers to the objective of fashioning an award that, to the extent possible, replicates the settlement the parties would have reached had the dispute been allowed to run its full course. In this regard, interest arbitrators look to benchmarks in the community ... and to the bargaining history between the parties...

The principle of gradualism reflects the reality that collective bargaining between mature bargaining parties, as these are, is a continuum that most often accomplishes gradual change as distinct from drastic change. It follows that absent compelling evidence, an interest arbitrator will be loath to award "breakthrough" items...

The principle of demonstrated need, as applied to a major economic item, provides a counterbalance to the principle of gradualism. It does so by establishing the basis upon which a board of interest arbitration will award a "breakthrough" item. A party seeking a major or even a radical change must convincingly establish the need for such change; hence the term demonstrated need...

Air Canada v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 2002, 2011 CanLII 152548 (CA LA) (Burkett) at 45-47, **Tab 3** of UTFA's Reply Book of Documents.

8. In applying the principle of replication, interest arbitrators consider criteria such as economic context, comparability, and demonstrated need:

In the normal course where the parties are not permitted to strike or lockout, an interest arbitrator must take into account the prevailing economic context, comparability and demonstrated need in applying the replication principle; that is, these factors must be considered and weighed in shaping an award that fairly reflects what the parties would have negotiated had they the right to strike or lockout...

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

Mount Allison University and Mount Allison University Faculty Association, 2014 CanLII 149792 (NB LA) (Burkett) at 4, **Tab 4** of UTFA's Reply Book of Documents.

9. Of these factors, comparability is often considered one of the most important objective factors that informs replication:

[16] In *Yarrow*, supra, the Board adopted two overriding principles that are an integral and historical part of interest arbitration generally: first, the replication principle; and second, what is fair and reasonable in the circumstances. With respect to the replication principle, an arbitrator will attempt to construct a collective agreement that would replicate as nearly as possible an agreement that conventional bargaining would have produced. With regard to what is fair and reasonable, an interest arbitrator will avoid imposing any agreement that would reflect an undue imbalance of power between the parties. In the application of these two principles an interest arbitrator will rely on one primary objective factor - the terms and conditions of employment of other employees performing similar work. This is known as the "comparator principle".

...

[95] Interest arbitrators are independent third parties that are guided by the principles of arbitral jurisprudence; for example, the principle of replication and what is fair and reasonable. One of the most important objective factors, in the application of these principles, is the comparison to other settlements with respect to similar employees performing similar work. In this case, this involves the rational matching of the terms and conditions of employment at comparable universities.

University of Northern British Columbia v University of Northern British Columbia Faculty Association, 2015 CanLII 90847 (BC LA) (Lanyon), at paras 16 and 95, **Tab 5** of UTFA's Reply Book of Documents.

10. The use of objective criteria has also been recognized by Justice Winkler in an interest arbitration award between the parties:

[12] Determining an award in replication of an agreement that might have been reached in the context of the "economic power struggle" and the "exigencies of the market-place" ... requires consideration of a number of dynamic elements including the specific employer-employee relationship, the specific "industry" or "industry segment" and the general economic conditions and climate in which both exist.

...

[17] ...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 necessitates 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.

Re University of Toronto v University of Toronto Faculty Association, Interest Arbitration Award, dated March 27, 2006 (Winkler), at paras 12 and 17, **Tab 21** of UTFA's Book of Documents.

11. Justice Winkler has also noted that the replication principle takes on a specific character in the University of Toronto context, noting that it is "inextricably interrelated" to the "mutual commitment of the University and the Association to ensuring that the University is a leader among the world's best teaching and research institutions of higher learning":

[6] The first is the "replication principle" which mandates that an award emanating from an arbitration conducted pursuant to Article 6 of the MOA should, as closely as possible, reflect the agreement that the parties would have reached had they been able to reach an agreement in free collective bargaining.

[7] The second underlying principle is found in the mutual commitment of the University and the Association to ensuring that the University is a leader among the world's best teaching and research institutions of higher learning.

[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.

Ibid at paras 6-8.

12. Justice Winkler further stated that assessing impact on bargaining of a shared commitment to excellence requires it be put into the context of the marketplace:

[19] In our view, while the commitment to excellence is clearly a significant factor in the relationship between the University and the Association, assessing its impact on the bargaining requires that it be considered in the context of the "marketplace" in which it is pursued.

[20] In essence, the University has staked out a position at the top of the relevant market or "industry segment". It implicitly admits that maintaining that position depends to a large degree on maintaining the quality of its faculty and librarians. That in turn requires, leaving aside the intangibles, ensuring that the total compensation package available to those faculty members and librarians is sufficient to place them at the top of the market as well...

Ibid at paras 19-20.

13. The subjective approach which the Administration urges the arbitrator to adopt is therefore artificial and outmoded, and has long since been disdained by other interest arbitrators.
14. At paragraphs 46-49 of its brief, the Administration further argues that UTFA's proposals violate the principle of gradualism, which the Administration suggests ought to be limited to a purely "inward-looking" assessment. The Administration asserts that what constitutes a breakthrough is defined in relation to the agreement that is in place between the parties, and not external agreements. The Administration relies in part on the decision in *McMaster University*.
15. With respect, the Administration's approach is again plainly incorrect and a mischaracterization of the application of the gradualism principle, which is not applied in isolation from other interest arbitration principles or divorced from sectoral comparators.
16. In *McMaster University*, the Union argued that a breakthrough was defined as "something novel, that no one else has". Arbitrator Anderson disagreed, noting that whether a proposal constitutes a breakthrough is relative to the current terms and conditions of employment enjoyed by the parties. However, as he noted, comparator agreements remain relevant, including for the reason that the parties use comparators themselves to negotiate their own agreement and influence the outcome at the bargaining table:

[6] The BUC asserts that the case law establishes that a breakthrough is "something novel, that nobody else has". At the same time, the BUC relies heavily on the concept of comparability in support of its positions with respect to wage increases and on the co-pay issue. That is, the BUC seeks to achieve outcomes on those issues similar to those achieved under what it identified as comparable collective agreements.

...

[8] ...[C]ontrary to the assertion by the BUC, whether something constitutes a breakthrough is to be assessed not so much by reference to comparable agreements (whether it is something that no one else has), but rather by reference to the current terms and conditions of employment of the affected employees. The relevance of comparable agreements is, at least in part,

that the parties would presumably have had reference to them and taken some guidance in negotiating their own collective agreement, not that they would necessarily have achieved the terms and conditions set out in those collective agreements...

Building Union of Canada v McMaster University, [2015] OLRD No. 27 (Anderson), at paras 6 and 8, **Tab 15** of the Administration's Book of Documents.

17. Notably, UTFA is not advancing the position that a breakthrough proposal constitutes something that "no one else has". Moreover, UTFA's position is that its proposals are clearly not "breakthrough" items, but rather appropriate and incremental improvements on existing conditions and policies at the UofT, reasonably supported by evidence from both UTFA member experience and comparator universities.
18. Moreover, as Arbitrator Anderson noted in his decision, interest arbitration principles should not be applied mechanically:

[5] The parties agree on the principles applicable to interest arbitration. As noted by McMaster, they are summarized in *Terrazzo, Tile & Marble Guild of Ontario, Inc*, 2013 CanLII 57029 (ON LA) as follows:

Replication: An arbitration award should endeavour to award the terms that would likely have been the achieved had bargaining proceeded to resolution without recourse to arbitration.

Comparability: The most relevant guide to what the parties would likely have negotiated had they bargained to resolution is the terms negotiated by other parties in the same industry and facing a broadly similar economic and labour market environment and historic bargaining relationships.

Economic Conditions: Arbitration awards should endeavour to reflect economic conditions, especially labour market conditions and changes in the cost-of-living. However, in most instances, these conditions are implicitly reflected in comparable settlements where the parties are deemed to have taken account of relevant economic conditions in their bargaining. In most instances, therefore, consideration of economic conditions is subsumed by the comparability principle.

Demonstrated Need: Significant changes should only be made when there is a demonstrated need.

No Breakthroughs: As a general principle, arbitrators decline to award breakthroughs in respect of either language or monetary terms when it is unlikely that such breakthroughs would have been achieved through normal bargaining in the absence of arbitration.

These principles cannot be mechanically applied. Rather, they are factors to be considered in attempting to arrive at what some cases provided by the BUC refer to as a "fair and reasonable" collective agreement. What is fair and reasonable must of course be assessed from the perspective of both parties. What this will mean will vary depending on the context.

Ibid at para 5.

19. The Administration relies on the gradualism principle to suggest that no improvements can be made to the WLPP and/or provisions governing UTFA members' workload. This is clearly a misapplication of the principle of gradualism, which refers to how arbitrators should generally seek to make gradual, or incremental, changes to longstanding provisions of collective agreements between mature parties. As discussed in greater detail below, UTFA submits that its proposals to improve the WLPP and PTR Policy satisfy both the objective elements of the replication test as outlined in the arbitral jurisprudence, and adhere to the principle of gradualism.
20. In sum, the Association submits that the Administration's efforts to argue that UTFA's proposals should not be awarded because they are not "strike" issues ought to be rejected as an outdated and artificial approach to interest arbitration.

b) The Administration relies on inappropriate and unduly narrow comparators

21. The Administration suggests that the members of the U15, an association of 15 Canadian research universities including the University of Toronto, form the appropriate comparators for UTFA. While UTFA agrees that the U15 is an appropriate comparator for some purposes, they do not form the sole relevant comparators. The University of Toronto, in addition to being a leading research institution, is also a leading teaching institution. Moreover, interest arbitrators have long emphasized the importance of economic context and geographical location (which informs economic context) as relevant to the selection of appropriate comparators. In light of these considerations and principles, it would be unduly narrow to only compare the UofT to other research universities, and to fail to consider the terms and conditions at other Ontario universities.
22. In UTFA's submission, the appropriate comparators for its proposals vary depending on the nature of the provision or benefit at issue and reflect those outlined in its initial brief and as indicated below.

c) The Administration's argument that local norms should prevail is a "straw-person" argument and should be rejected

14. Throughout its brief, the Administration repeatedly mischaracterizes UTFA's proposals as rigid and prescriptive and as overriding local norms and collegial processes. The Administration makes these arguments in particular in relation to UTFA's workload proposals. These arguments constitute a deliberate misreading

of UTFA's proposals as well as a mischaracterization of the principle of collegial governance and local autonomy at the UofT.

15. As UTFA laid out in its brief, the structure of the Workload Policies and Procedures (the WLPP), which UTFA negotiated with the Administration, embeds within it a careful recognition of the importance of local norms and collegial processes. It is for this reason, for example, that the parties agreed in the WLPP that workload policies will be determined by local, unit-level workload committees, which each develop unit-level workload documents. UTFA agrees that this is an important component of the process of determining workloads to ensure that university policies respect and are responsive to local norms. There is nothing in UTFA's proposals which alters or derogates from this structure.
16. At the same time, however, the WLPP in and of itself represents the parties' acceptance of the importance of university-wide standards. That is, the parties recognized, and embedded in the WLPP, a recognition that matters of workload—which are central to the terms and conditions of employment for UTFA members—cannot be left vulnerable to the vagaries of local “norms”, which in some cases can result in an unreasonable and highly inequitable distribution of workload. These minimum centralized standards are necessary and appropriate; UTFA members are entitled to a baseline of workload protection. For this reason, the WLPP is structured such that the WLPP establishes workload policy across the University consistent with the principles in 1.2, and Unit Workload Committees are empowered to translate the standards and norms to make sense within local conditions while adhering to the broader principles and standards embedded in the WLPP. In other words, Unit Workload Committees must work within the fabric of the WLPP; they are not entitled to make workload policy out of whole cloth.
17. UTFA's proposals do not seek to interfere with unit-level decision-making or norms, but rather to add to the existing WLPP, which establishes minimum standards for the units. Such a model—that is, having centralized standards that apply across the institution with discipline and/or unit-level variation—is widely accepted at other universities (see Tab 30 of UTFA's Book of Documents), and is firmly established in the University of Toronto governance context.
18. More specifically, in the WLPP itself the parties have agreed to certain fundamental protections which govern workload across the University, and regardless of campus or discipline. For example, Article 1.2 of the WLPP states as follows:
 - 1.0 Principles Governing the Establishment and Assignment of Workload
 - 1.1 Workload for faculty and librarians will be established and assigned in a manner consistent with the principles set out in 1.2.
 - 1.2 The University of Toronto is committed to:

- A fair, reasonable, and equitable distribution of workload;
 - A transparent process of workload allocation within a unit, based on decisions made in accordance with criteria that are known to members within that unit;
 - Flexibility in workload allocation that reflects the missions of units and is consistent with the type of appointment members hold and the diversity of their research and scholarship and assigned teaching and service responsibilities and activities;
 - Criteria for workload allocation that have been developed in accordance with collegial governance, including the opportunity for members of the unit to contribute reasonably to their development and review. In this regard, workload allocation should respect academic freedom and a reasonable degree of professional autonomy;
 - Workload allocation that will comprehensively take into account the full scope of activities and expectations of a member of a unit, commensurate with the 3 principal components of a faculty and librarian member's appointment;
 - Workload allocation that reflects approved participation in programs outside the unit;
 - Assignment of individual workload based on the principle that comparable work will be weighed in the same manner.
19. While “criteria for workload allocation that have been developed in accordance with collegial governance” is one of the principles set out in Article 1.2 of the WLPP, it is of no greater, or lesser, prominence or authority than the principle that there should be a “fair, reasonable, and equitable distribution of workload”, that there should be a transparent process of workload allocation within a unit, based on decisions made in accordance with criteria that are known to members within that unit”, or that “assignment of individual workload [will be] based on the principle that comparable work will be weighed in the same manner.”
20. It is also evident from the structure of the WLPP itself that the process for development of unit workload policies involves oversight from Deans. Article 2.14, for example, establishes the role of Deans in approving the unit’s proposed Unit Workload Policy:
- 2.14 Approval Process. By February 1 the Unit Workload Policy Committee shall establish the proposed Unit Workload Policy and shall forward same to the Dean, or in the case of single-department faculties or the libraries, to the Provost (or designate), and to all members of the unit. By February 15, the Dean or the Provost (or designate) shall approve or reject the proposed Unit Workload Policy established by the Unit Workload Policy Committee. If the Dean or the Provost (or designate), acting in a manner that is not

irrational, arbitrary or in bad faith, rejects the proposed Unit Workload Policy the proposed Unit Workload Policy will not come into effect, and he or she will respond in writing outlining the reasons for not approving the proposed Unit Workload Policy and request that the Unit Workload Policy Committee meet to review and revise the proposed Unit Workload Policy in light of the reasons provided by the Dean or the Provost (or designate) in writing. If the Dean or the Provost (or designate) rejects the proposed Unit Workload Policy the Unit Workload Policy Committee will establish a revised Unit Workload Policy within a reasonable time frame. The Dean or the Provost (or designate) shall, within a period of 15 calendar days from receipt of a revised Unit Workload Policy, approve or reject the proposed revised Unit Workload Policy, and paragraph 2.10 will then apply with all necessary modifications.

21. In UTFA's experience, Deans too often intervene in the internal discussions of the unit workload committee and seek to influence—or override—the unit workload policies that are developed. For example, when the WLPP was first implemented, Deans routinely instructed Unit Workload Committees that they were not permitted to put in place “new” workload policies, but rather could only codify practices that were already in place. In addition, UTFA became aware that in some cases Deans restricted what issues could be put on the agenda for discussion by Unit Workload Committees. Subsequently, in 2015, the Office of Faculty and Academic Life directed units that in revising their Unit Workload Policies, they were to “avoid quantitative breakdowns of teaching, research, service (e.g. 40/40/20 or 80/20)”. That is, despite a common local practice of describing workload norms in quantitative terms, the central Administration intervened and directed units otherwise.

“Revising Your Unit Workload Policy”, PowerPoint Presentation September 2015, at 9, **Tab 6** of UTFA's Reply Book of Documents.

22. This conduct by senior Administrators is hardly consistent with the stringent concept of “local autonomy” which the Administration now seeks to hold up as the predominant principle governing workload. Ultimately, the Administration cannot have it both ways; either the Deans and central Administration should not seek to influence unit workload policies (in order to preserve and respect the principle of local autonomy), or it is appropriate and reasonable to establish certain centralized standards that apply across the University.
23. The Administration's submissions inappropriately seek to transform the principle of collegial determination of workload norms into the principle of local autonomy. The WLPP's reference to “including the opportunity for members of the unit to contribute reasonably to their development and review” is only one dimension of the collegial determination of workload. Policy negotiations, including of the WLPP, are another opportunity for collegial governance. Further, the Administration's submissions inappropriately seek to make local autonomy into *the* predominant principle governing workload, in a manner which is simply not consistent with, or

mandated by, the University's own policy documents. Rather, the opposite is the case, and principles of collegial governance at the local level must be balanced against the recognition that certain university-wide standards should inform and govern the allocation of workload across all units.

24. Moreover, whatever the promise of collegial decision-making that originally informed the conceptualization of Unit Workload Committees, in UTFA's experience these committees have hardly turned out to be the locus of robust collegial decision-making or meaningful faculty voice. UTFA's consistent experience since the WLPP was first implemented is that is simply not the case. In many cases Unit Workload Committees do not meet regularly or in a timely way, or have become bogged down in the Dean's approval process. In the Department of Arts, Culture and Media at University of Toronto Scarborough, for example, the unit's proposed revisions to the Unit Workload Policy (which is required, under the WLPP, to be reviewed every three years), have been awaiting the Dean's approval for at least 12 months, and the unit's 2017 policy (which was due to be revised in 2020) is now more than two years out of date.
25. In other instances, the workload policy developed by the local Unit Workload Committees has been overridden entirely by the Administration. At the Institute of Communication, Culture, Information and Technology (ICCIT) at University of Toronto Mississauga, for example, the committee was advised in June, 2022 that their proposal for a revised unit workload policy had been denied by the Vice-Provost Faculty and Academic Life, without explanation or reasons. The Administration indicated that they would be "open to revisiting the proposal" once a process of decoupling certain courses from Sheridan College is complete – a process that will not be concluded for another two years.
26. These are only two examples of the many ways in which the process of local Unit Workload Committees has been ineffective or stymied by Dean's Offices and University Administration. It is simply inaccurate to hold up local workload committees as a place where robust and meaningful collegial governance takes place, or where excessive workload is reigned in.
27. It should also be underscored that collegial governance also occurs through a number of *additional* avenues at the UofT, and not only through the functioning of Unit Workload Committees. As noted above, negotiations and discussions with UTFA in respect of the terms and conditions of work of UTFA members, for example, is a significant and meaningful way in which the UTFA members engage in collegial governance.
28. Moreover, and contrary to the Administration's submissions, the proposals UTFA has made in the current round of bargaining continue to maintain the careful balance between ensuring minimal baseline protections for all UTFA members and respecting local norms and procedures.

29. The need to build certain baseline protections into the WLPP is particularly important for those faculty whose appointments do not closely reflect the “norm”, i.e. of a full-time tenured or Tenure Stream faculty member. As set out in paragraphs 164-166 of UTFA’s brief, approximately 800 of UTFA’s members are *not* Tenure Stream faculty and do not benefit from the broadly understood “40/40/20” workload norm. Notably, this group of UTFA members is also much more likely to identify as women or Black, Indigenous, People of Colour (BIPOC) than do faculty in the Tenure Stream.
30. Central guidance in the WLPP is also particularly important in the case of the Teaching Stream, who in many cases constitute only a small minority of faculty in a unit—often only one or two colleagues. In these circumstances, Teaching Stream faculty rarely form a critical mass on Unit Workload Committees and, as individuals or as a group, rarely have the power or voice to influence local level policy changes to adequately represent the interests of the Teaching Stream. Even where Teaching Stream faculty do serve on their Unit Workload Committees, it is often apparent that Tenure Stream colleagues and local administrators have significant misunderstandings about the scholarly nature of the Teaching Stream (and/or lack of familiarity with university policies governing the Teaching Stream) and too often mistake it to be a teaching-*only* stream. Because Teaching Stream faculty are almost always a minority of the committee (if they are represented at all), and Tenure Stream faculty often do not understand the on-the-ground realities of Teaching Stream workload to support changes to the unit workload policy, Teaching Stream faculty are particularly disadvantaged, making university-wide standards in the WLPP all the more important.
31. In these circumstances, clearer parameters are required in the WLPP around the balance of responsibilities in the Teaching Stream and applicable Teaching Stream workload—more so than in the Tenure Stream where Tenure Stream norms are already entrenched and the normative distribution of effort is known to the majority of colleagues.
32. Ultimately, in UTFA’s submission the Administration has improperly sought to turn ‘local autonomy’ into a trump card which overrides every other workload principle, indeed all the other principles in combination, and fundamentally mischaracterize UTFA proposals as seeking to ignore or override local, collegial norms. These arguments are simply without foundation. Rather, UTFA’s proposals are consistent with, and informed by, the balance between central/local, baseline standards/flexibility.

d) The Association’s proposals are properly within the jurisdiction of the arbitrator

33. The Association disagrees with the Administration’s preliminary objection outlined in paragraphs 29-32, and elsewhere in its brief, and submits that all of its proposals are properly within the jurisdiction of the arbitrator. The Association’s response to

the Administration's jurisdictional objection to Proposals 8, 10, 14, 18 and 20 are set out further below.

e) The Arbitrator has the jurisdiction to award a “re-opener” if Bill 124 is found to be unconstitutional

34. UTFA proposes that, in the event that Bill 124 is found to be unconstitutional or is otherwise modified or repealed, this Board of Arbitration is seized to make whatever award on salary and compensation matters that it would have made had Bill 124 not been in effect at the time of the interest arbitration award, or that is necessary to remedy the unconstitutionality of Bill 124.
35. The Administration argues that such a “re-opener” would be outside of the Arbitrator's jurisdiction unless the decision of the court hearing the constitutional challenge is rendered before June 30, 2023 (that is, before the end of the 12-month period at issue in this arbitration) (see para 87 of the Administration's brief). Similarly, at paragraph 84 of the Administration's brief, the Administration submits that a Dispute Resolution Panel can only issue an order for the time period of deal at issue – i.e., in this case only for 2022-2023. UTFA submits that these arguments must be rejected.
36. It is plainly the case, based on the language of Article 6, the longstanding practice of the parties, and the Administration's own proposals in this round, that the Arbitrator has the jurisdiction to award changes to the terms and conditions of employment for UTFA members on a go-forward basis and not just within the strict temporal confines of July 1, 2022 to June 30, 2023. This must necessarily be the case, otherwise every benefit improvement or policy change would only last for the term of the agreement at issue, and then would be automatically rolled back at the end of the term. That is patently not the case.
37. Contrary to the Administration's submissions, neither Article 6 nor the terms of the January 25, 2022 MOS establish any temporal limitations on the Arbitrator's jurisdiction.
38. Article 6, para 19, provides:

The jurisdiction of the Dispute Resolution Panel shall encompass only those unresolved matters relating to salaries, benefits and workload that have been referred to it by the parties. The Dispute Resolution Panel shall, however, take into account the direct or indirect cost or saving of any change or modification of any salary or benefit agreed to by the parties in making its recommendation for terms of settlement. [emphasis added]
39. Other provisions of Article 6 similarly refer to the role of the Dispute Resolution Panel as being to address “all unresolved salary, benefits and workload matters” (see for example para 13 of Article 6). It is clear on the plain face of the language in Article 6 that there is no temporal limitation on the jurisdiction of the Arbitrator;

rather, the jurisdiction of the Arbitrator is to address “all unresolved salary....matters”.

40. Nor does the January 25, 2022 MOS impose any temporal restriction on the authority of the Arbitrator appointed in place of a Dispute Resolution Panel. Rather, paragraph 5 of the MOS establishes that the arbitrator has the same jurisdiction as a Dispute Resolution Panel appointed under Article 6 of the MOA.
41. To the extent that the Administration seeks to argue that the January 25, 2022 MOS represents a mutual agreement by the parties that the Arbitrator would only have jurisdiction to issue an award up until June 30, 2023, after which the Arbitrator’s jurisdiction would be exhausted, this is nowhere reflected in the text of the MOS and at no time was any such intention communicated by the Administration to UTFa, either in the course of numerous bilateral negotiation meetings, or in the context of the Burkett mediation which resulted in the January 25 2022 MOS. There was absolutely no “meeting of the minds” that the arbitrator’s jurisdiction was to be so narrowly construed.
42. Moreover, if Bill 124 is ultimately found to be unconstitutional, UTFa would only seek for the Arbitrator to re-open and modify compensation matters for the time period with which the arbitrator is clearly seized – that is, for the year July 1, 2022 to June 30, 2023. As such, the Arbitrator would still be well within his “temporal’ jurisdiction” under the January 25, 2022 MOS.
43. The key question for the Arbitrator is how to address the concern that he is being asked to impose an artificially restricted salary increase (notably, an increase restricted to 1% at a time of inflation of close to 8%), in a context in which the parties are well aware that the legislation may be found to be illegal and of no force and effect. In these circumstances, and since the advent of Bill 124, arbitrators have consistently accepted that they should remain seized pending the outcome of the constitutional challenge. This approach is normative in the university sector, and virtually across the board in unionized workplaces in Ontario.
44. The first arbitration decision to hold that it was appropriate for an arbitrator to remain seized to reopen compensation issues in the context of Bill 124 was *Mon Sheong Home for the Aged v Ontario Nurses’ Association*.

Mon Sheong Home for the Aged v Ontario Nurses’ Association, 2020 CanLII 8770 (Gedalof), **Tab 7** of UTFa’s Reply Book of Documents.

45. In *Mon Sheong*, Chair Gedalof acknowledged that Bill 124 had disrupted the bargaining process and in particular, the ability of the interest arbitration board to apply the principle of replication. Nevertheless, given that Bill 124 remained good law at that point, Chair Gedalof held that the interest arbitration board was obliged to limit its award to the strictures of Bill 124. Noting however, that the very strictures that limited the Board’s decision were subject to a constitutional challenge, Chair Gedalof held that it was appropriate for the interest arbitration board to “mitigate

against the potential disruption to established bargaining patterns...in the event that...Bill is eventually deemed unconstitutional by the Court.” Chair Gedalof determined that in such a context, it was proper to grant a re-opener on monetary terms which was conditional on the union obtaining an Order from the Court setting aside Bill 124.

Mon Sheong Home for the Aged v Ontario Nurses’ Association, 2020 CanLII 8770 (Gedalof) at para 25, **Tab 7** of UTFA’s Reply Book of Documents.

46. Since *Mon Sheong*, the decision to grant a re-opener and remain seized has been adopted in numerous other interest arbitration decisions including those decided outside the *Hospital Labour Disputes Arbitration Act*. One such case is *Independent Electricity System Operator v The Society of United Professionals*. In that case—and similar to the circumstances of the instant case—Arbitrator Stout noted that his appointment as interest arbitrator was not pursuant to statute but rather pursuant to the parties’ agreement. The source of the Arbitrator’s jurisdiction had no bearing, however, on his ultimate determination with respect to the appropriateness of re-opener language. Rather, Arbitrator Stout held that it was appropriate for him to remain seized to reopen compensation issues depending on the Court decision on *Bill 124* noting that such actions are “now widely accepted”.

Independent Electricity System Operator v Society of United Professionals, 2021 CanLII 137444 (Stout) at para 14, **Tab 38** of UTFA’s Book of Documents.

47. Perhaps most relevant to the present case is *Ryerson University v Ryerson University Faculty Association*. In that case, Arbitrator Kaplan, whose appointment as interest arbitrator was also pursuant to the parties’ agreement rather than statute, held that it was “customary” for arbitrators to remain seized to reopen compensation should outstanding constitutional challenges be successful or Bill 124 be otherwise modified or repealed with retroactive effect.

Ryerson University v Ryerson University Faculty Association, 2021 CanLII 49703 (Kaplan) at 3, **Tab 8** of UTFA’s Reply Book of Documents.

48. In *Ryerson* the university argued that Arbitrator Kaplan should only remain seized during the term of the collective agreement. Arbitrator Kaplan flatly rejected the university’s argument:

Mention must be made of the University’s submission that I remain seized of this issue only during the term of this collective agreement. This request is rejected. The fact of the matter is that a constitutional challenge has been mounted – it may or may not be successful – but if it is, it may be determined that Association members were deprived in *this round* of their entitlement to free collective bargaining. In these circumstances, remaining seized to deal with any remedial issues that might arise from any finding is entirely appropriate. Putting over any remedy – should one be granted – to some

other round would be completely unfair, leading, as it inevitably would, to both intermingling and conflating of historical and then current issues, to the obvious, inevitable and axiomatic detriment of the Association and its members, assuming for the sake of argument that constitutional rights are found to have been infringed.

Ryerson University v Ryerson University Faculty Association, 2021 CanLII 49703 (Kaplan) at 3, **Tab 8** of UTFA's Reply Book of Documents.

49. A similar conclusion was reached in the interest arbitration at OCAD University.

Ontario College of Art & Design University v Ontario College of Art Faculty Association, 2021 CanLII 37800 (Kaplan) at 8, **Tab 9** of UTFA's Reply Book of Documents.

50. Arbitrator Kaplan's reasoning equally applies to the case at hand.

51. A key rationale for remaining seized to reopen compensation issues is to preserve the parties' entitlement to free collective bargaining *in this round* and to ensure that any decision of an interest arbitration board replicates free collective bargaining for *this round*.

52. Put differently, under Article 6, the Arbitrator is clearly seized with the full range of compensation issues before him. If Bill 124 is found to be unconstitutional, the parties should be put back in the position that they would have been had Bill 124 restrictions not been in place: that is, before the Arbitrator with the full set of compensation issues unrestricted by a 1% cap. Ordering UTFA's proposed re-opener language is therefore entirely consistent with normal remedial principles and the normal principles of interest arbitration.

53. Underscoring this arbitral approach, Article 6(16) of the MOA specifically empowers the Dispute Resolution Panel with the ability to issue a decision that "reflect[s] the agreement the parties would have reached if they had been able to agree." In the 2020 Interest Arbitration decision involving these same parties, Arbitrator Kaplan held that Article 6(16) requires arbitrators to apply the principle of replication:

In determining the outstanding issues, all of the usual criteria have been taken carefully into account, most especially replication: **the replication of free collective bargaining**. It is noteworthy that Article 6(16) of *The MOA* requires the award of an interest arbitrator to "attempt to reflect the agreement the parties would have reached if they had been able to agree." [emphasis added]

University of Toronto v University of Toronto Faculty Association, Interest Arbitration Award, dated June 29, 2020 (Kaplan) at 3, **Tab 24** of UTFA's Book of Documents.

54. The principle of replication has long recognized in the parties' history of cases as a "key pillar" of the frame-work to be applied in interest arbitration.¹ As a result, it is proper and appropriate for the Arbitrator, in response to the issues brought forward by the parties, to "mitigate against the potential disruption" to replicate free bargaining in the event *Bill 124* is struck down. If *Bill 124* is found to be unconstitutional, in the words of Arbitrator Kaplan, the result is "that Association members were deprived in *this round* of their entitlement to free collective bargaining." In other words, to remain seized to re-open in the present context is perfectly appropriate and aligned with the Arbitrator's powers under Article 6(16) of the MOA.

Re University of Toronto v University of Toronto Faculty Association, Interest Arbitration Award, dated March 27, 2006 (Winkler), at paras 12 and 17, **Tab 21** of UTFA's Book of Documents.

55. Importantly, a key reason why "re-opener" language has become normative in the context of Bill 124 is that it simply makes good labour relations sense, whether or not the Association is a certified trade union under the Ontario *Labour Relations Act*. In considering the appropriateness of UTFA's proposal, the Arbitrator should weigh heavily, in UTFA's submission, what would be the most appropriate, non-conflictual means of addressing any outstanding remedy if Bill 124 is declared to be unconstitutional.
56. If Bill 124 is ultimately found to be unconstitutional, and if no re-opener language is ordered or agreed to, UTFA's most likely avenue would be to seek a remedy from the Superior Court of Justice. Without prejudice to any remedial request that UTFA might ultimately seek, such a remedial request could include asking the Court to order the University to make UTFA members whole by paying to UTFA members their lost compensation. In UTFA's submission, however, an interest arbitrator is a much more appropriate forum to address any such remedial issues, given the arbitrator's greater labour relations expertise and expertise in the principles of interest arbitration which inform compensation awards.
57. In the context of a live constitutional challenge to restrictive legislation like Bill 124, it only makes sense for the parties to plan for the potential eventuality that the Bill is struck down as unconstitutional, and to put in place the most efficient, expert, and least disruptive mechanism to resolve any disputes as to remedy that the parties may not be able to resolve on their own. As many parties have determined by mutual agreement, and as interest arbitrators have consistently awarded, the most appropriate mechanism is plainly to remit the matter back to the interest arbitrator who was seized with the matter at the outset.
58. The alternative to re-opener language would be, in UTFA's submission, to ask the Arbitrator to make a pre-emptive declaration now about what would be the

¹ See for example *Re University of Toronto v University of Toronto Faculty Association*, Interest Arbitration Award, dated March 27, 2006 (Winkler), at para 5, **Tab 21** of UTFA's Book of Documents.

appropriate salary increase and benefits improvements (again, in the context of 8% inflation) if Bill 124 were not in place. In UTFA's submission, however, this would be a highly inefficient use of resources given the uncertainty about the status of Bill 124. There is little value, at this stage, to engaging in full-fledged litigation on what compensation would be but for the restrictions of Bill 124, or to asking the Arbitrator to issue such a pre-emptive order. Indeed, it is for this reason that unions and employers have routinely agreed, or arbitrators have ordered, re-opener language.

59. For all of these reasons, the Association submits that the Administration's jurisdictional objection is baseless and the Arbitrator should order the Bill 124 re-opener language proposed by UTFA.

II. RESPONSE TO ADMINISTRATION PROPOSALS

Administration Proposal re Retiree Benefits

60. At paragraphs 352-355 of its brief, the Administration proposes that any benefit increases that are awarded by the Dispute Resolution Panel should be applied only to active employees and not to retirees. That is, the Administration proposes that going forward, retirees should not receive the same benefits as other UTFA members. Similarly, at paragraphs 321-332 of its brief, the Administration argues against UTFA's position that retirees should continue to receive the same benefits as active employees.
61. As UTFA set out in its main brief, this Administration proposal constitutes a radical, breakthrough change which the Administration has failed to justify in any respect. UTFA relies on the arguments at paras 280-287 of its brief.
62. The consistent, longstanding, past practice at the University of Toronto is that retirees receive health benefits equal to those enjoyed by active members at UTFA. The Administration's proposal therefore takes an axe to longstanding benefits for an important segment of UTFA membership and constitutes a breakthrough and significantly harmful change without any demonstrated need.
63. Despite the radical nature of its proposal, the Administration has not presented any evidence to support that there is a demonstrated need for such a serious concession on the part of UTFA members. Indeed, it cannot. As the Association has pointed out in its brief, UofT is enjoying considerable financial health, including continuing to enjoy a surplus as of fiscal year ending 2022. As the 2022 Financial Report at Tab 5 of UTFA's Book of Documents demonstrates, the University has continued to thrive, with an ability to finance its capital projects. Moreover, contrary to the Administration's assertion, there is no evidence that the University's unfunded liabilities are growing to the extent that they represent a threat to the financial health of the institution. There is no evidence whatsoever to suggest that the University is unable to cover the cost of continuing to provide retiree benefits at the same level as active employees. This is a red herring.
64. Similarly, there is no evidence to support the Administration's contention that the cost of retiree health benefits is contributing to the University's unfunded liabilities in a manner which is seriously constraining the University's net assets or ability to borrow money. To the extent that these concerns relate to a change in accounting practices and the requirement for accrual accounting in the university sector, this requirement has been in place since 2007. This means that the accounting costs on the University's balance sheet have been a part of the system for 15 years. These requirements can hardly be cited as a new issue that has to be dealt with now, and through major concessions on the part of UTFA members. Moreover, these liabilities are not funded, so there is no cash impact on the University's finances. This liability might conceivably have an impact on the University's ability

to borrow on financial markets, but there is no evidence whatsoever that the University of Toronto is experiencing any difficulty in borrowing to finance capital expenditures.

65. There is simply no basis on which the University Administration can argue that as a matter of economic cost and the financial health of the University, such cuts to retiree benefits are necessary.
66. Moreover, in the context of a worldwide global pandemic, which impacts in particular on older individuals, it would be particularly serious to cut medical benefits for this more vulnerable segment of UTFA members. Such objective factors strongly mitigate *against* the Administration's proposal.
67. In seeking to support its proposal, the Administration argues that previous arbitrators who awarded equalization of benefits between active employees and retirees did so only on the basis of "modest cost", which "modest cost" the Administration says no longer applies. In UTFA's submission, this argument is a misreading of the case law with respect to retiree benefits between the parties.
68. For example, the Administration relies on the December 23, 1986 interest arbitration award between the parties to argue that Arbitrator Munroe was swayed to grant the Association's proposal on retiree benefits because the cost of the proposal was "relatively modest". The Administration seeks to rely on the Munroe decision to argue that the cost of retirees should be considered as a relevant factor in determining whether retirees should enjoy the same level of benefits as active employees.
69. At the time, the Employer paid 75% (health) and 80% (dental) of the premiums for active faculty members, and 50% of the cost of the premium for retirees. UTFA sought for the premium subsidy to be equalized for retirees. Arbitrator Munroe, in awarding the Association's proposal, supported the principle of equalization, and determined that the Association would have been successful in negotiating the change:

...The Association believes that the amount of subsidy should be the same for pensioners as it is for faculty and librarians with active status.

In our view, that belief has merit. Moreover, the cost of the Association's proposal is relatively modest. All in all, we think that the proposal would have held sway at the bargaining table. Accordingly, it should be awarded...

Governing Council of the University of Toronto and UTFA, December 23, 1986 (Munroe), at 17, **Tab 10** of the Administration's Book of Documents.
70. Arbitrator Munroe's comment about the "relatively modest" cost was limited to the change in premium contribution. Arbitrator Munroe did not hold that the overall cost of retiree benefits had to be relatively modest in order for retiree benefits to be equalized more generally (nor that granting the change in employer contribution

was solely predicated on cost). It is also relevant that Arbitrator Munroe issued his award in 1986, at a time when all UTFA members were required to retire at age 65. Since the end of mandatory retirement, the University has experienced a steady increase in the number of faculty members continuing to work past 65, and as such the number of retirees drawing on retiree benefits has diminished.

71. Moreover, Arbitrator Munroe quite rightly pointed out that the equalization of retiree benefits was an issue where, as a matter of the replication principle, UTFA would likely have held sway at the bargaining table. Similarly, UTFA submits that cuts to retiree benefits is an issue over which UTFA would have held sway at the bargaining table. In applying objective criteria, including considerations of the prevailing economic context, including the disproportionate impact of the COVID-19 pandemic on older adults, and the impact of the Bill 124 constraints on compensation, it is unlikely the parties would arrive at an agreement where retirees would lose benefits. Further, there is a long bargaining history over which UTFA has negotiated and maintained equalization.
72. The Administration further relies on the May 21, 2003 and November 14, 2003 awards between the parties to suggest that Arbitrator Teplitsky awarded equal benefits to retirees similarly based on the relative cost of providing the benefit to retirees as compared to active members.
73. The Administration cites Arbitrator Teplitsky's May 21, 2003 award to suggest that he would not grant the Association's proposal for improvement to orthotics and orthopaedic shoes unless the associated cost decreased, however the Administration fails to mention that Arbitrator Teplitsky stated he could not find reason to interfere with the benefit, from either the Association *or the Administration's perspective*.

*Governing Council of the University of Toronto and UTFA (Supplementary Award 1), May 21, 2003 (Teplitsky) at **Tab 32** of the Administration's Book of Documents.*

74. Subsequently, Arbitrator Teplitsky determined that a reduction in projected cost for the orthotics and orthopaedic shoes' benefit could fund the Association's proposal to improve major restorative dental coverage (for both actives and retirees).
75. The Administration cites Arbitrator Teplitsky's November 14, 2003 award to suggest that Arbitrator Teplitsky extended access to the increased benefit for major restorative dental coverage to retirees because of the assumed modest nature of the cost and/or benefit improvement. The circumstances of that interest arbitration can be distinguished from the present case because Arbitrator Teplitsky found it was unclear from the documentary record whether UTFA's ask was for active faculty members as well as retirees. Notwithstanding the lack of clarity, Arbitrator Teplitsky was satisfied that UTFA held an honest belief that whatever was awarded would apply to retirees. As Arbitrator Teplitsky noted, retiree benefits have an impact on the overall bargaining between UTFA and the Administration. In his post

facto review, Arbitrator Teplitsky determined that if the question had been squarely before him, he would have awarded the improvement.

Governing Council of the University of Toronto and UTFA (Supplementary Award 2), November 14, 2003 (Teplitsky) at **Tab 33** of the Administration's Book of Documents.

76. The Association respectfully submits that having considered the bargain that would have been otherwise been achieved by the parties, Arbitrator Teplitsky determined that the Association had not received a windfall as a result of clarifying that the award extended to retirees, and his decision to award equal benefits to retirees was not based on the sole premise that the relative cost of providing benefits to retirees was modest.
77. In the alternative, to the extent that the interest arbitration awards cited by the Administration do suggest that provision of equal benefits to retirees is premised on a relatively modest cost of provision as compared to active members, UTFA submits that that cost of equal benefit improvements for retirees in this round is not significant, particularly given the Bill 124 context which already significantly limits the extent of benefits improvements that UTFA can achieve:

Proposal	UTFA's Costings		Portion of cost applicable to maintaining equal access for retirees
	Administration's Portion of Cost – Actives	Administration's Portion of Cost – Retirees	
Psychology and mental health	*\$76,000	Minimal	Minimal
Paramedical	*\$99,000	\$37,500	27%
Vision	*\$85,000	\$32,000	27%
TOTAL	\$260,000	\$139,000	

*UTFA has modestly revised its original cost estimates, as set out paras 264-297 below.

78. The total cost of UTFA's proposed benefits improvements for retirees is in the range of \$139,000. It is frankly shocking that the Administration would take the position that this cost is such that could justify making the radical move of restricting retiree benefits, or that the cost of retiree benefit improvements is such that they represent a threat to the financial health of the institution. This amount is inconsequential given the University's extraordinarily healthy financial situation as articulated in paragraphs 16 to 26 of UTFA's brief. Even on the University Administration's own costings of UTFA's benefits proposals—which UTFA submits are inflated and based on unduly aggressive costing assumptions—the projected cost of applying these benefit improvements to retirees is only \$283,300.

79. Notably, the most expensive benefit in the existing benefits package for UTFA members is drug coverage; however, because most retirees are eligible for the Ontario Trillium Drug Plan, retiree costs are much less than for active employees.
80. With respect to comparators, there is considerable variation among universities with respect to the provision of benefits to retirees. As the Administration's own comparator chart (pp. 143-146 of the Administration's brief) demonstrates, benefit plans range from no benefits to retirees (e.g., University of Alberta) to equal benefits for retirees and active employees (University of Western Ontario and University of Toronto). The University of Toronto is certainly not an outlier. Moreover, the Administration's comparator chart is incomplete. For example, in addition to the University of Western Ontario and the University of Toronto, Carleton University also maintains the same level of health and dental benefits for retirees as for active employees. In any event, UTFA submits that comparators are much less relevant in relation to this proposal, given that UTFA members have essentially "bought" equal benefits for retirees as part of their total compensation through multiple successive rounds of bargaining, and given the nature of this proposal as a breakthrough item with no demonstrated need.
81. The Administration also cites changes in accounting practices and unfunded liabilities to justify its proposal. However, changes to the Generally Accepted Accounting Principles (GAAP), including the use of the accrual method rather than cash method, have been in place since 2001 (as noted at para 330 of the Administration's brief). Therefore, this is not a new issue and certainly does not justify a significant, harmful breakthrough item like the one being proposed by the Administration.

a) Bill 124 does not impact on retiree benefits

82. The Administration takes the position that improvements to retiree benefits must be costed against the Bill 124 envelope; that is, that even if benefits for retirees continue at the same level as for actives, the cost of the benefits must fit within the statutory 1% cap imposed by the Ontario government. This position is simply wrong in law, as a matter of statutory interpretation.
83. As noted by Arbitrator Hope, in the context of wage restraint legislation, an arbitrator's role is to read the legislation in a strict, and not overly-expansive manner, which would jeopardize the rights of the parties:

...[T]he duty of the arbitrator is to defend the rights of the parties and to resist any compromise of those rights that does not arise as an express requirement of the legislation.

Re Beacon Hill Lodges of Canada and Hospital Employees Union, 1985 CanLII 5413 (BC LA) (Hope) at 303-305. Tab 2 of UTFA's Reply Book of Documents.

84. Bill 124, *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, SO 2019, c 12, defines compensation in the following manner:

2 In this Act,

...

“compensation” means anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments; (“rémunération”)

85. The Supreme Court of Canada’s decisions in *Rizzo & Rizzo Shoes Ltd. (Re)*, and *Bell ExpressVu Limited Partnership v. Rex* set out the Court’s guiding principles in statutory interpretation.

86. In *Rizzo & Rizzo Shoes*, the Court stated:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 22, **Tab 10** of UTFA’s Reply Book of Documents.

87. In *Bell ExpressVu*, the Court summarized the approach to be taken with respect to statutory interpretation. The Court cited *Rizzo & Rizzo Shoes* with approval and affirmed that the approach to statutory interpretation as stated above. It further indicated that other principles of interpretation, such as the strict construction of penal statutes and the Charter values presumption only receive application when there is ambiguity as to the meaning of a provision. An ambiguity is “real” and arises when the words of a provision are reasonably capable of more than one meaning within the entire context of a provision. An ambiguity does not arise merely because multiple courts have come to differing conclusions on the interpretation of a given provision. Rather, a court charged with interpreting a provision must undertake a contextual and purposive approach and then determine if the wording is sufficiently ambiguous.

Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42 (CanLII), [2002] 2 SCR 559 at **Tab 11** of UTFA’s Reply Book of Documents.

88. From a plain and ordinary reading of Bill 124, compensation in the legislative context clearly refers to monetary payments and perquisites paid to employees, not to individuals who have retired from employment. There is no ambiguity requiring the application of other principles of interpretation.

89. The Administration's assertion that retiree benefits must be costed against the very limited increases allowed by Bill 124 for employees is therefore completely contrary to a plain reading of the legislation.
90. This was precisely the finding of Arbitrator Stout in interest arbitration decision *Independent Electricity System Operator v The Society of United Professionals*. In that case, the parties disagreed on the application of Bill 124 to wage proposals and the costing methodology. The employer argued that benefits provided to retirees and pensioners were included in the total compensation costing under Bill 124. Arbitrator Stout rejected the employer's argument and held that the compensation constraints of Bill 124 did not apply to retirees or pensioners:

...the ordinary and grammatical meaning of the language of *Bill 124* reflects the intention of the legislature to restrict the application of the *Act* to "employees" and the compensation that is constrained means compensation paid to employees. The language is absolutely clear and there is no ambiguity. A retiree or pensioner is not an employee they are former employees...

Independent Electricity System Operator v The Society of United Professionals, 2021 CanLII 137444 (Stout) at para 34, **Tab 38** of UTFA's Book of Documents.

91. Arbitrator Stout reasoned that if the legislature had intended to apply compensation constraints to pensioners and retirees, it would have used language that clearly captured such persons. Arbitrator Stout concluded "it must have been the intention of the legislature not to include benefits paid to retirees or pensioners who generally are not actively employed and live on fixed incomes."

Ibid, at para 35, at **Tab 38** of UTFA's Book of Documents.

92. Bill 124 limits salaries and compensation related to salary for employees to 1%. Retirees are self-evidently not employees. The Administration's argument that increases to costs for retirees is captured by Bill 124 is not supported by a review of the legislation or arbitral caselaw.
93. The Court in *Bell ExpressVu* further held that the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. It noted that Hansard can play a limited role in the interpretation of legislation, and that while courts should be mindful of its limited reliability and weight, it should be admitted as relevant to both the background and purpose of legislation.
94. In this regard, the Hansard debate further supports the Association's interpretation of Bill 124. In the bill's second reading, the bill's sponsor, the Honourable Peter Bethlenfalvy, President of the Treasury Board, stated:

...The proposed legislation represents a fair and time-limited approach that applies across the provincial public sector. If passed, employees would still be eligible for compensation increases and they would retain the ability to move through established salary ranges. They would also be able to negotiate terms and conditions....

...Public sector employees would still be able to progress through salary ranges, be eligible for compensation increases, and be able to negotiate terms and conditions, including compensation....

[emphasis added]

Hansard Transcript, Second Reading, October 28, 2019, at 5682-5683, **Tab 12** of UTFA's Reply Book of Documents.

95. The comments of the Honourable Bethlenfalvy clearly show that *Bill 124* was intended to apply to those actively employed in the provincial public sector and not to retirees who would have no ability to "progress through salary ranges."
96. Importantly in this case, UTFA and the University Administration calculated the Bill 124 residual amount based on compensation for active employees only, and not including retirees. In other words, the figures used by the parties as a baseline for compensation in 2021/2022 (and which resulted in the agreement to an envelope of \$612,060 in the January 25, 2022 MOS) did not include any compensation for retirees. If the University Administration had wanted to assert that benefits for retirees should be costed against the Bill 124 1%, then it should have provided, and proposed utilizing, compensation tables which included compensation paid to retirees (for example, in the form of per-course stipends) and the costs of benefits paid to retirees. The Administration did not do so. It cannot now, therefore, reasonably take the position that retiree benefits should be costed against the \$612,060 amount.

III. REPLY TO ADMINISTRATION'S SUBMISSIONS ON UTFA PROPOSALS

97. In its brief, the Administration addresses UTFA's proposals to improve the workload and benefits of UTFA members. By way of Reply, UTFA makes the following submissions.

The Administration's general arguments regarding workload proposals

98. The Administration's arguments against UTFA's workload proposals—which repeatedly seek to portray UTFA's proposals as “radical” and “rigid”—are based on a profound mischaracterization of UTFA's proposals and of the principles applied by interest arbitrators. Moreover, the Administration's arguments are based on a fundamental misunderstanding about the differences (and similarities) between the Teaching and Tenure Streams at the UofT.
99. The Association's responses to the Administration's comments on UTFA's specific proposals are set out in Section IV in detail below. However, it is helpful to begin with some preliminary comments regarding the Administration's approach to UTFA's workload proposals.

a) The Administration mis-states the applicable principles of interest arbitration

100. The Administration relies on the gradualism principle, and Arbitrator Kaplan's 2020 interest arbitration award, to suggest that *virtually no improvements* can be made to the WLPP and/or provisions governing UTFA members' workload. This is clearly a misapplication of the principle of gradualism, which refers to how arbitrators should generally seek to made gradual, or incremental, changes to longstanding provisions of collective agreements between mature parties.
101. However, the question before an interest arbitrator is what is the change that UTFA would have secured in respect of workload at the bargaining table and/or what is the next increment of change that flows from the bargaining context and in light of the parties' current agreement and objective factors such as relevant sectoral comparators.
102. The Administration's argument is effectively that since Arbitrator Kaplan rejected the Association's proposals on workload in the 2020 interest arbitration, UTFA's proposals on workload in the current round of bargaining should be similarly rejected. On its own, this is insufficient reasoning and obviously cannot be the case – or else a union would never be able to bargain new collective agreement provisions on behalf of its members. Rather, an interest arbitrator must freshly apply normative interest arbitration principles, considering the economic context, comparator agreements, and agreements achieved by the parties, to determine if the Association's proposal would have held sway in bargaining.

103. In particular, the intervening context of the COVID-19 pandemic has shone a bright light on the deep and significant policy gaps with respect to the lack of workload protections at the University. For clarity, it is not UTFA's position that its workload proposals are required in order to address problems of workload caused by the COVID-19 pandemic; the workload issues UTFA seeks to address pre-existed the pandemic. However, the advent of the pandemic highlighted and made clear the degree to which UTFA members are being subjected to overwork and burnout, and the failure of the WLPP to address these phenomena or to reasonably protect UTFA members.
104. In any event, and as explained in UTFA's interest arbitration brief, UTFA's proposals are different than those the Association made in 2020.
105. Moreover, Kaplan's 2020 award recognized and reinforced the importance of transparency and equity as fundamental principles with respect to workload distribution.

Governing Council of the University of Toronto and UTFA, June 29, 2020
(Kaplan) at **Tab 24** of UTFA's Book of Documents.

106. Arbitrator Kaplan's award resulted in the current language in Article 2.18 of the WLPP. While helpful, this change has not resulted in "full transparency" of individual and relative workloads that he sought to achieve. More is needed to achieve this objective.
107. Importantly, and contrary to the Administration's assertions, UTFA's proposals are incremental in nature, building from Arbitrator Kaplan's award, and constitute an extension of prior changes made.

b) The workload policies at UofT are under-developed, inadequate, and require improvement

108. The Administration asserts at paragraph 47 that the parties have a "mature" bargaining relationship dating back more than 40 years. The Administration's argument appears to be that, because the parties have a mature bargaining relationship, only the most modest changes should be awarded by an interest arbitrator in relation to the WLPP.
109. In so arguing, however, the Administration misstates the nature of the bargaining history at the UofT. While the parties do have a long history of bargaining pension and benefits under Article 6, it was only in 2010 that UTFA gained for the first time the ability to negotiate terms and conditions relating to workload. Prior to this time, UTFA had no ability to negotiate any terms and conditions of employment related to workload, and there existed no policies at UofT governing workload. As such, there was a major lacuna in the governing policies at the UofT, conditions of significant overwork, and pervasive concern and frustration by UTFA members. Indeed, and as set out in UTFA's interest arbitration brief at paragraphs 43-48, 50-

55, it was because of the considerable concern articulated by UTFA members with respect to the lack of regulation of workload, and the political pressure that members brought to bear, that the Administration ultimately agreed to expand Article 6 negotiations to include Workload for the first time.

110. When the Administration and UTFA agreed to the WLPP in 2011, this was the first policy of any kind that sought to govern the workload of UTFA members (see paras 43-48 of UTFA's main brief). As such, the parties have only had the opportunity to bargain workload matters for the last 11 years—hardly the “mature” bargaining relationship the Administration asserts as a basis for its arguments about gradualism.
111. It is not surprising, therefore, that the majority of UTFA's proposals relate to workload matters given that UTFA members persistently raise serious and significant concerns about crushing workload and burnout, and that workload protections at the UofT remain under-developed and inadequate. By contrast to the more comprehensive and established workload provisions that have existed for many more years at other universities (including, variously, provisions which establish distribution of effort for Tenure Stream and Teaching Stream faculty, limits on teaching load, limits on enrolment, robust requirements for transparent assignment of workload, and transparency with respect to the assignment of TAs), the UofT remains far behind in its workload protections for faculty members and librarians.
112. In effect, when the WLPP was implemented in 2011, UofT was already an outlier and significantly behind other universities with respect to the governance of workload.
113. Indeed, as the Association pointed out at paragraph 48 of its brief, in negotiating the WLPP to begin with in 2011, UTFA understood that the full realization of appropriate workload protections would require improvement as the parties gained on-the-ground experience. Far from being a fully-evolved policy document resulting from a mature bargaining relationship, and which requires only modest “tweaks” around the margins, as the Administration suggests, the parties were aware from the outset that the 2011 WLPP was only a first effort and would require revision over time. The proposals UTFA makes in this round are part of that incremental pattern of improvement, consistent with the principle of gradualism. At the same time, while UTFA recognizes that the WLPP will continue to evolve incrementally over time, it is also apparent that UTFA's proposed changes are necessary in order for the WLPP to be meaningful and effective.
114. Moreover, and as already stated, the Administration's assertion that the principle of gradualism must solely be considered vis-à-vis the terms and conditions of employment already applied to the affected employees. As already set out, arbitrators have consistently held that objective criteria, such as comparators in the sector, are a highly relevant factor to consider, and are not to be divorced from the principle of gradualism.

115. In any event, UTFA submits that its proposals are appropriately gradual and incremental vis a vis the provisions in place in the WLPP. As clearly set out in UTFA's main interest arbitration brief, various policies already in existence at the UofT already establish and acknowledge the principles which ground the Association's workload proposals. For example:
- The principle that the work and responsibilities of Tenure Stream faculty can be described as comprised of 40% teaching, 40% research/creative professional activities, and 20% service is already clearly acknowledged and accepted in the PTR Policy (contained in the Academic Administrative Procedures Manual (AAPM) at **Tab 13** of UTFA's Reply Book of Documents). As discussed in further detail below, UTFA rejects the Administration's argument that the PTR Policy is separate from, and irrelevant to, allocation of workload.
 - The principle that the normative teaching load of Teaching Stream and Tenure Stream faculty members can be quantified and set out in unit workload policies (albeit in terms of FCE, rather than %) is widespread; see e.g. the unit workload policies listed at paragraphs 179-180 of UTFA's brief.
 - The principle that restrictions on teaching load can be set out in a formula and by reference to the teaching load of Tenure Stream faculty is already acknowledged, by analogy, in Article 9.1 of the WLPP, which recognizes that the teaching load of CLTA faculty can be set out in a formula and by reference to the teaching load of Tenure Stream faculty.
116. There is nothing "radical" about taking the next step to further integrate these principles through the workload proposals UTFA has made.
- c) The Administration seeks to create and impose a difference between scholarship and teaching in the Tenure Stream and in the Teaching Stream which is not supported in policy and which threatens academic freedom**
117. Throughout its submissions, the Administration makes a number of comments with respect to the purported distinctions between the Teaching Stream and the Tenure Stream which are deeply problematic and which are neither supported by UofT policy nor by on-the-ground experiences of faculty members.
- i. First, the Administration asserts that the scholarship of Teaching Stream faculty arises in the context of, and is necessarily tied to, the [course-related] teaching duties of the faculty member. This assertion fails to acknowledge that Teaching Stream faculty also engage in discipline-based scholarship and that such a restriction constitutes a violation of academic freedom.

- ii. Second, while Teaching Stream faculty engage in more teaching than do Tenure Stream faculty (i.e., they teach more courses in a given year), the activities related to teaching are fundamentally the same (e.g., course preparation, classroom teaching, student evaluation). It is not accurate or meaningful to suggest that the teaching activities of Teaching Stream faculty are somehow different in nature than the teaching activities of Tenure Stream faculty.
118. As a preliminary comment, it is important to emphasize that UTFA recognizes *and values* certain key distinctions between the two groups of faculty members. As a teaching-intensive (not teaching-only) stream, Teaching Stream faculty undoubtedly have a different balance of responsibilities, with a greater focus on teaching than Tenure Stream faculty. The systems of career advancement for Teaching Stream faculty similarly reflect this more intensive teaching focus. At the same time, however, the fact that Teaching Stream faculty members engage in *more* teaching, does not mean that their teaching or scholarly activities are fundamentally different than for members of the Tenure Stream.
 - i. *The Administration unduly narrows scholarship in the Teaching Stream*
119. At paragraphs 188-189 of its brief, the Administration seeks to unduly narrow the scope of scholarly activities in which Teaching Stream faculty engage, arguing that

Teaching Stream faculty members are not expected to develop and advance a research program that is independent of their teaching duties. Instead the pedagogical and professional activities in which they engage are to be related to the teaching duties that are at the centre of their appointment.
120. This is a fundamental misreading of the scholarly activities of Teaching Stream faculty.
121. Further, the Administration's argument seems to be that the promise of reasonable time for scholarship in the Teaching Stream is effectively "built-in" to teaching activities, and therefore that Teaching Stream faculty members either do not need additional time in which to undertake scholarship, or their teaching (course preparation and delivery) time forms most of their time for scholarship. With respect, either proposition is absurd and offensive, and infringes on the academic freedom of Teaching Stream faculty.
122. As UTFA laid out at paragraphs 145-148 of its arbitration brief, the Teaching Stream is a scholarly stream with a teaching intensive focus. Both the AAPM and the WLPP clearly recognize that there are three principal components of a faculty member's appointment—whether in the Teaching or Tenure Stream—namely teaching, research and service. The *Policies and Procedures on Academic Appointments* (PPAA) (at **Tab 14** of UTFA's Reply Book of Documents) further clarifies at paragraph 30(x) that, in order to achieve continuing status, a Teaching

Stream faculty member is required to demonstrate excellence in pedagogical/professional development, which may be demonstrated in a variety of ways:

e.g. discipline-based scholarship in relation to, or relevant to, the field in which the faculty member teaches; participation at, and contributions to, academic conferences where sessions on pedagogical research and technique are prominent; teaching-related activity by the faculty member outside of his or her classroom functions and responsibilities; professional work that allows the faculty member to maintain a mastery of his or her subject area in accordance with appropriate divisional guidelines.

123. Further, and as discussed at paragraphs 146-147 of UTFA's brief, the *Policy and Procedures Governing Promotions in the Teaching Stream* requires Teaching Stream faculty to demonstrate evidence of scholarship ("continuing future pedagogical/professional development")² in order to achieve promotion to Full Professor, Teaching Stream.

Policy and Procedures Governing Promotions in the Teaching Stream, Tab 15, UTFA Reply Book of Documents

124. In other words, it is evident that Teaching Stream faculty have an obligation to engage in scholarship and that they may satisfy this obligation through discipline-based scholarship *in relation to, or relevant to, the field in which they teach*.
125. The Administration's arguments, however, seek to unduly narrow the scope of scholarly activities in which Teaching Stream faculty engage by asserting that Teaching Stream faculty may only engage in research activities directly tied to their "teaching duties" even if their course assignments shift significantly from term to term or year to year and that their pedagogical and professional activities are required to be related to "the teaching duties that are at the centre of their appointment". This is a profound reworking, and materially different, articulation of the scholarly activities of Teaching Stream faculty, and is not grounded in UofT policy. Teaching Stream are not obligated to tie their research activities to their "teaching duties"; they are entitled to reasonable time to engage in discipline-

² Para 10 of the *Policy and Procedures Governing Promotions in the Teaching Stream* provides: "Evidence of continuing future pedagogical/professional development may be demonstrated in a variety of ways e.g., discipline-based scholarship in relation to, or relevant to, the field in which the faculty member teaches, participation at, and contributions to, academic conferences where sessions on pedagogical research and technique are prominent, teaching-related activity by the faculty member outside of his or her classroom functions and responsibilities, and professional work that allows the faculty member to maintain a mastery of his or her subject area in accordance with appropriate divisional guidelines."

based research, scholarship, and creative professional activities “relevant to” or “related to” the *field* in which they teach, as clearly established by the PPAA.

126. Take, for example, a Teaching Stream faculty member who obtained their PhD in French Renaissance literature and who teaches in the Department of French. In a particular year, the faculty member is assigned to teach courses in Quebecois literature and French as a Second Language. Despite these course assignments, however, the faculty member in this scenario is not, in UTFA’s contention, in any way constrained to only conduct research on Quebec Literature or in the pedagogy of teaching French as a second language (i.e., subject areas relevant to the member’s “teaching duties”). Rather, the faculty member is entitled to a “reasonable” proportion of time to conduct research in subject areas “related to, or relevant to”, their general field, which include a wide variety of subject areas including for example French literary analysis, or Francophone Cinema, or contemporary feminist French-African writers. The member might also be engaged in developing new research interests in related areas such as Linguistics, or Comparative Literature. These are all subject areas broadly relevant or related to the faculty member’s field of French literature, but may not be specifically tied to their specific teaching duties in any given term. In UTFA’s strong contention, such research direction is wholly within the faculty member’s purview, and to constrain the faculty member to only engaging in research directly related to their teaching duties is unduly narrow, inconsistent with the PPAA, and a breach of the member’s academic freedom.
127. In addition to the fundamental issues of academic freedom, there is also an impracticality to the Administration’s arguments. In many circumstances, a Teaching Stream faculty member’s course assignment may change from year to year; following the Administration’s formulation—which constrains Teaching Stream faculty to only engage in research directly related to the courses they are teaching—faculty would then be in the impossible position of having to re-start their research agenda each year and on a regular basis, and would not be able to build on the research they have carried out to date. This is a totally impractical approach to research—given the typical life-cycle of a research project which can take multiple years from conceptualization of an idea, to collection of data, to presentation of a conference paper, to preparation of a peer-reviewed article or book manuscript, to publication. More importantly, it significantly impoverishes the scholarly life of a Teaching Stream faculty member and the contributions that they can make to the University, their students, and their fields of scholarship more generally.
128. The Administration’s approach also results in the illogical outcome that the more courses a faculty member is assigned, the *more* time they have to engage in scholarly activity, since teaching preparation is assumed to comprise part of the member’s scholarship. This is, of course, absurd. A faculty member who is assigned eight half courses does *not* have more time to carry out scholarship than a faculty member who is assigned six or seven half courses. Nothing about this formulation ensures “reasonable time” for scholarship.

129. In that regard, it is important to underscore that even though a Teaching Stream faculty member's scholarly activities are expected, under the PPAA, to be "in relation to, or relevant to, the field in which the faculty member teaches", they still require time to engage in these activities *outside of* and *in addition to* their teaching activities. In other words, the fact that the Teaching Stream professor in the example above is teaching Quebec Literature, does not mean that the course preparation, or time spent updating the course syllabi, or activities involved in developing innovations in classroom teaching, somehow constitute their "scholarship". These continue to be the normal and expected activities that comprise "teaching".
- ii. The activities of teaching are the same, whether for Tenure or Teaching Stream faculty*
130. The Administration's premise that scholarship, for the Teaching Stream, is "built-in" to their teaching requires accepting that teaching a course is somehow different for a Teaching Stream faculty member than it is for a member of the Tenure Stream. Not only is this, in UTFA's submission, a baseless proposition, but it is also a violation of the principles articulated in the WLPP that comparable work will be counted in a comparable manner, and that there are "3 principal components" of workload, not two [WLPPP 1.2].
131. Put differently, a Tenure Stream faculty member has the same obligation to engage in course preparation as Teaching Stream colleague. This requires, for the Tenure Stream faculty member just as much as for the Teaching Stream faculty member, careful attention to students' needs when designing and delivering courses, updating of course materials, updating assignments, evaluating students, and reporting results. These activities do not constitute the Tenure Stream faculty member's "scholarship", they are clearly part of the member's teaching. For the same reason a Teaching Stream faculty member's course preparation does not constitute their "scholarship". These are clearly teaching activities, and Teaching Stream faculty are entitled to separate time to engage in scholarly activities.
132. For clarity, UTFA acknowledges, of course, that Teaching Stream faculty members engage in more teaching than their Tenure Stream colleagues, and that Teaching Stream faculty are required to demonstrate excellence in teaching to achieve continuing status, whereas Tenure Stream faculty can achieve tenure on the basis of competence or excellence in teaching. However, it would be incorrect to therefore conclude that the activity of teaching for Teaching Stream faculty is somehow different than the activity of teaching for Tenure Stream faculty.
133. Ultimately, the goal for all faculty at the UofT is to create a rich learning environment for students. Students generally have no idea when they are in a classroom whether they are being taught by a member of the Teaching Stream or the Tenure Stream. The experience of students in the classroom, the preparation that goes into ensuring a rich learning experience for the student (for example, time and effort spent in planning curriculum, preparation of lectures and

assessment tools, responding to student questions, and in evaluation of students), and the learning experiences of the students, are the same for a faculty member in the Tenure Stream and Teaching Stream.

IV. REPLY TO ADMINISTRATION ARGUMENTS ON SPECIFIC UTFA PROPOSALS

UTFA Proposal 1D – TA Support

134. At paras 123-136 of the Administration’s brief, the Administration asserts that UTFA’s proposal for greater transparency in the assignment of TAs should be rejected because (a) this would run contrary to the principle that each unit should make determinations for itself, and (b) the proposal places too much weight on student enrolment in a course as a factor for TA support.
135. With respect to the first argument, as already set out, the Administration’s arguments inappropriately elevate the principle of local autonomy to create a kind of “super-value” governing the WLPP. This is neither warranted by, nor consistent with, Article 1.2 of the WLPP.
136. Rather, while section 1.2 of the WLPP acknowledges collegial practices and local autonomy as a relevant factor, this must also be balanced with the principles of “a **fair, reasonable, and equitable** distribution of workload” and “a **transparent** process of workload allocation within a unit, based on decisions made in accordance with criteria that are known to members within that unit”. Currently, decisions with respect to allocation of teaching assistant resources meet neither of these two criteria. That is, the process by which TAs are allocated, and the criteria for assignment, are generally not known to UTFA members within the unit (or between units), and as such there is no ability for UTFA members, or the Association, to determine if resources are being allocated in a fair, reasonable and equitable manner.
137. The principle of collegial decision-making cannot be reified into a kind of trump card which overrides these important baseline values in the WLPP. In any event, UTFA’s proposal specifically proposes that there be a collegial divisional process for the establishment of standards for allocation of TA support. This is hardly a “prescriptive” or “rigid” proposal. Indeed, such processes are standard at many Ontario universities, as set out in the comparator charts at pp. 28-31 of UTFA’s main brief.
138. Moreover, even if UTFA’s proposal (reasonably) recognizes class size/enrolment as a material factor to be considered in the allocation of TA resources, the proposal does not preclude units from adopting additional factors as criteria for allocation of TA hours—such as proportion of graduate students to undergraduate students, availability of specialized technology, mode of delivery. Rather, UTFA proposes that the WLPP be amended to establish “3. A requirement that each Division establish a process for increased and equitable distribution of TA support to members with enrolment above the minimum standard (limit)...” This divisional process could potentially include recognition of other relevant criteria, including the factors that the Administration itself lists at para 130 of its brief:

- a) "Whether or not a course has lab components that may require students to be supervised by individuals other than the course instructor;
 - b) A course's hours of instruction, because certain courses, including introductory language courses, many not have the same enrolment levels as introductory humanities courses, but many have language practicum sessions that are delivered by Teaching Assistants;
 - c) Specific course work and methods of evaluation, because courses where students are evaluated using multiple written assignments and not electronically-marked tests and examinations may require increased Teaching Assistant support to assist with the review and marking of these written assignments; and
 - d) The workload assignments of specific faculty members in a given year, because a faculty member may be assigned workload including the delivery of new courses that require additional preparation time such that they will need additional Teaching Assistant resources, regardless of how many students happen to be enrolled in their courses."
139. Similarly, UTFA's proposal does not preclude units from revising the criteria for allocation of TAs in the unit workload policy on an annual basis (the WLPP states that review of unit workload policies is required at a minimum every three years).
140. In the alternative, and in an effort to be responsive to the Administration's concerns, the Association proposes that the WLPP should be amended to establish:
- A requirement that each Department/Division establish in the Unit Workload Policy a minimum standard for access to TA support having regard to course enrolment and any other factors deemed relevant by the Unit Workload Committee, including, as deemed appropriate or relevant by the Committee: whether or not a course has lab components that require supervision; hours of instruction; practicum sessions; particular needs related to specific course work or methods of evaluation; the workload assignment of specific faculty in a given year; and any other relevant factor(s).
141. In the further alternative, UTFA proposes that, at a minimum, UTFA should be entitled to receive information with respect to the rules, guidelines and/or practices currently in place at the unit and division-level affecting the allocation of TA support, as set out at para 92 of UTFA's interest arbitration brief.

UTFA Proposal 1G – Mandatory Unit Workload Policy Factors

142. As previously stated, the Administration’s assertion that UTFA’s proposal is “rigid” and “formulaic” is a straw-person argument, and entirely misses the purpose and objective of the Association’s proposal.
143. UTFA proposes that the WLPP should be strengthened by ensuring not only that local workload committees “may” consider the various factors listed in section 4.2 in assessing teaching load, but also that the local workload committees “shall” have regard to a core set of factors (“Unit Workload Policies shall include consideration of the following factors...”). As UTFA set out in its brief, there is nothing in UTFA’s proposed language which would require units to treat or weigh each of these factors in any particular or prescriptive fashion; rather, the proposal simply requires workload committees to expressly address these factors in the unit workload policy, and how they are to be weighed in establishing workload.
144. UTFA’s proposal does not preclude units from deciding – having actively turned their minds to the listed factors – *how* any of the 1G factors should be considered by the unit in assessing teaching load, including that the unit may decide that some factors will have *no* impact on weight. UTFA’s proposal requires the unit to turn its minds to these factors and to indicate in the workload policy how these factors will be weighed. This is necessary to achieve the goals of a transparent, fair, and equitable distribution of workload.
145. UTFA’s proposal 1G is not rigid or prescriptive proposal or a failure to acknowledge or respect collegial norms. Rather, this is a proposal to enhance transparency, to ensure appropriate rigour in the work of the unit workload committee, and to ensure that colleagues in the units know and understand what the local policies and processes will be.

UTFA Proposal 1H – Equitable Course Release

146. UTFA has proposed strengthening the WLPP by requiring that course releases be granted equitably. This is entirely consistent with the values and principles agreed to by the parties and as set out Article 1.2 of WLPP.
147. The Administration objects that UTFA’s proposal is another attempt to impose a rigid and formulaic entitlement. This is simply not the case, and represents a fundamental mischaracterization of UTFA’s proposal.
148. As already discussed, Article 1.2 of the WLPP already provides that UTFA members are entitled to an equitable distribution of workload and that comparable work should be weighed in the same manner. Consistent with these governing principles, it is also the case that where units determine that teaching releases should appropriately be granted to members—whether because of their status as pre-tenure faculty, or in recognition of additional administrative work—the unit should take a consistent approach. That is, if a faculty member is granted a course

release because of taking on the additional administrative role of Undergraduate Program Director in one year, the next faculty member who subsequently takes on this same role should also be granted a course release. This is simply a matter of fairness.

149. Notably, Proposal 1H continues to respect local norms by leaving it to each unit to determine the specific contexts for when course releases should appropriately be granted, as long as this is done consistently and equitably within the unit.

UTFA Proposal 1I – Annual Workload Documents

150. In Proposal 1I, the Association proposes that each unit shall prepare, on an annual basis, a Unit Workload Document which sets out the assigned teaching and service workload for each member in the unit; teaching releases; and certain relevant factors about assigned courses (for example, the assigned FCE, mode of delivery, class size, and level of TA support). UTFA's proposal builds on the existing requirement under Article 2.17 of the WLPP, negotiated by the parties, which give all members of the unit the right to access the workload letters of other members of the unit. As UTFA argued at paras 136-144 of its brief, the existing language is a necessary but insufficient measure. For the WLPP to achieve its goals of fair, reasonable, equitable, and transparent assignment of workload, members of the unit must be able to know, with a basic level of detail, the workload of their colleagues.
151. The Administration argues that UTFA's proposal conflates transparency with prioritization of factors that in its view do not facilitate meaningful comparison. As set out above, this argument depends on the flawed assumption that faculty workload cannot be quantified or compared. Yet, as is clearly the experience at other universities, it is entirely possible—and common practice—for universities to clearly articulate and describe the workload assigned to each member, even while taking into consideration the natural flexibility and fluidity of an academic schedule (see paras 144, 161-162, 191 of UTFA's brief, **Tabs 28 and 30** of UTFA's Book of Documents).
152. In any event, and in an effort to be responsive to the Administration's concerns, the Association would be willing to amend its original proposal 1I to allow units to make determinations with respect to what factors should be included in the Annual Workload Document to allow for meaningful comparison of workload between colleagues. Specifically:

In order to enhance transparency and the equitable distribution of workload within a Unit, add a new Article 3.X to the WLPP as follows:

- (i) the assigned teaching and assigned service workload for each member in the Unit;

(ii) for each course that the member teaches, the assigned teaching credit, the mode of delivery, the class size, and level and/or hours of TA support, **and any other factor which the Unit Workload Committee determines is a reasonable factor for comparison;**

(iii) for each member any teaching release and the reason for it (e.g. pre-tenure course reductions), subject to any confidential accommodation agreements.

The Unit Workload Document will be provided to all members of the Unit and to UTFA by June 30th of each year.

UTFA Proposal 1J – Distribution of Effort in Unit Workload Policies and Workload Letters and UTFA Proposal 1K – Teaching Stream Courseload

153. The Administration's brief sets out the Administration's response to this proposal together with the Administration's response to Proposal 1K (limit Teaching Stream teaching load to not more than 150% of the Tenure Stream teaching load).
154. Proposals 1J and 1K are distinct proposals with distinct rationales, and UTFA relies on its original submissions at pp. 48-67 of its interest arbitration brief.
155. Nevertheless, the Administration's decision to combine its response to both proposals together is indicative of certain fundamental differences in the approach between the parties and, in UTFA's submission, fundamental misconceptions by the Administration about the nature of faculty work.

a) Faculty workload can be quantified

156. The Administration argues vehemently that UTFA's proposals must be rejected because they rely on a "rigid quantification" of faculty member workload, and that concepts such as "distribution of effort" (DOE) or of a "normal workload" are radical and misplaced within the WLPP, and constitute a breakthrough item.
157. In UTFA's submission, by contrast, it is not only entirely reasonable and appropriate to articulate and communicate to members what is their expected balance of responsibilities as between teaching, scholarship and service, *but it already takes place at the UofT and other Canadian universities*. The only reason why the University Administration does not want to see this concept formally acknowledged in the WLPP is because it would support the argument of some members that they are being overworked as compared to their colleagues. This is not a reasonable basis to refuse transparency in workload.
158. UTFA does not disagree with the Administration's assertion that there is a degree of fluidity inherent to the work of faculty members. It is undoubtedly the case that what faculty members do on a day-to-day basis will change over the course of the week or term, and will be different during teaching terms and outside of teaching

terms. There is no doubt that this requires a degree of flexibility on the part of members.

159. Nevertheless, however, the overall fluidity of schedule and work tasks which faculty members experience does not in any way mean that a faculty member's overall distribution of effort cannot be articulated. UTFA has not proposed, for example, that a faculty member can only be required to spend their time in a manner that is directly proportionate to their assigned distribution of effort (for example 40/40/20) at any given moment of their week, or term, or year. Rather, distribution of effort (or, to use the language of the PTR Policy, balance of responsibilities) is itself a fluid and global concept, which recognizes that a faculty member's activities will vary over the course of the term, but nevertheless can be broadly categorized within the three categories of teaching, research/scholarship/creative professional activities, and service.
160. If this were not the case, the deeply entrenched norm of "40/40/20" in the Tenure Stream, and as recognized by the PTR Policy, would be meaningless. The reality is that faculty members are assigned certain kinds of work (such as teaching assignments and service commitments) and are self-directed in other kinds of work (scholarship). Each of these components of faculty workload involve various engagement by the faculty member in a series of tasks, to which they devote time, energy and effort, and for which they are remunerated. It is disingenuous for the Administration to suggest that workload cannot, at the broad level proposed by UTFA, be described. (The Administration's arguments with respect to PTR are addressed in further detail below.)
161. Moreover, and as set out in UTFA's brief, the WLPP already requires that work be "weighed", that is, it is a governing principle of the WLPP that "comparable work will be weighed in the same manner" (Article 1.2). This principle, agreed to by both the University Administration and UTFA as a foundational principle governing the WLPP, has no meaning if workload cannot be quantified and compared.
162. Similarly, the WLPP also protects "reasonable time" for pedagogical and professional development, including discipline-based scholarship, for Teaching Stream faculty (Article 7.2). This principle also requires some ability to quantify workload, and to allocate appropriate time for different components of workload; otherwise, it is rendered meaningless. The suggestion that any effort to articulate a member's balance of responsibilities is "rigid" is simply inaccurate and ignores the reality on the ground and the experiences of UTFA members.
163. The fact that faculty workload can be quantified and described in terms of broad distribution of effort, despite the inherently fluid nature of faculty work, is clearly evidenced by the fact that a number of universities across Ontario and Canada have recognized distribution of effort language, both for the Tenure and increasingly the Teaching Stream. Relevant comparators are set out at paras 161-162 of UTFA's Brief and **Tab 28** of UTFA's Book of Documents. These include research-intensive universities like Waterloo, McMaster, and Western.

164. The Administration points out that there are currently no workload policies that refer to 40/40/20. As the Administration is well aware, however, and as set out above, in September 2015 the Administration specifically instructed units not to include a distribution of effort in unit workload policies; prior to that date, some units *did* set out a distribution of effort of 40/40/20. These included, for example, the units of Chemical, Civil, Electrical and Computer, Biomedical, Mechanical and Industrial, and Materials Science in the Faculty of Applied Science and Engineering, and units of Anatomy and Occupational Science Occupational Therapy in the Faculty of Medicine, among others. It is frankly disingenuous for the Administration to rely on its *own instructions* to Unit Workload Committees to argue that unit workload policies do not reflect recognition of DOE. Indeed, such a direction belies the Administration's assertion that workload norms and practices should be left up to the colleagues as a matter of local autonomy.

"Revising Your Unit Workload Policy", PowerPoint Presentation, September 2015, at 9, **Tab 6** of UTFA Reply Book of Documents.

b) The Administration's assertion that Distribution of Effort is "irrelevant" to PTR ought to be rejected

165. The Administration argues that there is no correlation between workload and PTR. With respect, this argument is baseless and disingenuous as it relates to the majority of faculty who are assigned workloads in keeping with a 40/40/20 balance of responsibilities and evaluated on the same basis. UTFA further submits that the Administration's efforts to divorce the two concepts reflects a totally flawed and artificial understanding of UTFA members' work, and creates a deep unfairness and arbitrariness in the assessment processes in place at the UofT.
166. UTFA members have a fundamental right to know what work they are required to undertake, and to be evaluated accordingly. It would be profoundly unfair and inequitable, for example, to convey to a Teaching Stream faculty member that they are not expected to engage in discipline-based scholarship, and then to rate their performance negatively in the PTR process because they have not published peer-reviewed articles in top-ranked journals. Similarly, it would be unfair to communicate to a part-time faculty member that they have minimal service obligations, and then to negatively rate that faculty member for the purposes of PTR because they have not carried out any significant contributions to the collegial life of the unit or university.
167. The work assigned to UTFA members, and the basis on which they are evaluated, must in some way be linked. To suggest otherwise is, in UTFA's contention, sets up a profoundly arbitrary and unfair system of performance evaluation and so-called "merit" pay for UTFA members.
168. Notably—and contrary to the position of the University Administration—distribution of effort is recognized as a key consideration in determining merit-based pay increases at other Ontario universities. For example:

- At the University of Guelph, performance increments are awarded on the basis of the three individual performance ratings (Teaching, Scholarship, and Service) which are weighted according to the member's DOE.
- At McMaster University, merit-based pay increases are determined by the Career Progress/Merit (CP/M) Plan. Under the CP/M scheme faculty members' is evaluated in teaching, research, and service, with performance in each area weighted to reflect their workload. The default weighting is 40%, 40%, and 20% respectively unless the Dean approves either a Faculty-wide or Department-wide variance or a variance for a specific individual or class of individuals.
- At University of Waterloo, merit-based pay increases are computed based on the weighted average of the individual ratings in teaching, scholarship and service. The weight assigned to each area is dictated by the member's letter of appointment. If weights are not specified in the letter of appointment, professorial positions are weighted at 40% for teaching, 40% for scholarship, and 20% for service; lecturer positions (that do not carry with them scholarly expectations) are weighted at 80% for teaching and 20% for service.³
- At The Ontario College of Art and Design University, merit-based pay increases are awarded based on a faculty member's overall rating which is computed from the weighted average of the individual ratings in teaching, scholarship and service. The weighted averages are 40% for teaching, 40% for scholarship, and 20% for service.

169. These provisions represent a widespread recognition that distribution of a faculty member's workload is directly related to the components of assessment for the purposes of merit pay. The University Administration's assertion that the recognition of a 40/40/20 DOE in the PTR Policy is irrelevant to workload at UofT is simply not plausible.

c) The Administration greatly underestimates the teaching workload of Teaching Stream faculty.

170. At paragraphs 194-199 of its brief, the Administration seeks to argue that Teaching Stream faculty have adequate time to engage in scholarly activities, even while teaching a full courseload, by counting the number of hours a Teaching Stream faculty member spends engaged in "teaching" during the term. Specifically, the

³ It should be noted that the position of Lecturer at University of Waterloo is clearly distinct from, and should not be compared to, the Teaching Stream at UofT. While Lecturers at Waterloo have a teaching-only appointment—and do not engage in scholarship as a component of their appointment—the Teaching Stream at UofT is expressly acknowledged as a professorial stream, with members who engage in all three components of a faculty appointment (teaching, pedagogical/professional development, and service).

Administration argues that the performance of in-class teaching accounts for less than 25% of a 40-hour work week, leaving a Teaching Stream faculty member 31 hours a week to prepare for in-class teaching, hold office hours, complete their administrative service, and to engage in pedagogical and professional development.

171. With respect, the Administration's analysis greatly underestimates the work and time involved in teaching a course.
172. It is self-evident that a count of the number of hours spent in front of a classroom vastly underestimates the hours of work that are required for the design, preparation and delivery of a course, student contact hours, and the evaluation of assignments and exams. It is well understood in the sector that a faculty member spends several hours outside of the classroom engaged in teaching activities for every one hour spent in the classroom. This is well-documented in the literature and would apply to any faculty member, whether Teaching or Tenure Stream.

J. Kenny and A.E. Fluck, *Towards a methodology to determine standard time allocations for academic work*, Journal of Higher Education Policy and Management, Vol. 39 No. 5, 503-523 (2017), **Tab 16**, UTFA's Reply Book of Documents

H.L. Allen, *Faculty Workload and Productivity in Canada in an Era of Global Crises*, NEA 2011 Almanac of Higher Education, 101-116, **Tab 17**, UTFA's Reply Book of Documents

173. The widespread experience of faculty members across the university sector is that these demands are continually increasing, given growing class sizes; the significantly heightened, and ever-growing, accommodation needs of students which are putting unprecedented demands on faculty time; ballooning administrative burdens resulting from the downloading of teaching-related tasks onto faculty; and students' expectation that faculty will be continuously and constantly available by email.
174. In fact, the Administration and CUPE 3902 Unit 1 (Course Instructors) have signed a Letter of Intent confirming that for the purpose of Employment Insurance, a course instructor of a 1.0 FCE will be deemed to have worked 470 hours per full course; an instructor of a 0.5 FCE is deemed to have worked 240 hours. Considering that the CUPE Instructor would likely only be spending a maximum of 39 of the 240 hours in the classroom in a term (3 hours of lecture X 13 weeks in a term), this means that the Instructor is spending an additional 201 hours in course preparation, communicating with students, or engaged in student assessment (grading, etc.). As such, the University Administration itself has acknowledged that non-classroom teaching activities are considerably more time-consuming than classroom hours.

Letter of Intent: Employment Insurance Hours for Course Instructors, Memorandum of Agreement between the University of Toronto and CUPE 3902 (Unit 1), March 26, 2021 at Tab 18 of UTFA Reply Book of Documents.

175. There is no reason to assume that a faculty member would spend any less time in course preparation, student contact, or student assessment, than a CUPE Instructor.
176. Based on the CUPE benchmark of 240 hours per half course, a faculty member teaching four half courses in one term would be spending 960 hours over a 13-week period, which suggests that they would be working more than 70 hours a week not including other components of their workload, and additional teaching-related responsibilities that do not apply to CUPE instructors.
177. Even accounting for the possibility that faculty members might spread this work over a longer period of time (for example, beginning course preparation before the start of term, or engaging in grading during the post-term exam period), it is clear that the non-classroom components of teaching constitute a very heavy workload—far in excess of what the University Administration acknowledges in their brief.
178. Looked at differently, and applying the minimum standard that every hour of lecture time in the classroom requires approximately 2.5-3.5 hours of other teaching activities,⁴ a Teaching Stream member carrying a 7.0 FCE teaching load (4.0 in one term and 3.0 in another term) might, during the term when they are teaching 4.0 HCE, have the following time commitments:
- Lecture time: 3 hours per course a week per HCE x 13 weeks = 39 hours of lecture time per HCE
 - Course prep/student contact/evaluation, etc.: 2.5 to 3.5 hours per hour of lecture time = 97.5 to 136.5 hours per HCE
 - Total teaching activities per HCE: 39 hours + 97.5 to 136.5 hours = 136.5 to 175.5 hours
 - Total teaching hours during a 13-week term = 136.5 to 175.5 hours x 4 courses = 546 to 702 hours, or **42 to 54 hours per week**
179. By this calculation, which is less than the Administration allocates for CUPE instructors, a Teaching Stream faculty member teaching 4.0 courses will in all likelihood exceed **45 hours a week**, before they have even begun to carry out their 20% service obligations or engage in any scholarly activities comprising another component of workload, let alone attend department meetings, engage in informal (but work-related) discussions or meetings with colleagues, etc. By any reasonable

⁴ Note that this is a generally accepted measure of time related to teaching activities, and that more time may be required to achieve the standard of “excellence” at the University of Toronto.

standard, this work schedule clearly far outstrips the 40-hour work-week assumed by the University Administration in its analysis and does not provide sufficient time for Teaching Stream faculty to engage in teaching to a standard of excellence, never mind to have reasonable time for scholarship/creative professional activities.

180. The Administration's suggestion that Teaching Stream faculty have ample time to engage in scholarly activities during the term is simply unfounded and ignores the extensive and time-consuming teaching-related activities a member carries out to deliver a course at the standard of excellence.
181. The Administration further argues that because Teaching Stream faculty cannot be assigned teaching in all three terms, this means that they have at least 20 weeks of the year (i.e., in the summer) in which to carry out scholarship. For the reasons set out at paragraphs 154 and 187 UTFA's brief, this is simply an unrealistic response. Teaching Stream are regularly assigned courses that involve high levels of student contact hours, such as any course that involves a placement or work co-op, which often involves tasks that extend into the Summer term. In addition, because they carry a heavy teaching load, Teaching Stream faculty are generally required to engage in numerous teaching-related tasks which extend well into the summer months; this includes the extensive course preparation time needed to meet the standard of excellence in teaching; TA coaching and supervision; the supervision of student major research papers and theses that do not fit neatly into academic terms; student formal and informal accommodations that cause assignment and exam extensions, often requiring the faculty member to create and evaluate several versions of major culminating assignments/exams; the time-consuming handling of academic misconduct allegations, student appeals, etc. It is simply not the case that the summer months are "free" of teaching-related duties and can be entirely devoted to scholarship.
182. More significantly, however, it is not realistic to expect that a faculty member can engage in a scholarly program for only three months of the summer. As any faculty member is aware, pursuing a scholarly research agenda – including developing a research question (sometimes in collaboration with other faculty members), applying for grant funding, conducting primary research (whether collecting data, conducting fieldwork, or engaging with primary sources), analyzing research results, attending conferences, preparing manuscripts or other forms of scholarly activity – requires sustained and persistent attention over the course of the year. A faculty member who is only able to devote the summer months to their scholarship, and neglects their scholarly activities for the remaining 32 weeks of the year, will have significant difficulty in developing and sustaining a reasonable research programme. This is hardly what was intended as the promise of "reasonable time" for scholarship in Art 7.2 of the WLPP.
183. Frankly, the extreme variation between the experience of Teaching Stream faculty – and faculty members generally – in the Administration brief and UTFA's brief make clear the need for increased transparency and clarity in workload, including

the distribution of effort required of each stream, as sought in UTFA's workload proposals, to enable a meaningful comparison and review of workload.

184. In that regard, the Administration's assertion that a difference in graduate student supervision explains the significant deviation in teaching load between Tenure Stream and Teaching Stream faculty is significantly over-stated.
185. The Administration argues that a comparison of full-course equivalents assigned to Teaching and Tenure Stream is not appropriate, because Tenure Stream faculty also engage in graduate student supervision as a teaching activity, while Teaching Stream faculty do not.
186. This argument is significantly over-stated. First, while Teaching Stream faculty are not permitted to act as sole supervisors of doctoral students, many Teaching Stream faculty do supervise master's students and in fact, some also act as lead supervisors and co-supervisors of doctoral students. The Department of Anatomy, for example, expressly recognizes graduate supervision as part of the teaching load for both Tenure Stream and Teaching Stream faculty.

Division of Anatomy, Department of Surgery, Faculty of Medicine Unit Workload Policy and Procedures, **Tab 19** of UTFA's Reply Book of Documents.

187. Moreover, the degree to which Tenure Stream faculty engage in graduate student supervision varies significantly. The fact that Tenure Stream faculty supervise a small number of graduate students can hardly explain the vast disparity in teaching workload.
188. In any event, UTFA's view is that where Tenure Stream faculty carry a significant supervisory load, this should be recognized with teaching credit—as is the practice in some units. It is not an answer to say that Teaching Stream faculty should be assigned very heavy courseloads because some Tenure Stream faculty are not getting the teaching credit they ought to be granted for supervising students.
189. In sum, the Administration's arguments with respect to graduate supervision are flawed and over-inflated.

d) The Administration's arguments rely on a deeply flawed assumption that the teaching activities of Teaching Stream faculty are distinct from the teaching activities of Tenure Stream faculty, which should be rejected.

190. This argument is addressed at paragraphs 130-133, above.

e) The Administration's arguments rely on the deeply problematic proposition that scholarship in the Teaching Stream must be integrated into, and directly arise from, "teaching duties"

191. This argument is addressed at paragraphs 119-129, above. As already asserted, the Administration's premise that scholarship in the Teaching Stream must be related to teaching duties/course assignments in any given term, is inconsistent with UofT policy, offensive to the scholarly nature of the Teaching Stream, and a breach of academic freedom.

f) The Administration's costing of UTFA's teaching load proposal is highly inflated.

192. The Administration initially costed UTFA's proposal to restrict Teaching Stream teaching load to 150% of a Tenure Stream teaching load at \$9.9M, and subsequently revised its costing to approximately \$14M.
193. Given the University's very healthy financial status, including a multi-billion dollar annual carry-over and compensation restrictions imposed by Bill 124, it is UTFA's view that the University can and should bear the reasonable costs associated with redistributing the excess in teaching workloads currently shouldered by many Teaching Stream faculty members by creating additional UTFA positions. It is not unreasonable or disproportionate for the University to bear the expense of working toward a more reasonable distribution of workload for UTFA members.
194. In any case, however, the Association submits that the Administration's estimates are significantly inflated.
195. The Administration's costing is based on a number of factors which artificially increase its costing. For example, the Administration's cost estimate is based on the Teaching Stream and Tenure Stream workloads set out in each unit's workload policy. In other words, the costing is built on theoretical policy standards, not on actual numbers.
196. In addition, the Administration's costing also fails to consider the fact that a minimum of 20% of the time of a Teaching Stream faculty members is spent conducting service, which is of direct benefit to the University. For example, Teaching Stream faculty members regularly carry out administrative roles such as 'paperwork' and other logistical and non-academic administrative tasks associated with student accommodations, graduate admissions, course and career counselling, open houses, and recruitment. In effect, by hiring additional Teaching Stream faculty as estimated by the Administration, the University would be able to reduce costs associated with hiring certain staff or administrator positions. At a minimum, therefore, the Administration's estimate is over-stated by at least 20%.
197. In any event, and in an effort to be responsive to the Administration's concerns, the Association would be prepared to consider a staggered or incremental approach to the implementation of its proposal. To that end, there are a number of factors that the Administration could utilize to stage the implementation of UTFA's proposal:

- **Complement:** While UTFa is strongly of the view that the courses currently being taught by continuing status Teaching Stream faculty should continue to be taught by the continuing stream, it is also the case that as a matter of academic planning, it would not be realistic to assume—as the Administration has done—that all courses would be taught as of January 1, 2023 by continuing status Teaching Stream. As a practical matter, for one thing, it would not be possible to hire a full complement of continuing status stream faculty before the start of next term.

Rather, the University has the ability to hire a blended complement, including part-time Teaching Stream, CUPE sessional, Teaching Stream faculty on Contractually Limited Appointments (CLTA), existing faculty teaching on overload, and retirees teaching on course stipends. This blended complement could be staged to move towards a majority of continuing status Teaching Stream over time.

- **Threshold:** UTFa acknowledges that in some units where the Tenure Stream carry a course load of 1.0, the 150% formulation proposed by UTFa may result in an artificially low course load for Teaching Stream faculty. UTFa is therefore open to the possibility of establishing a baseline “threshold”. In that case, if 150% of Tenure Stream teaching load comes to less than the faculty member’s current teaching load, and to less than the threshold (such as 2.0 FCE), then the faculty member would maintain their current teaching load. This threshold would ensure that no faculty member would experience an increase in their teaching load, but also that no Teaching Stream faculty member would have their teaching load reduced to less than 2.0 FCE unless that was their existing load.
- **Period of Implementation:** As has taken place at other universities where the Administration and Faculty Association have negotiated a decrease in teaching load, UTFa would be amenable to a staggered implementation of its proposal over a period of three to five years. This staggered approach would also be consistent with UTFa’s proposed blended complement, which would begin with the hire of more CUPE sessionals and part-time faculty, and would graduate towards a majority continuing status stream by the end of the transition period.

198. Through a combination of these tools, the Administration would be able to implement UTFa’s proposal within a reasonable cost envelope and while respecting the time required for appropriate academic planning.

Alternative Models for Implementation of Proposal 1K, **Tab 20**, UTFa Reply Book of Documents.

199. The Administration’s argument that UTFa’s workload proposal should be costed against the 1% compensation cap under Bill 124 should also be rejected on the

basis that (i) UTFA does not seek an overall reduction of workload, but rather a redistribution of workload, and therefore there is no increase in “compensation” under Bill 124; and (ii) the Administration’s argument defies a plain language interpretation of Bill 124.

200. With respect to the first argument, UTFA’s workload proposal 1K seeks to restrict teaching load in order to ensure that Teaching Stream faculty members have the reasonable proportion time available for scholarly endeavours, as required under the WLPP. Scholarship is a recognized and required component of the workload of Teaching Stream members. Under UTFA’s proposal, for example, a Teaching Stream faculty member who is currently carrying a teaching load of 7.0 courses, in a unit where Tenure Stream faculty carry a courseload of 4.0, for example, would have their teaching load reduced to 6.0 courses. That faculty member would then have a modestly increased proportion of time available to devote to their scholarly activities, such as peer-reviewed publications, conference presentations, pedagogical or discipline-based scholarship, and creative professional activities.
201. UTFA therefore does not propose that Teaching Stream members should be paid the same for less work, rather, UTFA proposes that Teaching Stream faculty be paid the same for a modestly redistributed workload. UTFA’s proposals simply do not implicate Bill 124.
202. Moreover, the Administration’s Bill 124 arguments are simply not supported by a plain reading of Bill 124.
203. Bill 124 limits salaries and compensation related to salary, not an employer’s total employment costs, to 1%. The Administration’s argument that anything that increases its costs constitutes compensation is not supported by a review of the legislation, arbitral caselaw, or precedent in prior instances of wage restraint legislation.
204. As already noted, under Bill 124 compensation means:

anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments;
205. Hansard debate from the Second and Third Readings of Bill 124 make clear that the intention of Bill 124 was to act as a wage restraint, and does not preclude employees from negotiating improvements to other terms and conditions of their employment. As the bill’s sponsor, the Honourable Peter Bethlenfalvy, President of the Treasury Board stated:

...The proposed legislation represents a fair and time-limited approach that applies across the provincial public sector. If passed, employees would still be eligible for compensation increases and they would retain the ability to move through established salary ranges. They would also be able to negotiate terms and conditions....

...Public sector employees would still be able to progress through salary ranges, be eligible for compensation increases, and be able to negotiate terms and conditions, including compensation....

Hansard Transcript, Second Reading, October 28, 2019, at 5682-5683, **Tab 12** of UTFA's Reply Book of Documents.

206. In the bill's third reading, Bethlenfalvy stated:

...Let's start by talking about what the bill would do; namely, employees would still be able to negotiate important terms and conditions of employment. The proposed legislation, if passed, sets out requirements that would allow for an up to 1% increase to salary rates and overall compensation for unionized and non-unionized employees in Ontario's public sector. It would apply for a period of three years upon the expiry of existing collective agreements. Additionally, Ontario's public sector employees would still be able to receive salary increases for seniority, performance or increased qualifications, as they do currently...

Hansard Transcript, Third Reading, November 7, 2019, at 6037, **Tab 21** of UTFA's Reply Book of Documents.

207. From a plain and ordinary reading of Bill 124, compensation in the legislative context clearly refers to monetary payments and perquisites paid to employees, not to changes to working conditions or other terms and conditions of employment.

208. UTFA submits that restrictions on teaching load clearly constitute neither monetary payments nor perquisites. Rather, as UTFA's brief makes clear, restrictions on teaching load will enable those Teaching Stream faculty who are subject to unconstrained and excessive teaching loads (for example 200-300% of the teaching load of a Tenure Stream faculty member) to spend additional time engaged in scholarly activities.

UTFA Proposal 1L – Teaching and Service Release

209. The Administration argues that UTFA's proposal for teaching and service release for pre-tenure and pre-continuing status faculty members, and professional practice and service release for pre-permanent status librarians, should be rejected based on three arguments. UTFA submits the Administration's arguments ought to be rejected.

210. First, the Administration argues that the proposal would be an unreasonable incursion into the autonomy of local academic units, by dictating to all units that they must provide pre-tenure/continuing status/permanent status release. UTFA disagrees. As already discussed in these submissions, the WLPP recognizes that there should be a balance between instituting baseline parameters that protect reasonable workload for all UTFA members, while also leaving room for local

norms and criteria. Regularizing a practice that is already widespread among many units to provide pre-tenure release for Tenure Stream faculty is not “rigid” or “prescriptive”; rather, it is a modest step to ensure greater transparency and consistency in the allocation of teaching releases, and more equitable workload.

211. Second, the Administration argues that because Teaching Stream faculty are primarily evaluated on the basis of teaching for their interim continuing status review, they have no need of a pre-continuing status release. UTFA submits this argument downgrades the importance of pedagogical/professional development, ignores the value of review of pedagogical scholarship and resulting revision of course curriculum and pedagogy, and in any event does not withstand scrutiny based on the language of the PPAA itself.
212. As the Administration points out, section 30(vii) of the PPAA establishes that Teaching Stream faculty will undergo an interim review in the fourth year of their appointment, based on their teaching and pedagogical/professional development to date. To that end, the appointee is required to submit a teaching dossier and “an account of pedagogical/professional development which has been completed or undertaken since the start of the appointment”. It is evident based on the language of the PPAA that Teaching Stream faculty members are expected to have engaged in pedagogical/professional development in the course of their initial four-year term, and will be assessed on that work.
213. The Administration argues that a “lack of substantial achievement” in pedagogical/professional development will not be, in and of itself, cause for non-renewal of appointment, and therefore Teaching Stream faculty do not require and would not generally benefit from a pre-continuing status release. However, and contrary to the Administration’s characterization, paragraph 30(vii) of the PPAA provides:

Normally, no later than the May 1, the appointee should be asked to submit their teaching dossier and an account of pedagogical/professional activity which has been completed or undertaken since the time of initial appointment; however, lack of substantial achievement in this area since appointment should not, in itself, be cause for non-renewal.
214. In other words, the language of “a lack of substantial achievement’ applies to both teaching activity and pedagogical/professional development—not only to pedagogical/professional development as the Administration seems to imply. In any event, this does not mean that Teaching Stream faculty are not expected to have actively engaged in, and will be evaluated on, their work in both areas. This provision in the PPAA cannot justify denying Teaching Stream faculty entitlement to a pre-continuing status release.
215. Moreover, the Administration's arguments assume that the only reason for a faculty member to be afforded a pre-tenure or pre-continuing status release is to benefit their scholarship. However new faculty have a steep learning curve in

relation to their teaching activities, as well as considerably more new course preparation than do more senior, more experienced faculty. New faculty would benefit considerably from the opportunity to have additional time to develop and reflect on their courses and to seek support from resources such as the Centre for Teaching Support & Innovation in order to develop their pedagogical skills.

216. Third, the Administration argues that with respect to Librarians, professional practice is the primary criterion for promotion. As such, release from professional practice is antithetical to the Librarian's success in promotion. In UTFA's submission, this is flawed logic. The fact that work in a particular area of responsibility will constitute the primary basis for evaluation does not mean that (a) *more* work in this area is better for the Librarian, or (b) that the Librarian will not also be assessed on the basis of their scholarly work, which is a recognized component of Librarian workload.
217. Finally, the Association notes that the Administration has not made the argument that, for Tenure Stream faculty, a pre-tenure teaching and service release would not be beneficial. It is self-evident that this is the case, given the significant weight attributed to research/creative professional activity for advancement in the tenure stream. While UTFA rejects the Administration's arguments with respect to Teaching Stream faculty and Librarians, these very arguments also underscore the importance of more uniform pre-tenure teaching and service release in the tenure stream.
218. In Reply, UTFA continues to rely on its submissions at paragraphs 196-202 of its interest arbitration brief.

UTFA Proposal 1M – Librarian Research and Scholarly Contributions

219. At paragraph 228 of its brief, the Administration's mischaracterizes UTFA's proposal to suggest that UTFA is seeking for all three components of Librarian's workload to be self-directed, and therefore the Administration will not be able to direct librarians to participate, for example, in specific service-based tasks such as serving on committees. Rather, UTFA's proposal only seeks to recognize the fundamental principle—already enshrined in Article 5 of the MOA—that the *scholarly* component of Librarian workload is self-directed. UTFA's proposal does not limit the ability of the Administration to assign activities to Librarians as part of their 8.1(a) or 8.1(c) responsibilities; this is a red herring.
220. Importantly, UTFA's proposal only seeks to align the WLPP with the existing language in the *Librarian Workload Policy* and recently negotiated agreement on Librarian Research Professional Development Days, both of which already recognize the self-directed nature of research and scholarly contributions. As already set out in UTFA's brief, this is consistent with existing rights with respect to the academic freedom of Librarians and the recognition that research and scholarship for faculty members is self-directed. As such, the Administration's

proposed language is inconsistent with language recently negotiated by the parties in the ongoing negotiations on the *Policies for Librarians* and ought not to be accepted.

UTFA Proposal 8 – Pregnancy & Parental Leave, and Adoption/Primary Caregiver Leave Accessibility

221. The Administration argues that UTFA’s proposal to establish a central fund to provide research and teaching supports to members taking pregnancy and parental leave, or adoption/primary caregiver leave, ought to be rejected on the basis that it is outside of the scope of the arbitrator’s jurisdiction and that there is no demonstrated need for the proposal. UTFA disagrees on both accounts.
222. As set out at paragraphs 215-220 of UTFA’s brief, the Association’s proposal is designed specifically to address the University’s policy on pregnancy and parental leave, and adoption and primary caregiver leave. A significant barrier to the ability of UTFA members to access these leaves are the responsibilities inherent in running a lab, which cannot be temporarily ‘paused’ while a faculty member takes a leave. This creates a significant barrier to the ability of UTFA members to access their statutory right to take a parental leave, and very important (and human rights-protected) benefit.
223. Article 6 of the MOA establishes that the Association has the right to negotiate, mediate and arbitrate issues concerning:

Salary and benefits (including...the policy on maternity leave, and the policies on family care leave and parental leave), workload...
224. UTFA’s proposal to propose a central fund to provide research and teaching supports to members taking pregnancy and parental leave, or adoption/primary caregiver leave, falls squarely within the University’s maternity leave policy, and therefore within the arbitrator’s jurisdiction under Article 6.
225. UTFA further submits that this is not a breakthrough item requiring demonstrated need. Indeed, as the Administration itself points out at paragraph 250 of its brief, it is already the case that in some instances, faculty members are granted research and/or teaching supports to arrange and pay for personnel to support the member’s laboratory while they are on leave. This benefit, however, is granted only on a discretionary, case-by-case basis, and most UTFA members are unaware that they can seek such supports. This continues to create a barrier of access to these important employment leave benefits. Formalizing the benefit in a more transparent is an incremental improvement, and one which will make a more equitable and inclusive university environment.

UTFA Proposal 10 – Eldercare and Compassionate Care Leaves

226. UTFA has proposed that the Administration develop and implement a mechanism for reporting on leaves taken by, or accommodations given to, faculty members and librarians to care for family members. The Administration’s response to this proposal is that it is outside the scope of Article 6, a violation of Article 11, and that the information simply does not exist at the UofT. UTFA submits that these arguments are baseless and beside the point.
227. With respect to the Administration’s jurisdictional objection, compassionate care leaves are plainly within the scope of Article 6. Paragraph 1 provides:

Negotiation of salary and benefits (including pension, the policy on sick leave affecting faculty members and librarians, the practices affecting faculty members and librarians related to **leaves of absence, short-term compassionate and emergency leaves**, the policy on maternity leave, **and the policies on family care leave** and parental leave), Workload, and those matters set out in paragraph 29 below as subject to Facilitation/Fact-finding shall take place annually in accordance with the following procedures. [emphasis added]

Memorandum of Agreement, Tab 1 of UTFA’s Book of Documents.

228. It is self-evident that a proposal with respect to the University’s practices and policies relating to eldercare and compassionate care is directly related to “leaves of absence, short-term compassionate and emergency leaves” and “policies on family care leave”.
229. The Administration further argues that it ought not to be required to provide the requested information to UTFA because Article 11 does not obligate it to provide such information, and it cannot be obligated to provide information over and above what is set out in Article 11. In UTFA’s submission, this is a fundamental misreading of Article 11 and of the relationship between Articles 6 and 11.
230. Article 11 provides:

Article 11: Information

The University of Toronto agrees to provide the Association such documents as may be necessary for the negotiation of matters pursuant to this Agreement. This shall include, without limiting the generality of the foregoing: University financial reports and audits; the University of Toronto summary budget, budget estimates and allocations relating to academic staff provided to the Budget Committee; University-wide salary analyses; age, rank and salary profiles; any instructional activity analyses; staff benefit costs; actuarial reviews of the University of Toronto pension plans; and all other such documents provided to or received from the Ministry of Training

Colleges and Universities, the Ontario Council on University Affairs, Statistics Canada, or the Governing Council.

The University of Toronto agrees to provide any reports or recommendations relating to terms and conditions of employment of faculty members and librarians about to be made to or by the Governing Council or its committees, in sufficient time to afford the Association a reasonable opportunity to consider them and, if deemed necessary, to make representations when they are dealt with by the Governing Council or its committees. Copies of all agendas, minutes, motions, resolutions, bylaws, and rules and regulations adopted by the Governing Council shall also be forwarded to the Association.

It is understood that this Article shall not be construed to require the University of Toronto (a) to compile information and statistics in particular form if such data are not already compiled in the form requested or (b) to provide any information relating to any individual.

The University of Toronto agrees to designate an information contact person who will conduct the exchange of information with an information officer designated by the Association. The parties agree that any dispute concerning compliance with this article shall be referred to the Chair of the Grievance Review Panel for expeditious and final and binding decision.

231. The Association agrees that confidential information that could identify individual faculty members or librarians transmitted by the University of Toronto to the Association in relation to salary and benefit negotiations will not be used in a manner which would allow the identification of individual members. The Association also confirms that it will not use the information in a manner that would be inconsistent with the requirements of negotiations or communications with members of the Association. The Association agrees that all confidential information shall be maintained in a secure location separate and apart from the general files of the Association.

Memorandum of Agreement, Tab 1 of UTFA's Book of Documents.

232. Again, Article 11 plainly establishes that the University Administration is obligated to furnish UTFA with information "as may be necessary **for the negotiation of matters** pursuant to this Agreement". Matters related to eldercare and compassionate care are clearly "matters for negotiation" pursuant to Article 6. Article 11 then goes on to provide that "this shall include, **without limiting the generality of the foregoing:...**" and describes a number of records. There is nothing to suggest, anywhere in Article 11, that the University Administration's obligations are limited to the specific documents listed therein.
233. The Administration relies on the fact that Article 11 states that "this Article shall not be construed to require the University of Toronto (a) to compile information and

statistics *in a particular form* if such data are not already compiled” (emphasis added). In the Administration’s view, this is a full answer and precludes the Administration from ever being required to provide any additional information that it does not already collect or compile. First, this broadens the exclusion that is articulated in Article 11 on its face, which does not require the Administration to compile information in a particular form if such data is not already compiled. Second, in UTFA’s view, the Administration’s position is a complete misreading of the relationship between Article 11 and Article 6. While it may be the case that, depending on the circumstances and pursuant to the terms of Article 11, the Administration may not be required to compile information in order to respond to a request for information under Article 11, this does not mean that the Administration does not have an obligation to compile information pursuant to its obligations under Article 6. In other words, the Administration may be able to rely on the terms of Article 11 to address a request for information under Article 11, the Administration cannot rely on the terms of Article 11 to defeat an otherwise appropriate request for information pursuant to Article 6.

234. The Administration relies on Arbitrator Teplitsky’s award in *Governing Council of the University of Toronto and UTFA*, to suggest that it is “not obligated to compile information for the purpose of assisting the Association with subsequent rounds of negotiations”. The Administration argues that Arbitrator Teplitsky dismissed the Association’s request for information because he determined it was inappropriate for him to order information for a subsequent Article 6 process. Notably, however, in that case UTFA had made a *production request to assist in preparation for the next round of bargaining*. This is not the case here. It is also worth noting that while Arbitrator Teplitsky declined to make the order for production in that case, he found the Association’s request to have been reasonable and hoped the Administration would make timely production on a voluntary basis.

Governing Council of the University of Toronto and UTFA, December 30, 2002 (Teplitsky) at 8-9, **Tab 28** of the Administration’s Book of Documents.

235. UTFA’s proposal is for the Administration to implement an institutional mechanism for reporting on leaves taken by, or accommodations given to, its members who provide care for family members, and to provide UTFA with a report at least annually. This is not a production request – it is a substantive proposal seeking annual demographic data to support its ongoing representation of its members. Notably, this proposal serves to advance the parties’ shared objectives to recruit and retain faculty members from diverse, equity-seeking groups.
236. Finally, the Administration argues that UTFA’s proposal should be rejected because the Administration does not maintain a central repository of information about eldercare and compassionate care leaves, and does not readily have the information that UTFA seeks. With respect, this entirely misses the point of UTFA’s proposal, which is to require the Administration to begin to collect and compile such information, and to provide anonymized reports to UTFA. The fact that the Administration does not already collect this information is no answer to UTFA’s

proposal that it should be required to begin to gather this information, in order to better govern and improve the use and availability of this benefit.

237. In the alternative, the Administration has indicated that its Human Resources Information System tracks data related to various leaves of absence for faculty and librarians that provides some of the information UTFA seeks in its proposal. The Administration has not provided a reasonable basis for denying UTFA access to this information.

UTFA Proposal 11B - PhD Tuition Waiver

238. As set out in UTFA's interest arbitration brief, the tuition waiver is an existing benefit negotiated in the parties' 2015 MOS. Given that UTFA seeks to ensure the Administration is implementing the benefit as previously negotiated, any costs associated with the implementation of the benefit do not count against the Bill 124 compensation cap. In other words, UTFA is not seeking a *new* benefit within the three-year moderation period under Bill 124, but rather is simply seeking clarification of a benefit negotiated long before Bill 124 was imposed.
239. Further, and in addition, the Administration has provided no basis for its costing of this proposal at \$56,772. It is unclear how the clarification of this existing benefit, which, to UTFA's knowledge, is utilized by only a very small number of UTFA members in a given year—if any—could cost \$56,772.
240. UTFA continues to rely on its submissions at paras 233-243 of its brief.

UTFA Proposal 12 – Librarians' Research and Professional Development Days

241. The Administration argues that Librarians simply do not use their current entitlement and therefore should not be granted an increase in Research and Professional Development Days.
242. Librarians are required to seek permission for more than 14 days, which inhibits usage above this limit. This can be seen in the Administration's own data, which show a steep fall-off of the number of Librarians using 15 days or above.
243. The Administration's data shows a decline in utilization in 2019-2020, 2020-2021 and 2021-2022 as compared to 2018-2019. This pattern corresponds to the impact of the COVID-19 pandemic, including pandemic restrictions on travel, pandemic-related disruptions to childcare, the cancellation and postponement of conferences and workshops, the closures/inaccessibility of archives and other research sites, and the pivot of conferences and workshops to online delivery. Online delivery made it possible for Librarians to participate in limited and specific sessions without the need to exhaust a greater number of research days.

244. In reviewing the Administration's data, it is clearly evident that the number of Librarians taking 11-15 days was consistent except for 2020-2021, when there was a drop, and then the number of Librarians taking 16-20 days experienced a significant drop in 2019-2020 and has not returned to as high as the 2018-2019 level.
245. The Administration's data from 2018-2019 must be understood in context of status and/or the different stages of a Librarian's career. In general, some Librarians who lack permanent status may generally be hesitant to ask for research days due to the precarious nature of their appointment. Librarians who lack permanent status (i.e. those who are Librarian I and Librarian II) account for approximately one-third of all Librarians. In 2018-2019, they accounted for 47 out of a total of 151 librarians. These librarians may feel pressure to place emphasis on work performance and professional practice. Librarians are evaluated annually by their supervisors and these performance assessments are included in the documentation for consideration at the time Librarians are evaluated for permanent status.
246. As noted in both the Administration's and UTFA's briefs, Librarians at several institutions, including McMaster University, Dalhousie University, York University, Wilfrid Laurier, the University of Waterloo, Queen's, and Mount Allison University, have greater entitlements to research and professional leave compared to UTFA members. Further, UTFA notes that Librarians at Toronto Metropolitan University are eligible for 16 professional development days, Librarians at Memorial University are eligible for 20 days of research or professional development time, and Librarians at Concordia University are eligible for up to 66 days of research time.

University	Research and Professional Development Leave (in days)
University of Toronto	14
Toronto Metropolitan University	16
McMaster University	20
Memorial University	20
Dalhousie University	21
York University	22
Wilfrid Laurier	22
University of Waterloo	24
Queen's University	24

Mount Allison University	25
Concordia University	66

247. While Librarians at the University of Guelph do not have research days, they have a distribution of effort for their areas of responsibility, including 10-30% allocation for scholarship.
248. Additionally, Librarians at the University of Ottawa may request “a reasonable amount of leave with pay” for research activities, in addition to having the right to “devote a reasonable proportion of [their] scheduled working hours” to scholarly activities, and rights to academic leave (i.e., sabbatical).

UTFA Proposal 18 – Health and Safety

249. The Administration submits that UTFA’s proposal to establish a joint central health and safety committee falls outside of the scope of Article 6, and in any event is addressed by a separate Memorandum of Settlement. The Association submits these arguments ought to be rejected.
250. First, the fact that the parties entered into Minutes of Settlement to resolve a grievance relating to asbestos in the workplace, and in the specific context of that grievance agreed to establish a Central Health and Safety Committee, has no bearing on the arbitrator’s jurisdiction under Article 6. For the reasons set out at paras 288-295 of UTFA’s brief, it is evident that the effectiveness of the Central Health and Safety Committee is limited by the Administration’s refusal to recognize it as a joint health and safety committee under the *Occupational Health and Safety Act*. These limitations need to be addressed.
251. Second, the Association submits that the proposal clearly falls within the scope of Article 6. Matters decided at the CHSC are intimately connected to issues relating to health and wellness of UTFA members, including integrally related to issues of accommodation and workload. For example, since the establishment of the CHSC in early 2020, the Committee has spent considerable time discussing matters related to COVID, including workload implications of the Administration’s decisions, appropriate accommodations, and leaves for those affected by the pandemic. The University’s policies and practices related to leaves fall directly within the scope of Article 6.
252. For these reasons, and for the reasons set out at paras 288-295 of the Association’s brief, the Association submits that the CHSC should be recognized as a joint health and safety committee under the *Occupational Health and Safety Act*.

UTFA Proposal 20 – Maintenance of Salaries, Benefits and Workload During Bargaining

253. The Administration asserts that UTFA’s proposal to effectively freeze all terms relating salaries, benefits and workload while the parties are in bargaining and until final resolution is outside the scope of the Arbitrator’s jurisdiction under Article 6 of the MOA. This argument should be rejected.
254. Article 6 allows the parties to engage in negotiations, mediation, and ultimately dispute resolution (in this case through binding arbitration) with respect to matters relating to salary, benefits, pension and workload. The University Administration cannot be allowed to put undue pressure on UTFA members, or to exact leverage over UTFA, by making changes precisely to terms of salary, benefits, pension and workload while matters are unresolved. UTFA’s proposal is therefore integrally connected to Article 6 issues of salaries, benefits, pension and workload.
255. The connection between UTFA’s proposed “freeze” provision and Article 6 was made clear in the 2021 award of Arbitrator Kaplan in the PTR Grievance. As set out at paras 309-312 of UTFA’s arbitration brief, in 2020, in the midst of Article 6 negotiations, the Administration significantly altered the terms and conditions of employment related to compensation by refusing to pay PTR in the normal course. While Arbitrator Kaplan held that there was no “obligation” on the University to pay PTR under the terms of the previous settlement agreement, he also found that “There is clearly an expectation that there will be PTR payments, an expectation arising from...the central role that PTR has played, without exception, for decades...” (p. 21) and that “...there is substantial evidence that PTR has previously been regularly and routinely implemented prior to the conclusion of Article 6 negotiations.” (p. 18).

University of Toronto v University of Toronto Faculty Association (PTR Dispute), Grievance Award, dated January 4, 2021 (Kaplan), **Tab 22** of UTFA’s Reply Book of Documents.

256. Arbitrator Kaplan’s comments highlight the long history of “freezing” the compensation mechanisms already in place, even before the conclusion of Article 6 bargaining. They also point to the significant disruption to the workplace if the University Administration is permitted to withhold compensation—a central feature of Article 6 bargaining—in the course of SBPW negotiations.
257. In UTFA’s submission, the proposal for a “freeze provision” therefore goes to the heart of the salary, benefits, pension and workload issues which are clearly within the scope of Article 6, and are thus within the jurisdiction of the arbitrator.

UTFA Proposals 9, 13, 14, 15, and 16 – UTFA’s Benefit Proposals

258. UTFA is proposing three improvements to health benefits for faculty and librarians:
1. An increase in the annual maximum claimable for psychology services and other mental health services from \$5,000 to \$7,000.
 2. An increase in the annual maximum claimable for paramedical services from \$2,500 to \$5,000.
 3. An increase in the maximum claim for vision care from \$700 to \$800 every two years.
259. UTFA withdraws its proposals with respect to major restorative dental services and orthodontic services on a without prejudice basis.
260. Following on the parties’ agreement regarding the Dependent Scholarship Program, the remaining “residual” for Year 3 is \$297,060.
261. In response to UTFA’s benefits proposals, the Administration argues that the cost of providing the benefits improvements exceeds the Bill 124 envelope.
262. In UTFA’s submission, the assumption applied by the University Administration in costing UTFA’s benefits proposals for psychology and mental health and paramedical benefits are overly aggressive and based upon flawed assumptions, leading to significantly inflated costings.
263. Notably, the Administration’s costing proposal with respect to vision care was significantly less than UTFA’s original costing, which UTFA originally costed at \$112,500.⁵ The data provided by the Administration on vision care claims was very rudimentary; however, and UTFA is content to rely on the Administration’s own cost estimates for the proposed improvement. Based on this estimate, the proposed benefits fall well within the remaining Bill 124 envelope of \$297,060.
264. The parties’ respective costings for the Administration’s contribution for UTFA’s proposed benefits’ improvements with respect to active members only (for the purposes of the cap on compensation pursuant to Bill 124) are as follows:

⁵ Note: In UTFA’s original brief, vision care was inadvertently costed on the basis that premiums are split 50/50 between the University and UTFA; for clarity, the University pays 75% of vision care premiums.

Benefit	UTFA's Costing	Administration's Costing	Difference
Psychology and Mental Health	\$76,000	\$145,000	\$69,000
Paramedical Services	\$99,000	\$200,100	\$101,100
Vision Care	\$85,000	\$85,000	\$0
TOTAL	\$260,000	\$430,100	\$170,100

265. As set out below, UTFA generally disagrees with the Administration's costings of the benefit proposals and the Administration's position that the cost of UTFA's proposals exceeds the amounts allowable under Bill 124.
266. Further, and in the alternative, to the extent that the cost of the benefits proposals exceeds the amount allowable under the Bill 124 remainder, UTFA submits that the excess amount is more than off-set against the significant, multi-million-dollar surplus in the Green Shield health and dental benefits plan attributable to faculty and librarians.

(a) General considerations regarding benefits proposals

267. As a general matter, it is important to note that none of UTFA's benefits proposals contemplates a change in the structure of the benefit that is being provided. The services that are covered in the current benefits program are exactly the same as the services that would be covered by UTFA's proposed program changes. The only change is to the total amount that can be claimed.
268. For psychology and mental health, paramedical, and vision care services, UTFA is proposing an increase in the maximum amount that can be claimed for a covered individual. Deriving a cost estimate is not a simple matter of multiplying the number of covered individuals by the increase in the maximum because only a relatively small proportion of covered individuals will actually claim the maximum. Covered individuals who claim less than the maximum under the current program would not be expected to generate any increase in claims as a result of an increase in the maximum. By the same token, covered individuals who claimed the maximum under the current program should not automatically be assumed to increase their total claims to the new maximum. Accordingly, the key issue for each of these three benefits is the take-up or utilization rate for the increase in the maximum.
269. An additional consideration that applies to all of the UTFA proposals is that in every case they follow-on proposals from improvements that were negotiated for the first two years of the period of restraint imposed by Bill 124. As a consequence, great care must be taken to ensure that cost increases that arise from improvements effective in years 1 and 2 are not attributed either directly or indirectly to the improvements proposed here to be effective in year 3.

(b) Benefit Costing Analysis

Psychology and Mental Health benefits

270. The Administration has estimated the cost for increasing the Psychology benefit from \$5,000 to \$7,000 as \$145,000.
271. UTFA estimates the cost of this proposal at \$76,000. UTFA has revised its previous estimate from \$75,000 to \$76,000 based on the Financial Accounting Statements disclosed by the Administration on September 15, 2022 in response to the Interim Award of Arbitrator Gedalof dated September 12, 2022. UTFA's previous estimate included a 13% factor, which represented the industry standard for health benefit plans of similar size, because at that time UTFA had not received the relevant data from the Administration. The Financial Accounting Statements that have now been disclosed indicate that an expense factor higher than the industry standard has been applied to UofT's benefit plan. Without prejudice to UTFA's position in any future proceedings that this higher expense factor is unreasonable, UTFA has revised its estimate for the sole purpose of this current arbitration to include a 15% expense factor.
272. Underlying the Administration's cost estimate is a projected increase in claims of \$168,000 per year, to which the Administration has then added a 15% expense factor to account for taxes and administrative fees. 75% of this amount is borne by the University as the employer share of the benefits costs.

University Costing Assumption Document, August 31, 2022, **Tab 23** of UTFA's Reply Book of Documents.

273. The Administration's projected increase in claims of \$168,000 assumes that 84 claimants will utilize the full increase in claims room of \$2,000. In UTFA's view, this is an unreasonable assumption. In particular, the Administration makes two aggressive costing assumptions.
274. First, the Administration's estimate assumes that every claimant who hit the maximum of \$5,000 in the period ending May 2022 would also utilize the full \$2,000 increase (for a total of \$7000) — a 100% take-up assumption. Second, given that the 2022 data are only for a partial year, the Administration also assumed that every claimant who used over \$3,800 in 2022 would, in a normal year, have reached the \$5,000 maximum, and thus are assumed to utilize the full \$2,000 increase up to a maximum of \$7,000. In other words, the Administration's estimate makes two 100% take-up assumptions. First that individuals who claimed \$3,800 before May 2022 would actually claim \$5000 in a full year, and second that this group should also be projected to utilize the full \$2,000 increase.

University Costing Assumption Document, August 31, 2022, **Tab 23** of UTFA's Reply Book of Documents.

275. In total, the Administration's costing assumes that 37% of the claimants who reached the maximum of \$3,000 in 2021 will utilize the full \$7000 benefit, which is unduly aggressive.
276. To put this assertion into perspective, the claims data provided by the Administration shows that in the plan year 2020-2021, a total of 211 claimants reached the then-maximum of \$3,000. In other words, the Administration's analysis implies that of the approximately 211 claimants who reached the \$3,000 maximum in 2020-2021, 84 would claim an additional \$4,000 in total mental health claims under the proposed \$7,000 maximum. Assuming a standard cost for therapy of \$225 per hour, this assumes that 84 claimants would claim 31 hours of therapy each. Such an estimate significantly exceeds the normal clinical range established by the Ontario Psychological Association of 12-20 hours for a standard course of treatment in cognitive behavioural therapy (CBT). In other words, the Administration's estimate assumes that 84 claimants will engage in an average of 11 hours *more* therapy than the maximum end of the standard range outlined by the Ontario Psychological Association. UTFA submits that the benefit increase in 2022 to \$5,000 will cover most, if not all, of the claimants' treatment assuming a standard treatment plan. However UTFA's estimate nevertheless builds in the cost for potentially 20% of the high-cost claimants who may claim a further \$2,000 when the plan increases to \$7,000. This is a conservative estimate that builds in a more than reasonable cost buffer.
277. Ultimately, UTFA submits that the take-up assumptions embedded in the Administration's cost estimates for mental health benefits are unreasonable on their face and fail to take adequate account of the fact that the base for the benefit maximum increase had already been increased from \$3,000 to \$5,000 in years 1 and 2 of the period at issue. In other words, any increase in utilization arising from the increase from \$3,000 to \$5,000 would have been captured in the costing of the increases the parties negotiated for year 2. To the extent that the Administration's costing for the increase from \$5,000 to \$7,000 reflect this prior increase, the Administration's costing engages in double-counting.
278. By contrast, UTFA's analysis is grounded in more reasonable assumptions. In the most recent plan year data ending June 2021, there were 1095 claimants of which 20%, or 220 individuals, hit the plan maximum of \$3000. Making the conservative assumptions that 20% of these high-cost claimants, or 44 individuals, would utilize services beyond the current \$5,000 maximum and that they would utilize the full amount of the proposed \$2,000 increase, this would result in a total claims increase of \$88,000. Adding an administrative expense factor of 15% and allowing for the 75/25 split of premium costs, UTFA estimates the cost at \$76,000.

279. Notably, UTFA has reviewed the 2021-2022 claims data produced by the Administration (up to June 2022), which reveals a consistent picture in claims trends.⁶
280. UTFA submits that its costing assumptions are more reasonable than those employed by the Administration given that those claimants who hit the \$5,000 plan maximum in 2021-2022 are not likely to use more than \$4,500 in a given year, even if the plan maximum is increased to \$7,000. This is because, as noted, the Ontario Psychological Association recommends a standard course of treatment of CBT of 12-20 hours. An individual engaging in a 20-hour course of treatment (which is at the high end), paying the standard rate of \$225/hour, would cap out at \$4500—well within the current plan benefit of \$5000.
281. For this reason, UTFA assumed that the 224 people who hit the \$3,000 plan max in 2020-2021 would use \$4,500 under the new plan max in 2021-2022 (20 hours at \$225/hour for CBT). UTFA also assumed that the 95 people who claimed between \$2,500-\$2,999 in 2021 would also have used the same \$4,500 cost for CBT in 2021-2022. A review of the 2021-2022 claims data produced by the Administration (again, up until June 2022) confirms that UTFA's assumptions are reasonable.⁷
282. Based on the trends in the benefit claims data, the current plan benefit of \$5,000 is likely to cover most of the need of UTFA members; only a small proportion of members are likely to utilize the \$2,000 increase proposed by UTFA, but those that do are in need and the benefits plan should be adequate to support their needs to remain productive.

Paramedical benefits

283. The Administration has revised its estimate of the cost of increasing the Paramedical benefit from \$2,500 to \$5,000 from \$360,000 to \$200,100.
284. UTFA has revised its estimated cost from \$97,500 to \$99,000, taking into consideration the 15% expense factor.
285. The Administration's cost estimate assumes a projected increase of \$232,000 in claims, adding a 15% administrative expense factor and allowing for the 75/25 split of premium costs.

⁶ The Association notes, however, that the June 2022 data provided by the Administration only shows the number of claimants who maxed out under the prior benefits cap of \$3000, and did not break out the number of claimants who claimed between \$3000 and the new plan max of \$5000, if any.

⁷ As noted above, the Administration produced data for 2022 broken down by dollar bands only up to and including the benefits cap of \$3000 (ie, the cap in 2021, not the increased cap of \$5000 which was implemented in 2022). The information that can be inferred from the 2022 is therefore limited.

286. The current maximum of \$2,500 was increased from \$1,250 in Year 2 of the three-year term set out in the January 25, 2022 MOS.
287. The Administration's costing assumptions are significantly flawed and again include unduly aggressive take-up assumptions. Specifically, the Administration's estimate assumes that all 62 active members who hit the maximum \$2,000 in paramedical claims in 2021-2022 would utilize an average of \$2,060 more in 2022-2023. It is unclear on what basis this average is calculated. The Administration further assumed the 153 active members whose claims were between \$1,500 and \$2,000 in 2021-2022 would utilize an additional average of \$680 more for a total of between \$2,180 and \$2,680. These 215 claimants are assumed to claim an additional \$232,000, an increase of an average of \$1,079 in annual claims. This is an unreasonably aggressive set of assumptions.

University Costing Assumption Document, September 21, 2022, **Tab 24** of UTFA's Reply Book of Documents.

288. To put this assertion into perspective, in plan year 2019-2020, 149 claimants hit the then-maximum of \$1,250. In plan year 2020-2021, 231 claimants hit the \$1,250 maximum. In light of these data, it would be a significant stretch to assume that **215** claimants would not only exceed the newly-negotiated \$2,500 maximum but would average \$1,079 in claims over and above that maximum. Rather, increasing the benefit max from \$2,500 to \$5,000 will not influence the majority of the membership to use some or all of the available paramedical services.
289. It is notable that in the first six months of 2021-2022, only 73 claimants hit \$2,000 and 192 were between \$1,500 - \$2,000. For the three years prior, by contrast, approximately 300-400 individuals claimed near or at the old plan maximum of \$1,250 over each 12-month period. This means that in the year 2021-2022 when the plan maximum increased to \$2,500, there were in fact fewer claimants approaching that plan max. It is therefore not reasonable to conclude that a higher number of heavy users will surface to max the plan when the benefit level increases.
290. UTFA's estimate is based on the conservative assumption that 20% of those who reached the \$2,500 current maximum would make additional claims beyond the \$2,500 maximum, averaging \$2,875 for a total additional claim of \$115,000. Adding the 15% administrative charge and allocating premium costs on the 75/25 basis yields an additional cost of \$99,000.
291. UTFA submits that the take-up assumptions behind the Administration's cost estimates for the increase in the paramedical maximum imply an unreasonably high take-up of the increase and fail to make an appropriate allowance in estimates for the fact that the maximum was increased from \$1,250 to \$2,500, the cost of which is appropriately allocated to Year 2 (2021-2022) over which there is already agreement with respect to benefits and costs.

Vision care benefits

292. The Administration asserts a cost of \$85,000 per year to increase the vision care maximum from \$100 increase in the 24-month plan maximum. Data provided by the Administration on vision care is very rudimentary. In light of the limited data received, UTFA accepts the Administration's costing of the vision care proposal.

(c) Surplus in the Benefit Plan

293. In UTFA's submission, and to the extent that UTFA's proposals for benefits increases exceed the Bill 124 envelope, these amounts are off-set by the significant surplus in the Green Shield Health & Dental benefits plan.
294. Green Shield's financial reconciliation documents (or financial accounting statements) for the benefits plan reveal that in the plan year ending June 2022, Green Shield billed \$75.6 million and created a surplus of \$3.2 million in the plan. The aggregate surplus for all divisions of the UofT plan at the end of June 2022 was **\$16.9 million** including the carry forward of prior year balances.

*Green Shield ASO Reconciliation and Invoice documents 2017-2022, **Tab 25-29** of UTFA's Reply Book of Documents.*

295. While the financial reconciliation documents do not include a breakdown for UTFA members only, the University's Total Compensation Report demonstrates that the share of health benefits contributions attributable to UTFA members is somewhere in the range of 33% - 40%. (Based on the UofT's Total Compensation Report, disclosed by the Administration to UTFA, the share of health benefits contributions attributable to UTFA members is 33%, and the share of LTD and Life Insurance its share of Life Insurance and LTD benefits contributions is 40%).

*University of Toronto Compensation Report, 2021, **Tab 30** of UTFA's Reply Book of Documents.*

*University of Toronto Compensation Report, 2021 with UTFA Notations, **Tab 31** of UTFA's Reply Book of Documents.*

296. It is therefore reasonable to assume that between \$5.6 and \$6.8 million of the surplus is attributable to UTFA members.
297. Despite repeated requests for the financial reconciliation documents, this arbitration is the first time that information has been disclosed to UTFA with respect to the plan's surplus, and that UTFA has become aware of the significant surplus in the health and dental benefits plan.

(d) Surplus funds do not count towards the Bill 124 “cap”

298. The plan surpluses more than offset the modest cost of the benefits increases proposed by UTFA. As such, to the extent that any of the cost of the benefits exceeds the 1% cap, this modest cost should be off-set by the surplus.
299. UTFA further submits that the redirection of benefits surplus funds to support benefits improvements does not constitute “compensation” under Bill 124. Rather, the surplus funds are already part of the University’s calculation of total compensation from prior years, and were already taken into consideration as part the University Administration’s calculation of total compensation.
300. In any event, these surplus amounts ought rightfully to be considered part of the compensation already negotiated by UTFA in previous rounds of SBPW negotiation, which monies have been diverted to other purposes and/or have gone unused. Surpluses represent money already spent by employees and employers. Even if the cost of certain benefits is over and above the Bill 124 cap of 1%, if these benefit improvements result from accrued surpluses, and there are no increases to premiums, then benefits can be improved without increase to compensation. Put in other terms, to the extent that the Arbitrator accepts the Administration’s submission that the cost of the proposed benefits is in excess of the 1% cap, UTFA submits that its members have *already* paid for these benefit improvements through the existing premium rates, which are higher than necessary to pay for the existing benefits received and have resulted in significant ongoing surpluses. As a result, there is no incremental cost (including for the purposes of Bill 124) to improving these benefits and they ought to be awarded.
301. The cost that *does* have to be accounted for under Bill 124 is any established incremental increase required to the *premium during the life of the agreement*. Bill 124 explicitly exempts any increase in cost to existing entitlements that existed on the day prior to the first day of the moderation period, so it is only any *incremental* cost increase that results from a negotiated change to the benefit entitlements that must be considered for the purpose of Bill 124.
302. Generally, surpluses in the plan are created because the plan budgets for 85% as a loss ratio and, in some years, the claims come in below that amount. Of course, there could also be years where the claims come in higher. That is why insurers generally set rates on the conservative side to avoid a deficit. These accounting practices are appropriate, so long as any surpluses are ultimately reconciled and not left to aggregate over time – as has occurred in the UofT plan. In other words, the University has set premium rates at a level that is not only more than enough to cover the cost of claims, but more than is needed for a rainy-day fund. The surplus in the Green Shield health and dental plan has been created from dollars that were negotiated as part of compensation in past years, which effectively “belong” to UTFA members, and which have not been spent for the purpose for which they were collected.

303. As a result, at a minimum, the University must eventually either refund this consistent overcharging of premiums back to UTFA members or improve benefits so that the current and ongoing premium levels are appropriate for and expended on actual claims. In practice, some employers in these circumstances have made the decision to take, and provide to employees, premium holidays.
304. For example, at various times UTFA and the Administration have discussed the impact of COVID on benefits claims, and the likelihood that claims would decrease at least for 2020. The Administration indicated at the Joint Benefits Committee in the Fall 2020 that they would consider lowering premium rates in July 2021, however this did not occur. It is therefore particularly striking that in the plan year ended June 2021 the surplus was even larger than normal. In that year, Green Shield billed \$74 million, with a surplus of \$7.4 million (i.e. 10%). This was largely the result of a much lower loss ratio. The aggregate surplus including all carry forward amounts was \$20.2 million. The Administration cannot have it both ways. That is, the Administration cannot argue on the one hand that benefits must be costed aggressively in order to protect against the possibility of a deficit (resulting in a given envelope of funds buying a lower level of benefits), but fail to reconcile these amounts and “return” the unused funds to UTFA members when it turns out the actual cost of the benefits was not as expensive as projected.
305. It is evident, therefore, that the surplus funds are not over and above the 1% cap, but rather are funds previously negotiated by UTFA for the purpose of paying for benefits for UTFA members. To the extent that UTFA’s benefits proposals exceed the 1% cap under Bill 124, therefore, UTFA proposes that these be offset against the surpluses that already exist within the Green Shield health and dental plan, and which have already been paid for by UTFA members.
306. To address the surplus in the benefits plan, UTFA therefore proposes as follows:

UTFA Proposal:

UTFA proposes that the matter of the surplus in the Green Shield Health and Dental plan be referred to the Joint Benefits Committee for examination. The Joint Benefits Committee shall attempt to come to agreement on the following:

- (i) The amount of any surplus in the Plan that is attributable to UTFA members;*
- (ii) Recommendations with respect to how any surplus attributable to UTFA members should be distributed, including:*
 - a. Lowering premiums or taking premium holiday;*
 - b. A refund to UTFA members;*
 - c. Funding enhancements to the benefit plan;*
 - d. Any other measure the Committee deems appropriate;*
 - e. The timeline and schedule of any agreed-upon measures to distribute such surplus.*

To conduct its examination, the Committee shall schedule special ad hoc meetings over and above the four regularly scheduled meetings of the Joint Benefits Committee.

The Administration shall provide the Committee with arguably relevant information to enable the Committee to carry out its examination, including the Financial Accounting Statements for the years 2017 to 2022.

The Committee shall issue a Report setting out its determinations and recommendations, including any dissenting views, by no later than March 15, 2023.

The arbitrator shall remain seized with respect to the work of the Committee, including with respect to the provision of information to the Committee.

(e) Comparators

307. The Administration suggests that UTFA members enjoy superior benefits compared to faculty members at other post-secondary institutions. This is simply not the case. For example, with respect to paramedical benefits, as compared to the current \$2,500 combined maximum per year available to UTFA members:
- Toronto Metropolitan University covers 20 sessions with each of 6 providers and unlimited coverage for physiotherapy;
 - York University covers \$2,000 per provider up to a \$3,000 combined maximum;
 - Laurentian provides \$3,000 per year for each of 7 (physiotherapists, chiropractors, osteopaths, speech therapists, massage therapists, podiatrists/chiropractists, and naturopaths; for a potential combined maximum of \$21,000);
 - Waterloo provides 80% with a cap of \$768 per year for each of 9 providers (physiotherapists, chiropractors, osteopaths, speech therapists, massage therapists, podiatrists/chiropractists, naturopaths, occupational therapists, and athletic therapists; for a potential combined maximum of \$6,912);
 - Brock provides \$500 per year for each of 7 providers (chiropractors, osteopaths, speech therapists, massage therapists, podiatrists/chiropractists, naturopaths, and acupuncturists) and unlimited coverage for physiotherapy
308. It is evident that the benefits of UTFA members continue to fall behind those of faculty and librarians at comparator institutions.
309. Moreover, the Administration's brief is misleading.

310. For example, when it comes to paramedical benefits, the Administration's table at paragraph 294 fails to list the *combined allowance* for all practitioners covered by the benefits. If the individual allowances were tallied to reflect the combined total, it is clear that UTFA members do not enjoy top-of-marketplace standing.
311. With respect to UTFA's proposed improvement to the Psychology and mental health benefit (from \$5,000 to \$7,000), even with the \$2,000 increase, the University's coverage would still be less than the mental health benefit at York (which covers up to \$10,000) and at Carleton (which provides unlimited coverage at 80% with a doctor's referral).

(f) Any benefits awarded should be retroactive to July 1, 2022

312. The Administration has taken the position that any benefits improvements awarded should be on a go-forward basis only. UTFA strongly rejects this view.
313. There is nothing that prohibits an arbitrator from awarding retroactive benefits improvements.
314. Article 6 of the MOA between the parties provides that the negotiation of salary and benefits shall take place annually. The parties have agreed to negotiate salaries and benefits for the period of July 1, 2022 to June 30, 2023.
315. This agreement is akin to a duration clause in a collective agreement. While some arbitrators have suggested that there is a distinction to be made between monetary and non-monetary provisions such that there is a presumption that monetary provisions are retroactive, or that vested fringe benefits should only be made retroactive where there is clear and explicit language, others have taken the approach that the agreement as a whole is retroactive unless there is an explicit limitation on scope in the agreement or retroactivity would lead to results that are absurd, impractical, unintended or unfair:

... [T]he current approach of Canadian arbitrators is to start from the presumption that the agreement as a whole is made retroactive, as the parties have stated in their duration clause. But specific exceptions may be read into this standard retroactive principle, excluding certain terms of the agreement from the clause, if full retroactivity would appear to lead to quite impractical and unintended results.

Re Penticton and District Retirement Service and Hospital Employees' Union, Local 180, 1977 CanLII 2954 (BC LRB) (Weiler) at 102, Tab 32 of UTFA's Reply Book of Documents.

316. The above review of the most recent arbitral jurisprudence indicates that where a duration clause is present, unless the parties have stated with clear words that certain provisions will not apply retroactively, all the terms of a collective agreement are to be construed as applying retroactively, unless the result, would be absurd, impractical, unintended or unfair.

Durham Memorial Hospital and London & District Service Workers' Union, Loc. 220, Re, 1991 CanLII 13404 (ON LA) (Kaufman) at 334-335, **Tab 33** of UTFA's Reply Book of Documents.

317. The parties have not agreed, nor has the Administration taken the position on the outset, that individual proposals would not apply retroactively. In absence of any such agreement or articulated position, UTFA submits that the general principles governing retroactivity outlined above should be applied.
318. In particular, it is evident that awarding retroactivity of benefits improvements will not lead to a result that is absurd, impractical, unintended or unfair.
319. To the extent that the Administration relies on any operational concerns to suggest that a retroactive award is impractical, in UTFA's view there are no such operational concerns in this case. UTFA is seeking for the increase in benefit maximums to be made retroactive to July 1, 2022 – that is, the start date of the Green Shield Health and Dental plan year. There is no “impracticality” to UTFA members submitting receipts for reimbursement several months after the benefit was accessed (for example, several months after a new pair of glasses were purchased). Rather, the opposite is true – the Green Shield benefit plan provides for employees to submit claims for reimbursement up to one year after the date of the service.
320. Similarly, retroactivity does not pose any operational concerns with respect to the re-opening of budgets, as the University's fiscal year is May 1, 2022 to April 30, 2023.
321. The only operational task required to implement a retroactive award is for premium payments supporting the benefits' improvements to be made for the months of July, August, and September 2022. This should be no more complex than implementing retroactive ATB or PTR payments, which the Administration has agreed to on multiple occasions.
322. Notably, interest arbitrators have awarded retroactivity for benefits improvements similar to those being sought by UTFA.
323. In *Ottawa Police Services Board v Ottawa Police Association*, the parties' collective agreement expired on December 31, 2014. In his award dated June 21, 2016, Arbitrator Marcotte awarded an increase in benefits coverage for vision care, massage therapy, chiropractor services, physiotherapy and psychology for the period of January 1, 2015 to December 31, 2015, retroactive to January 1, 2015.

Ottawa Police Services Board v Ottawa Police Association, 2016 CanLII 37533 (ON LA) (Marcotte) at 21-22, **Tab 34** of UTFA's Reply Book of Documents.

324. Similarly, in *Brockville Police Services Board and Brockville Police Assn. (Re)*, Arbitrator McLaren awarded an increase in vision care benefits for the period of

January 1, 2004 to December 31, 2005, retroactive to January 1, 2004 in a decision dated March 10, 2005.

Brockville Police Services Board and Brockville Police Assn. (Re), 2005 CanLII 94166 (ON LA) (McLaren) at 155, **Tab 35** of UTFA's Reply Book of Documents.

325. Indeed, the Administration and UTFA have themselves agreed to retroactive benefits improvements in previous years—further illustrating that there is nothing “absurd, impractical, unintended or unfair” about retroactive benefits improvements. For example, in the 2014-2017 round of bargaining, the parties entered into Minutes of Settlement on November 21, 2015 that included benefits improvements retroactive to July 1, 2015. Specifically, the Association and the Administration agreed to improve both vision care and paramedical health services retroactive to July 1, 2015. There is simply no basis for the Administration to claim that retroactive benefits improvements are either non-normative or are not feasible from an operational perspective.

2014-2017 MOS, Appendix C, dated November 21, 2015, **Tab 36** of UTFA's Reply Book of Documents

326. Importantly, the failure to award retroactive benefits can serve to disincentivize expeditious negotiations. In addition to negatively impacting labour relations generally, such a result would lead to unfairness, as any delay on the Administration's side will be borne by UTFA and its members in the form of lost benefits' improvements. This ought not to be allowed.
327. In the alternative, if the Arbitrator accepts the Administration's position that benefits improvements should be implemented on a go-forward basis only, UTFA members should be “credited” with the portion of the Bill 124 remainder amount attributable to the period of time in which the benefits were not in place. For example, if the Arbitrator accepts the Administration's position that benefits improvements should be made as of November 1, 2022, UTFA members will have been denied access to the improved benefits for four months of the year, equivalent to **\$99,020** of the remainder ($\$297,060/12 \times 4$ months).
328. In this context, and without prejudice to UTFA's view that the Association's costings are to be preferred, any difference in the Administration's costings should be off-set against the \$99,020 benefit that the Administration has received as a result of the delayed implementation.

UTFA Proposal 14 - Reasonable and Customary

329. UTFA has proposed that the University Administration provide the Association with information with respect to the reasonable and customary (R&C) rates applied by Green Shield. In response, the Administration objects that this proposal falls outside of the scope of Article 6 and is beyond the Arbitrator's jurisdiction.
330. As set out in UTFA's brief at paras 258-263, R&C rates have a material impact on the level of benefits that are actually available to UTFA members, in spite of what is negotiated between the parties. This was recognized by Arbitrator Schimdt recognized in *Arterra Wines Canada Inc v Teamsters Local 1979*. Arbitrator Schimdt held that reasonable and customary limits can impact the benefits available to members and may be subject to arbitral review.
- Arterra Wines Canada Inc v Teamsters, Local 1979*, 2021 CanLII 84069 (ONLA), at para 16, **Tab 39** of UTFA's Book of Documents
331. Reasonable and customary rates are integrally tied to the level of benefits enjoyed by UTFA members. R&C rates also directly impact on the ability of the Association to effectively and meaningfully negotiate benefits entitlements on behalf of UTFA members. As such, UTFA's proposal falls squarely within the scope of Article 6 and the Arbitrator's jurisdiction.
332. The Administration further objects that it has no obligation to compile new information under Article 11 of the MOA, and that this information is confidential and proprietary to Green Shield. In UTFA's submission, these are not barriers to the proposal and in any event do not go to the arbitrator's jurisdiction under Article 6.
333. First, UTFA's proposal is a proposal to address a matter relating to benefits under Article 6. UTFA's proposal is not a proposal for information under Article 11. Therefore, any limitations on the Administration's obligations to compile information under Article 11 are simply not relevant.
334. Second, and in any event, the information UTFA seeks are clearly and easily available to the Administration. UTFA is not asking for the Administration to compile thousands of records or data points. UTFA is seeking information with respect the R&C rates that are applied annually in respect of the limited list of benefits enjoyed by UTFA members. The Association is entitled to such information.
335. To the extent that Green Shield considers such information to be confidential and private, UTFA is willing to undertake a confidentiality agreement similar to the agreement attached to the production of the information in this round of bargaining. Notably, the Administration argues at paragraph 303 that Green Shield does not make such information "available to the public". UTFA is clearly not "the public", but rather the bargaining representative for all UTFA members on matters of benefits (among other matters). For this reason, UTFA is entitled to, and does,

receive a range of confidential personal and financial information from the University Administration in respect of UTFA members and in order to administer benefits.

336. All of which is respectfully submitted this 27th day of September, 2022.