

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BOARD OF GOVERNORS OF LAKEHEAD UNIVERSITY

- and -

LAKEHEAD UNIVERSITY FACULTY ASSOCIATION

GRIEVANCES RE SHUTDOWN

JANE H. DEVLIN

SOLE ARBITRATOR

FRED BICKFORD, FOR THE UNIVERSITY

ROBERT C. EDWARDS, FOR THE ASSOCIATION

There are three grievances before me which concern a shutdown of the University which took place from December 21 to December 24, 2009, inclusive. The shutdown was announced on April 24, 2009 and the notice which was issued by the University provides as follows:

Important Announcement - University Shutdown in December 2009

As part of our effort to address the current fiscal challenge, the University is shutting down operations for four days prior to the Christmas holiday period. The shutdown will commence on Monday, December 21 and conclude Thursday, December 24.

Other than those required to work to protect University assets and/or for health and safety reasons, all employees will not be scheduled to work during this four-day shutdown and will not be paid.

The December 31 pay will be reduced to reflect there being no work during this shutdown and the corresponding direct deposit will reflect the reduction in pay for four days.

This four-day shutdown will in no way affect entitlement to the holidays in between Christmas and New Year's Day as stipulated in various collective agreements and as customarily observed, and employees will be compensated.

Employees who are on Long Term Disability during the four-day shutdown will not be affected. Life Insurance Coverage and Health & Dental Benefit Programs through Medavie Blue Cross will not be affected. All other non-insured benefit programs which could result in expense to the University will be suspended during the shutdown.

It is regrettable our financial situation requires the need to take this action. However, by taking a broad approach affecting all employee groups, we are able to minimize the length of the shutdown. By scheduling the shutdown to be contiguous to our regular holiday period, students will not be affected and most employees will be provided a two-week uninterrupted break during the holiday season. This approach also ensures the contribution to curbing the deficit is not borne by only a small group of employees.

As our objective is to generate bottom line savings, the University will not be granting paid vacation requests during the shutdown.

We realize that this shutdown was unanticipated and are hopeful that this substantive period of advance notice will allow each employee an opportunity for the best possible planning and preparation.

In May, 2009, an Association grievance was filed together with a group grievance signed by a number of Association members and these grievances allege that the proposed shutdown and corresponding reduction in salary constituted a violation of the collective agreement. An individual grievance was also filed by Professor Gerry Phillips claiming that the University contravened the collective agreement by denying him paid vacation during the shutdown. In addition to these grievances, which remain outstanding, a grievance was filed on behalf of Contract Lecturers alleging that the University was improperly reducing their pay by four days. A grievance was also filed by Professor Birbal Singh claiming that the University was improperly reducing the salary of Association members on sabbatical during the fall term in 2009. In June, 2009, Ray Rasiack, the Director of Human Resources, advised that the University did not intend the financial implications of the shutdown to apply to Association members on sabbatical or to Contract Lecturers who would complete all of the duties associated with their fall teaching assignments prior to December 21st.

By way of background, the University was created pursuant to the *Lakehead University Act, 1965* and reference was made to a number of provisions of the Act, including provisions dealing with the objects and purposes of the University, the powers and authority of the Board of Governors, the Senate and the President. These provisions are as follows:

3. The objects and purposes of the University are,

- (a) the advancement of learning and the dissemination of knowledge; and
 - (b) the intellectual, social, moral and physical development of its members and the betterment of society.
- ...

6. The Board of Governors of The Lakehead College of Arts, Science and Technology is hereby continued as a body corporate by the name of "Board of Governors of Lakehead University".

...

12. Except as to such matter by this Act specifically assigned to the Senate, the government, conduct, management and control of the University of its property, revenues, expenditures, business and affairs are vested in the Board, and the Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University, including, without limiting the generality of the foregoing, power,

- (a) to appoint and remove the President and vice-presidents, if any;
- (b) to appoint, promote and remove the heads of all faculties and schools, the senior administrative officers of the University, the teaching staff of the University, and all such other officers and employees as the Board deems necessary or expedient for the purpose of the University, but no person shall be appointed, promoted or removed as head of a faculty or school, as a senior administrative officer or as a member of the teaching staff of the University, except on the recommendation of the President;
- (c) to fix the number, duties, salaries and other emoluments of the officers, agents and employees of the University;
- (d) to appoint an executive committee and such other committees as it deems advisable, and to delegate to any such committee any of its powers;
- (e) to establish such advisory bodies as it sees fit;
- (f) to borrow money on the credit of the University in such amount, on such terms and from such persons, firms, or corporations, including chartered banks, as may be determined by the Board;

- (g) to make, draw and endorse promissory notes or bills of exchange;
- (h) to hypothecate, pledge, charge or mortgage all or any part of the property of the University to secure any money so borrowed or for the fulfilment of the obligations incurred by it under any promissory note or bill of exchange signed, made, drawn or endorsed by it;
- (i) to issue bonds, debentures and obligations on such terms and conditions as it may decide, and pledge or sell such bonds, debentures and obligations for such sums and at such prices as it may decide, and mortgage, charge, hypothecate or pledge all or any part of the property of the University to secure any such bonds, debentures and obligations;
- (j) to provide for the retirement and superannuation of persons mentioned in clause a and b;
- (k) to provide for payments by way of gratuities, retiring allowances, superannuation allowances, pensions, annuities, life insurance or health insurance, or any combination thereof payable to, in respect of, or for the benefit of the persons mentioned in clauses a and b for any class or classes thereof out of a fund or funds comprising contributions made by such persons or any class or classes thereof, or by the Board, or both, or otherwise;
- (l) to expend such sums as may be required for the purposes of funds which are established for the payment of gratuities, retirement allowances, pensions, life insurance or health insurance for the benefit of the persons mentioned in clauses a and b;
- (m) to make by-laws respecting the meetings of the Board, including the determination of a quorum necessary for the transaction of business, fixing fees to be paid by students for instruction, examinations, certificates, diplomas and any ancillary activities.

14. The Senate is responsible for the educational policy of the University, and, with the approval of the Board in so far as the expenditure of funds and the establishment of facilities are concerned, may create such faculties, departments, schools or institutes or establish such chairs as it may determine, may enact by-laws and regulations for the conduct of its affairs, and, without limiting the generality of the foregoing, has power,

- (a) to control, regulate and determine the educational policy of the University;

- (b) to determine the courses of study and standards of admissions to the University and continued membership therein, and the qualifications for degrees and diplomas;
- (c) to conduct examinations and appoint examiners;
- (d) to deal with all matter (sic) arising in connection with the awarding of fellowships, scholarships, bursaries, medals, prizes and other awards;
- (e) to confer the degrees of Bachelor, Master and Doctor, and all other degrees and diplomas in all branches of learning that may appropriately be conferred by a university;
- (f) to confer honorary degrees in any department of learning;
- (g) to create faculty councils or committees and committees generally to exercise its powers.

15. (1) There shall be a President of the University who shall be appointed by the Board and who, unless otherwise provided by the Board, shall hold office during the pleasure of the Board.

...

(3) The President is Vice-Chancellor and chief executive officer of the University and chairman of the Senate, and, when the Chancellor is absent or if there is a vacancy in the office of Chancellor, he shall perform the functions of the Chancellor, and subject to the will of the Board, the President has supervision over and direction of the academic work and general administration of the University and the teaching staff, officers and employees and students thereof, and has such other powers and duties as from time to time may be conferred upon or assigned to him by the Board.

...

The main campus of the University is located in Thunder Bay and there is a smaller campus in Orillia, with a total of approximately 7500 full-time and part-time students at the two campuses. The University has in excess of 1500 full-time and part-time employees. Its fiscal year extends from May 1st to April 30th and Michael Pawlowski, Vice-President (Finance and Administration) and Chief Financial Officer testified that the University's annual operating budget is approximately \$110 million.

The Association represents approximately 300 academic staff, including Professors, Lecturers, Contract Lecturers and Continuing Contract Lecturers as well as Professional Librarians. The University and the Association have a longstanding collective bargaining relationship and the collective agreement under which the grievances were filed covers the period from July 1, 2008 to June 30, 2011. Bargaining for this agreement concluded in late August, 2008 and there was no dispute that the University did not advise the Association during bargaining of the possibility of a shutdown in December, 2009. Mr. Pawlowski testified that the shutdown was necessitated by the requirement to balance the operating budget for the 2009/2010 fiscal year and the budgeting process for that year did not begin until the fall of 2008.

The University is also a party to collective agreements with a number of other unions, namely, the Canadian Auto Workers, the International Union of Operating Engineers, the United Steelworkers of America, the Service Employees' International Union and the Canadian Office and Professional Employees Union. Duties performed by employees covered by these agreements include housekeeping, maintenance, security and clerical functions. Certain Technicians at the University have also formed an employee group.

As noted previously, the Association grievance and the group grievance allege that the shutdown and corresponding reduction in salary constituted a breach of the collective agreement. With regard to these grievances, reference was made to

numerous provisions of the agreement, including Articles dealing with university governance and operations, academic freedom, the rights and responsibilities of faculty members and salaries. These provisions include the following:

ARTICLE 8 - UNIVERSITY GOVERNANCE AND OPERATIONS

8.01 Board of Governors

The Association recognizes the rights, powers and responsibilities of the Board to operate and manage the University in accordance with the Lakehead University Act, 1965. The Board shall exercise those rights, powers, and responsibilities which are pursuant to this Agreement in a fair and reasonable manner.

8.02 University Senate

The Board and the Association recognize the rights, powers and responsibilities of the Lakehead University Senate in accordance with the Lakehead University Act, 1965.

8.03 Collegiality

The Board acknowledges the reasonable, certain, and known rights and responsibilities of members to participate in the formulation and/or recommendation of academic and Library policies and procedures within the University. The Board acknowledges that openness and transparency are essential to encourage collegiality and academic freedom. The involvement and participation of members in the selection of senior academic administrators is accepted and supported by the Board.

ARTICLE 15 - ACADEMIC FREEDOM

15.01 The parties recognize that the University, in pursuing its objects and purposes, subscribes to the principle of academic freedom which encourages the search for knowledge and its free expression.

15.01.01 Faculty members have the right to examine, question, teach, learn, investigate, speculate, comment, publish, and criticize, without deference to prescribed doctrines. Academic freedom makes possible commitment that may result in

strong statements of beliefs and positions, and protects against any University penalty for exercising that freedom. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge.

...

ARTICLE 16: RIGHTS AND RESPONSIBILITIES

16.01 Faculty Members

16.01.01 The responsibilities of faculty members (excluding those appointed as Contract Lecturer Members) at Lakehead University shall encompass an appropriate combination of teaching, research and other scholarly and creative activities and service to the profession and the community.

...

16.02 Teaching

16.02.01.01 Normally, a full-time faculty member shall receive his/her teaching assignment and schedule no later than July 1st for the fall/winter term and full year courses and no later than March 15th for the spring/summer courses. A full-time faculty member shall accept his/her teaching assignments and schedules communicated to him/her by his/her Dean, as set out in his/her letter of appointment.

...

16.02.01.02 The teaching load for full-time faculty normally shall not exceed 5 HCEs during an academic year. The teaching load for faculty members who are more active in teaching and service and less active in research and other scholarly and creative output shall not exceed 6 HCEs during an academic year. . .

16.02.06 A faculty member is expected to foster a learning environment that is conducive to scholarly learning, to treat students fairly and ethically, and to be conscientious in the preparation, organization, and revision of his/her course materials.

16.02.07 At the commencement of each course, a faculty member shall prepare and make available to the students written information concerning course requirements, assignments, evaluation procedures, components and percentage weighting of the final mark, penalties for late filing of assignments, office hours for

academic counselling and any other relevant material, and shall file a copy of this written information with his/her immediate supervisor. Any change to this written information must be provided in writing to the students and copied to the immediate supervisor in a timely manner.

16.02.07.01 A faculty member shall be available on a reasonable basis to provide students with academic counselling.

16.02.08 A faculty member shall notify students and his/her immediate supervisor as far in advance as is practicable of the rescheduling of any instructional activity. Rescheduling shall occur only in exceptional circumstances beyond the reasonable control of the faculty member or when prior approval has been obtained from the immediate supervisor and prior arrangements have been made with the students. Such approval shall not be unreasonably withheld.

16.02.09 A faculty member shall evaluate students' performance and shall supervise, when appropriate, students' research, practical work, theses and major papers.

16.02.10 A faculty member shall supervise the work of teaching, research, and laboratory assistants assigned to him/her.

16.02.11 A faculty member shall comply with procedures approved by Senate for conducting examinations and for reviewing students' marks and grades, and with reporting deadlines communicated to him/her by the Dean.

16.02.12 Faculty members shall assist in the registration process when required by their Dean or immediate supervisor and shall arrange for the adequate supervision of their examinations.

...

16.03 **Research and Other Scholarly and Creative Activities**

16.03.01 Faculty members have the right and the responsibility to devote a reasonable proportion of their time to research and other scholarly and creative activities so as to advance knowledge and understanding and to maintain scholarly competence in their discipline. Insofar as it is possible the Board shall provide adequate facilities and support for these purposes.

...

16.03.03 Research and other scholarly and creative activities shall include, but may not necessarily be limited to, the following:

- (A) Investigations, conducted individually or in co-operation with others, so that the results are (a) published in refereed journals, conference proceedings, or as patents, or (b) are presented at scholarly or professional conferences or seminars and are available for peer review;
- (B) Any studies that may be published as books, chapters in books, or disseminated by other suitable means in a manner which makes them available for peer review;
- (C) Experimentation with teaching techniques and formats, provided the results are disseminated by suitable means in a manner which makes them available for peer review; and
- (D) Literary and artistic works, exhibitions, and performances appropriate to one's discipline and which are available for peer and/or critics' review.

16.04 Administrative Responsibilities

- 16.04.01 Consistent with their primary teaching and scholarly responsibilities, faculty members shall participate in the governance of the University through active membership on appropriate bodies such as Department and Faculty Councils, and shall participate to a reasonable extent in other University bodies, including Faculty and University committees and Senate.
- 16.04.02 Members are responsible for providing evidence of their active participation in relation to all administrative activities in the context of this Article.
- 16.04.03 The Board and the Association agree to work together to promote a collegial environment such that while exercising administrative responsibilities, faculty members shall a) treat academic colleagues, other employees and students ethically, so that objectivity, fairness, and absence of discrimination are maintained in all deliberations, including assessment of performance of any colleague, other employee or student and b) not infringe on their colleagues' academic freedom, and shall observe the principles of

confidentiality in a manner consistent with the performance of collegial obligations.

16.05 Service to the Profession and the Community

- 16.05.01 A member has the right to participate in the governance of his/her professional organizations, including but not limited to membership on committees of such organizations.
- 16.05.02 The parties encourage service to the community that enhances or extends the reputation of the University.
- 16.05.03 A faculty member's active participation in the activities of the Lakehead University Faculty Association is a recognized activity within the context of this article.
- 16.05.04 Members are responsible for providing evidence of their active participation in relation to all activities in the context of this article.
- 16.05.05 In activities that extend to the community, members shall retain the rights and responsibilities associated with academic freedom. In activities not related to members' employment with the University, members shall not purport to represent the University or speak for it, or to have its approval, unless such authority has been given in writing.

16.06 Annual Report

- 16.06.01 Each faculty member shall submit to his/her immediate supervisor three copies of an Annual Report by May 31st of each year. The Annual Report shall include the previous May 1st to April 30th period. One copy of the report shall be filed in the office of the Chair/Director and two copies shall be forwarded to his/her Dean, one of which shall be placed in the faculty member's official file.
- 16.06.02 The Annual Report (excluding Contract Lecturer Members), which shall be completed on a standardized form supplied by the Dean, shall include only the following information:
- (A) teaching responsibilities undertaken, including supervision of graduate students (for example, course outlines and/or any other pertinent materials);

- (B) evidence of teaching delivery and teaching performance (for example, the Senate approved teaching evaluations or other teaching evaluations, peer evaluations, student testimonials, reproductions of student work, and/or any other pertinent materials);
- ©) books and papers published;
- (D) conference papers given;
- (E) research and other scholarly work in progress;
- (F) graduate degrees awarded or graduate students in progress and the expected date of completion, university, and title of thesis;
- (G) awards and other honours received;
- (H) Departmental, Faculty, Senate, Board, Association and other University activities;
- (I) contributions to the faculty member's profession;
- (J) professional contributions fo the faculty member's community;
- (K) an account of the academic activities pursued by the faculty member during a term or terms in which he/she did not have an assigned teaching responsibility;
- (L) research grants and contracts awarded, name of granting body, research title, amount awarded and the date awarded, and specific role of the faculty member (i.e., principal investigator, co-investigator, or other);
- (M) a statement of his/her outside professional activities in the previous year (as per Article 27.01.07)
- (N) a statement of his/her proposed future activities; and
- (O) any other information that the faculty member deems relevant.

...

- 16.06.04 Following review of the Annual Report, the Dean shall respond to each faculty member and provide constructive suggestions and reasonable support for the purpose of enhancing the faculty member's performance. If an Annual Report has been submitted by the deadline and the Dean has not responded by August 31st, the performance of the faculty member concerned will be deemed to have been satisfactory for the time period covered by the Annual Report and for the purpose of awarding career development increments as per 35.01.04.
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ARTICLE 35: SALARIES

35.01 Regular Salary

- 35.01.01 Regular Salary is the annual salary rate of a member engaged in full-time employment with the University excluding any stipends and/or payments for overload teaching or in the case of a librarian for overtime work. The salary of a member employed on a full-time basis for less than an academic year shall be pro-rated on the basis of his/her Regular Salary. The salary of a member who is on leave pursuant to Article 37 shall be pro-rated on the basis of his/her Regular Salary.
- 35.01.02 Regular Salaries shall be adjusted annually, and the adjusted salaries shall take effect as of July 1st or as otherwise indicated. Salary adjustments for individual members shall include some or all of the following components:
- (A) a scale increment;
 - (B) a career development increment;
 - (C) a merit increment; and,
 - (D) an anomaly adjustment.
- 35.01.03 The scale increment shall be the minimum percentage increase applied to the salary floor and ceiling of each faculty and librarian rank and to the Regular Salaries of all members within the rank.
- ...

35.01.09 Salary Floors and Ceilings

- 35.01.09.01 For each rank there shall be a salary floor, which shall be determined each year.

No faculty member's salary shall be less than the floor for his/her rank.

- 35.01.09.02 For each rank there shall be a salary ceiling, which shall be determined each year.

No faculty member's salary shall exceed the ceiling for his/her rank, except as a result of merit increases pursuant to Article 35.01.05.

- 35.01.09.03 For each Librarian rank there shall be a salary floor, which shall be determined each year.

No Librarian member's salary shall be less than the floor for his/her rank.

- 35.01.09.04 For each Librarian rank there shall be a salary ceiling, which shall be determined each year.

No Librarian member's salary shall exceed the ceiling for his/her rank, except as a result of merit increases pursuant to Article 35.01.05.

- 35.01.10 Members' salaries shall be paid semi-monthly.

...

35.04 Salary Adjustments from July 1, 2009 to June 30, 2010 for Faculty Members on staff as of June 30, 2009

- 35.05.01 The scale increment shall be 3.3%.
- 35.05.02 The Career Development Increment pursuant to 35.01.04 shall be \$2,400. One CDI shall be added to a member's regular salary on July 1, 2009.
- 35.05.03 A special increment of \$600 on January 1, 2010 shall be awarded to each faculty member who was a full-time faculty member as of June 30, 2009. Any portion of this special increment that is in excess of the ceiling for a member's rank shall not be awarded.
- 35.05.04 A special adjustment shall be added to all regular salaries January 1, 2010 based upon Lakehead University's relative position with respect to Statistics Canada Data - Table 1 average salary by rank at January 1, 2009 in comparison to the following universities: Brock, Carleton, Guelph, Laurentian, Nipissing, Ottawa, Trent,

Laurier, UOIT, Ryerson, Windsor. For the 2009/10 period, the adjustment shall be \$0.

35.05.05 A merit fund of \$80,000 shall be established for distribution pursuant to 35.01.05. Any portion of the merit fund that is not distributed in 2009/10 shall be added to the merit fund available for distribution in 2010/11.

35.05.06 An anomaly fund of \$10,000.00 shall be established for distribution pursuant to 35.01.06.

35.05.07 Notwithstanding 35.01.03 the 2009/2010 floors and ceilings shall be

(A)	Professor	\$94,605	\$146,745
(B)	Associate Professor	\$75,275	\$131,770
(C)	Assistant Professor	\$60,030	\$ 91,860*
(D)	Lecturer	\$50,845	\$ 73,105*

*Applies only to tenured Faculty Members. For untenured Faculty Members, the Associate Professor ceiling is also the Assistant Professor and Lecturer ceiling

35.08 Salary Adjustments from July 1, 2009 to June 30, 2010 for Librarian Members on Staff as of June 30, 2009

35.08.01 The scale increment shall be 3.3%.

35.08.02 The Career Development Increment pursuant to 35.01.04 shall be \$1920. One CDI shall be added to a member's regular salary on July 1, 2009.

35.08.03 A special increment of \$360 on January 1, 2010 shall be awarded to each Librarian member who was a full-time member as of June 30, 2009. Any portion of this special increment that is in excess of the ceiling for a member's rank shall not be awarded.

35.08.04 A merit fund of \$4,000 shall be established for distribution pursuant to 35.01.05. Any portion of the merit fund that is not distributed in 2009/10 shall be added to the merit fund available in 2010/11.

35.08.05 An anomaly fund of \$1000 shall be established for distribution pursuant to 35.01.06.

35.08.06 The 2009/2010 floors and ceilings shall be:

(A)	Librarian IV	\$68,710	\$108,965
(B)	Librarian III	\$60,070	\$ 98,065
(C)	Librarian II	\$51,430	\$ 98,065
(D)	Librarian I	\$46,750	\$ 88,440

35.08.07 The hourly rates for members employed on a part time basis pursuant to 13.04 shall be:

(A)	Librarian III	\$33.00
(B)	Librarian II	\$28.25
(C)	Librarian I	\$25.70

In addition to the provisions set out, reference was made to Article 22 of the collective agreement, which deals with promotion, tenure and renewal ("PTR") committees that are responsible for making recommendations to the President on the renewal of probationary appointments, the granting of tenure to members holding probationary appointments and the promotion of members. Each committee is comprised of the Vice-President Academic, who serves as a non-voting Chair, two Deans and a number of tenured Professors and the Association noted that tenured faculty members make up the majority of each committee. Article 25 of the collective agreement sets out the criteria and procedure for obtaining tenure.

With regard to Contract Lecturers, reference was made to Article 16.01.05 which provides that it is the primary responsibility of Contract Lecturers to teach but that nothing prevents them from voluntarily engaging in research, other scholarly activities, administrative activities, and service to the profession and the community. The collective agreement provides for three levels of remuneration for Contract Lecturers for teaching a half course equivalent ("HCE"), apart from a distance education course, and

each level depends on the member's service which is based on the total number of courses taught previously.

During the last round of bargaining, the parties also agreed on a new position of Continuing Contract Lecturer, which is the subject of a Letter of Understanding. The letter provides that the position of Continuing Contract Lecturer involves a nine-month appointment from August 1st to April 30th. The letter also refers to the assignment of duties by the Dean and provides that the normal maximum teaching workload for members in this position is six HCEs over the nine-month period. The letter specifies that the salary of Continuing Contract Lecturers is six times the amount of each HCE payment (for Contract Lecturer 3) plus \$250.00 with the proviso that the salary will be prorated if the member does not teach six HCEs.

A number of tenured Professors who were called as witnesses by the Association testified that when they were hired, they were given a letter of appointment setting out their annual salary, among other matters. Since then, they have received letters annually setting out their salary for the coming year. These letters reflect the scale or salary increment set out in the collective agreement as well as other increments, such as a career development increment ("CDI") to which faculty members may be entitled. In accordance with the agreement, faculty members are paid semi-monthly and Mr. Raslack acknowledged that although their pay stubs refer to a specific number of hours worked during each pay period, the hours are generated by the program used for payroll purposes and do not reflect the hours actually worked.

The Professors who were called as witnesses by the Association also gave evidence about their job duties and the allocation of their time among the responsibilities referred to in Article 16.01.01 of the collective agreement. As set out above, this Article refers to teaching, research and other scholarly and creative activities, administrative activities and service to the profession and the community.

Dr. Lori Chambers, a Professor and Graduate Co-ordinator in the Department of Women's Studies, testified that publishing is an essential feature of her job for which research is required and that in recent years, increased emphasis has been placed on research by the University. She also testified that if she is teaching three courses a term, most of her time is taken up with teaching and administrative duties and, as a result, she tries to carry out research either when she has a lighter teaching load or during non-teaching periods. Professor Chambers explained that in allocating her time, she generally gives priority to work that has an impact on others including teaching, marking, and preparing reference letters for students. She also testified that she may mark assignments throughout the weekend and return to her teaching duties on Monday. She testified, as well, that she may write for long periods of time if she is productive, that she cannot turn off ideas and that ideas may come to her even when she is on vacation.

Professor Chambers has authored two books and numerous book chapters and testified that she generally prepares two or three conference papers each

year. She testified that the time involved in preparing these papers may be significant and she explained that the delivery of conference papers is important because it allows her to refine her ideas and affords an opportunity for discussion, debate and an exchange of ideas with colleagues. She also testified that lectures and presentations both at the University and in Thunder Bay raise the profile of the University and promote its involvement in the community.

Professor Chambers testified that faculty members submit an annual report to their Dean documenting their activities and have between three and six years to progress through the ranks and obtain tenure based on the criteria set out in the collective agreement. She acknowledged that she was not aware of a faculty member who was not promoted or failed to obtain tenure because he or she did not work for four days. She also agreed that faculty members may be absent from work for reasons such as illness or compassionate leave. She testified, however, that faculty members carry out their work both on and off campus and the fact that a faculty member is not on campus does not necessarily mean that he or she is not working.

Professor Phillips, who was also called as a witness by the Association, teaches in the Faculty of Business Administration and since 1997, has been the Chief Negotiator for the Association. He testified that the Faculty of Business Administration operates in a collegial manner and that there is an opportunity for discussion and input before a decision is made. In fact, he testified that in most cases, a consensus is reached. He also testified that Professors in the Faculty of Business Administration do

not all allocate their time in the same way and that some are more heavily involved in research and publications whereas others are more involved in administrative activities and service. Professor Phillips testified that his interests lie in teaching, administrative activities and service. Like Professor Chambers, Professor Phillips testified that in recent years, the University has placed increasing emphasis on research and scholarly activity.

Professor Phillips also testified that faculty members are given a one year period within which to fulfill their responsibilities and submit an annual report to their Dean and he expressed the view that if they fulfill their responsibilities, they ought to be paid their annual salary. He characterized the reduction in salary associated with the shutdown as a clawback of the negotiated wage increase provided for in the collective agreement. As to whether he could fulfill his responsibilities as a Professor if he didn't work for four days, Professor Phillips testified that the quality of his work might suffer or students might be deprived of counselling. He also testified that he would make up the time by working through his vacation.

Dr. Margaret Johnston, a Professor in the School of Outdoor Recreation, Parks and Tourism, testified that only teaching and occasional meetings are scheduled and that for the most part, she decides how she allocates her time. Even in terms of teaching, Professor Johnston testified that faculty members have input and that she could, for example, arrange to have a course scheduled in the evening. She also testified that most Professors teach five half courses during an academic year and that a

standard course involves three hours of class time although additional time may be involved if the course includes labs or field trips. She testified, as well, that the correlation between preparation time and classroom hours varies greatly depending on whether a faculty member has taught a course previously. However, even in that case, Professor Johnston testified that courses must be revised based on developments in a particular field. She also testified that teaching takes place both in and outside the classroom and that with advances in technology and the use of email, students have greater access to faculty members.

Professor Johnston also testified that with experience, she has developed a sense of the time required to accomplish her goals and that for the most part, she sets those goals. In terms of her success in achieving her goals, Professor Johnston testified that she may have her work accepted for publication or she may receive funding for a particular project. With regard to teaching, she receives feedback from students and at certain points, she also receives feedback from her Dean and from the PTR committee.

Like other faculty members, Professor Johnston testified that the University has placed greater emphasis on research in recent years. She also testified that funding and a block of time are required to conduct research and that a lengthy application process is often involved to obtain grants for research work. As a result, she testified that she finds it difficult to carry out research when she is teaching or at her office at the University as there are frequent interruptions. She explained that she needs time to think and consider ideas and that if there is an issue or problem she is trying to resolve,

she may work until 2:00 a.m. She testified that in preparing a recent article, she worked with a colleague for five days and on one occasion, they worked until after midnight. Professor Johnston testified that at times, she works more than eight hours a day and at other times, less and that if she works more than eight hours, she is not entitled to overtime.

With regard to academic freedom, Professor Johnston noted that the final sentence of Article 15.01.01 of the collective agreement provides that academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge. In accordance with this provision, Professor Johnston testified that a faculty member has a professional obligation to do his or her job properly and not take the easy way out. She also testified that work must be carried out in an ethical manner and that the privilege of academic freedom brings with it a responsibility for justification and an ethical and professional approach to one's work.

Glenna Knutson, an Associate Professor in the School of Nursing, testified that class time is scheduled and that in fulfilling their teaching responsibilities, faculty members also plan and prepare courses, evaluate students and correspond with students by email. Professor Knutson testified that apart from class time, she decides how she allocates her time among the responsibilities referred to in Article 16.01.01 of the collective agreement and documents her progress in her annual report. She also testified that she works in the evening, on weekends and during vacation periods and

that she has observed her colleagues do so as well. She testified that most faculty members find that there is no upper limit to the work to be done.

Dr. Aris Carastathis, a Professor of Music, is a composer and conductor and testified that he requires lengthy periods without disturbances outside his teaching hours to devote to composition. He testified that he may do this work in the evening, on vacation or holidays and that he does his most creative work between 9:00 p.m. and 3:00 a.m. He also testified that much of his work is commissioned by others and, as a result, there may be time limits for the delivery of the work.

Professor Carastathis testified that his teaching schedule generally involves 12 contact hours a week but that he spends considerably more time with students as he is involved in rehearsals and conducting student groups. In addition to conducting musical performances at the University, Professor Carastathis conducts performances elsewhere in Thunder Bay and in cities such as Toronto, Ottawa, Edmonton and Athens. The Thunder Bay symphony has also commissioned and played Professor Carastathis' work and he testified that on those occasions, he is involved in rehearsals and collaborates with the conductor and the musicians.

The Professors who were called as witnesses by the Association also gave evidence about their responsibilities during the month of December. At the time they testified in the summer and fall of 2009, the academic schedule for 2009/2010, which

had been approved by Senate in November, 2008, provided that classes for the fall term would end on December 3, 2009. The schedule also provided that the examination period would extend from December 7th to December 19th with an examination contingency date of December 21st. This latter date was designated in the event that examinations had to be rescheduled due to inclement weather or student illness, for example. The academic schedule approved by Senate specified that marks were to be submitted by noon on December 24th. As in other years, the University was to be closed from December 25th to January 1st.

Professor Chambers described the month of December as a very busy time and testified that in 2008, she declined an invitation to be a featured speaker at a conference in Australia beginning on December 19th because she had too much work to do. She testified that she taught three courses in the fall term that year, all of which included substantial written assignments and she also supervised two graduate students. She explained that she prefers research assignments to examinations and that she allows students to hand in a number of drafts which she reviews during the course of the term. In 2008, final assignments were due by mid-December and Professor Chambers testified that she marked assignments from December 10th to December 24th. She also testified that she worked with a graduate student on revisions to her thesis up to and including December 24th and finished work that day at about 6:00 p.m. Professor Chambers testified that the revisions had to be completed so that the student could avoid paying tuition for another term, which she couldn't afford.

Professor Chambers also testified that in prior years, she and other Professors and Teaching Assistants involved in teaching sections of a first course arranged a "marking party" in which they marked examinations together in order to ensure that marks were consistent for all students. The party was held on December 19th or 20th and Professor Chambers testified that it could not have been held earlier because graduate students would not have completed their work by that time. The party generally lasted for a day or two and Professor Chambers testified that those who attended marked examinations for eight to nine hours at a time. After the party, Professor Chambers reviewed and collated marks to ensure that there were no anomalies.

Professor Chambers also testified that as applications for graduate school are due in January, she generally prepares ten to 15 reference letters for students in the last two weeks of December and that each letter must be tailored to the individual student. She testified, as well, that although she tries not to work between December

Chambers agreed that the date for the submission of marks for the fall term could be extended to early January, 2010, she testified that doing so would create a problem for graduate students. She also testified that students might require their marks for a particular program and would be disadvantaged if other universities provided marks and Lakehead University did not. She testified, as well, that changes to the academic schedule, including the date for the submission of marks, require the approval of Senate.

Professor Phillips testified that once classes end in December, tutorials may be scheduled and that Professors are involved in setting, invigilating and marking final examinations and assignments. He explained that often assignments cannot be done until the end of a course because it is only at that time that students have the necessary knowledge. He also testified that while some Professors may submit their marks prior to the deadline, their ability to do so depends on the examination schedule. He testified, as well, that Senate is responsible for approving the academic schedule, including the date for the submission of marks.

Professor Phillips testified that in the month of December, faculty members may also be involved in counselling students, conducting research or carrying out administrative duties. He explained that meetings are frequently held in December when classes are over as that may be the only time that faculty members can get together. In the past, meetings of PTR committee have been scheduled during the week of December 10th and Professor Phillips testified that a significant amount of reading is

involved in preparing for those meetings. He also testified that between December 25th and January 1st, faculty members may be involved in last-minute marking, preparing for courses to be taught the following term and responding to emails from students. Every second year, the Faculty of Business Administration hosts a function for alumni at the University on Boxing Day.

Professor Johnston testified that in November and December, she often writes reference letters for students and that she may spend an hour writing a single letter. She also spends time assisting students applying for scholarships and is involved in counselling students. When classes end in December, Professor Johnston works intensively with graduate students and marks examinations and she testified that she would generally spend three to five days marking examinations for a third year course.

On five different occasions, Professor Johnston has also supervised students on trips to Antarctica during the month of December. In two cases, the trip extended from late November to mid-December and in two cases, from mid-December to Christmas. In 2008, the trip extended from mid-December to early in the New Year. Professor Johnston testified that during these trips, she was responsible for the students at all times and for the learning process, which included seminars and informal discussions with students. On some trips, she also invigilated and marked examinations.

Professor Johnston testified that if she is not on a field trip with students during the period from December 25th to January 1st, she often works with graduate students, completes a paper or prepares courses for the following term. She testified that during this period, some Professors work on campus and others at home. She also testified that if she did not work from December 21st to December 24th, she would have to do the work at another time, likely in the evening or on weekends. Accordingly, Professor Johnston testified that she intended to work during the shutdown and that if she had access to her office, she would spend some time on campus, and some time working at home.

Professor Knutson testified that in December, meetings are held that cannot be arranged earlier, including curriculum and faculty council meetings as well as meetings of faculty involved in team teaching in the winter term. Faculty members also invigilate and mark examinations and prepare courses for the following term. Professor Knutson testified that the time required for marking depends on the number of courses being taught, the size of each class and the type of examination. If essay questions are involved, she testified that she may spend an hour marking each examination. She also testified that although the situation has improved over time, in some cases when she taught distance education courses, she did not receive the examinations before Christmas. In those circumstances, she marked the examinations between Christmas and New Year's. She testified that she may mark examinations for full credit courses and prepare courses for the following term at that time as well. She explained that

preparation must be completed before a course begins because a course outline must be provided to students.

Professor Knutson also testified that when she teaches a fourth year clinical course in the School of Nursing, she is involved in arranging placements and preceptors for students beginning in January. Accordingly, in December, she prepares information packages for nurses who act as preceptors and testified that although in most cases, she receives the names of preceptors from hospitals by mid-December, that is not always the case. Once the names are received, she sends out the information packages and provides students with an updated list of preceptors. During December, Professor Knutson also works with graduate students and often attends faculty-related meetings in Toronto. As well, she carries out research and data analysis and testified that it is often difficult to find blocks of time for that work prior to December.

With regard to the effect of the proposed shutdown on students, Professor Knutson testified that students in a joint BScN program have the option of attending courses at the University or at Confederation College. She testified that students would have the opportunity to speak to College faculty until December 24th but that in view of the shutdown, that would not be possible at the University because it was her

and that it was not possible to arrange to do all of the work ahead of time. She testified that, apart from class time, she and other faculty members decide how they manage their time and are paid an annual salary to fulfill their responsibilities.

Professor Carastathis testified that during the month of December, he is involved in marking, administrative duties and preparing materials for the following term. He testified that approximately 60% of the time, it is necessary to prepare new materials which are geared to a particular combination of instruments and the students' level of ability. Professor Carastathis also described the month of December as an oasis for a composer and an opportunity to catch up on creative work. He testified that the period from December 20th to January 1st, in particular, is prime time for composing and that if he did not make use of this time, he would fall behind. As noted previously, he is often composing for others and he testified that as the field is highly competitive, he must respond to requests for his work. Professor Carastathis also testified that during the month of December, he prepares proposals for festivals and conferences and that after Christmas, he delivers his work to various groups. He testified, as well, that although he may not work on Christmas Day, he would certainly want to work from December 21st to 24th.

Dr. Qinglai Dang, a Professor in the Faculty of Forestry and the Forest Environment, who was also called as a witness by the Association, testified that during the month of December, he spends approximately one week's time marking examinations. He also testified that he is currently conducting research on the effects of

climate change on the boreal forest and that from October to late March or April, he conducts experiments in greenhouses at the University. He testified that it is critical that the experiments be checked on a daily basis, including Christmas Day and New Year's Day, and that a student checks the plants twice a day and he generally goes to the University once a day.

Dr. Phillip Allingham, another witness called by the Association, is an Associate Professor and Chair of Undergraduate Studies in the Faculty of Education and an Adjunct Professor in the English Department. He testified that in the period prior to Christmas, he speaks to colleagues about students, discusses research and attends meetings with the Dean and others in his Faculty and across campus. He also testified that when classes are over in December, faculty members have an opportunity to prepare courses for the following term; carry out initial research, reading and analysis; and prepare papers for the conference season, which extends from May to August. In the week prior to Christmas, Professor Allingham may spend time reading papers submitted by Masters students so that they can work on revisions during the break and between Christmas and New Year's, he is in contact with staff and students by email.

During the month of December, Professor Allingham also spends time dealing with issues relating to practicums for students in the professional year in the Faculty of Education. He explained that the program has two nine-week terms, each of which is followed by a five-week practicum and in the fall, the practicum ends when the public schools begin their Christmas break. He testified that the education office at the

University then processes over 600 reports completed by teachers who supervise the students during their practicums. Most reports are received electronically on December 21st or 22nd and Professor Allingham testified that he is then involved in discussions with the co-ordinator regarding students for whom there are performance concerns. He testified that approximately 4% of students fall into this category and that he would contact the teachers who prepared the reports. In approximately half the cases, he would be unable to reach them until the New Year. Although Professor Allingham agreed that students may withdraw without penalty until early February, he testified that he tries to deal with as many cases as possible before Christmas because it is difficult to predict the number of problem situations and that in January, he resumes his teaching duties. By that time, he has responsibilities for other students involved in practicums.

In addition to the evidence of faculty members, the Association introduced a report of Dr. George Fallis, a Professor of Economics and Social Sciences at York University and it was agreed that the report could be considered by way of background. Professor Fallis has been a faculty member at York University for over 30 years and during that time, he served as Chair of the Department of Economics in the Faculty of Arts for six years and Dean of the Faculty of Arts for seven years. His report indicates that he has also been involved in most aspects of Senate-based academic activity at the University. Professor Fallis indicates, as well, that since 2001, a substantial portion of his research has related to the role of universities in contemporary society and he has published articles on the subject in academic journals, made presentations at conferences and seminars, delivered public lectures and written articles for the popular

press. He has also written a book entitled *Multiversities, Ideas and Democracy* (U of T Press, 2007) and taught a graduate course on the University and Society.

For purposes of his report, Professor Fallis reviewed the *Lakehead University Act*, material on the Lakehead University website relating to the composition of the Senate and its committees, Lakehead University's Strategic Plan 2005-2010, the Senate's Academic Plan 2006, the current collective agreement and the grievance filed by the Association.

In his report, Professor Fallis indicates that although universities are public institutions, they are separate and distinct from government. He attributes the independent character of universities to three interrelated aspects: "universities are autonomous institutions, whose faculty members have academic freedom, and that on matters of academic policy operate under a system of collegial self governance". Professor Fallis indicates that these interrelated aspects are fundamental to the nature of universities across the Anglo-American world and that academic freedom is the most important of the three. He describes academic freedom as follows:

Academic freedom is a complex concept. It includes the well-known right to teach, to conduct research, and to publish without deference to prescribed doctrine. Teaching and the advancement of knowledge are best served by the free and unconstrained examination and pursuit of ideas. But academic freedom embodies more than this. In the nineteenth century, when the idea of academic freedom was being developed and tested, many of the most controversial cases involved the teaching of Darwin's ideas. Board of Governors - many of whom were clergy - refused to hire and even dismissed professors who taught, studied, and published new findings about Darwin's ideas. The battle was not simply between accepted ideas and new, perhaps, heretical, ideas. The battle was also

about who is competent to judge the work of a professor. Embedded in the idea of academic freedom is the idea that professors should be judged by their peers and by the criteria of their discipline (not by the clergy, or the Board of Governors, or the President or the Dean). The right to be judged by one's peers subtly, but fundamentally, supports the idea of collegial self-governance. It also subtly, but fundamentally, shapes the nature of the relationship between the University as employer and faculty member as employee, discussed below in point 24 and following.

With regard to collegial self-governance, Professor Fallis' report includes the following:

Collegial self-governance is manifest in many ways, but most significantly, in the separation between the overarching powers of the Board of Governors (or equivalent body) and the powers of the Senate (or equivalent body). The statute establishing the University creates a Board of Governors and also a Senate. The Board appoints the President and is responsible for the financial, property, and business affairs of the university. The Senate is responsible for the academic policy of the university; and the majority of the Senate shall be faculty members. The Senate can create councils within Faculties, and these Faculty Councils in turn create departmental councils. Faculty members are also the majority on Faculty Councils and departmental councils. Thus on matters of academic policy, looking across the Senate, Faculties and departments, the university is collegially self-governing.

In his report, Professor Fallis also indicates that at all universities, faculty members have three responsibilities: to teach, to conduct and publish research, and to provide service to the university, their profession and the wider community. He states, however, that only in the area of teaching does the employer formally assign tasks although he suggests that even in this area, there is much collegial input. He also indicates that although the "balance across the three responsibilities varies by professor, by field, and by university, teaching is seldom more than 50-60 percent of the activities

of faculty members". Professor Fallis describes the three responsibilities of faculty members as follows:

Teaching can be at the undergraduate level or graduate level, and can sometimes be in continuing education or professional development programs. The work involves setting out the structure and content of the course in a syllabus, preparing for each class, presenting the class (whether lecture, seminar, labs or studio), setting the instrument for assessment (tests, exams, problem sets, lab or studio exercises, or essays) and assessing the submitted work. Faculty members must also be available to students outside of the class hours and in a timely way to answer questions, provide clarification, advice and so on. Much of this out-of-class consultation with students now occurs through e-mail. Professors also keep contact with students after any one course is finished and are asked to write letters of reference for applications to graduate or professional schools, for scholarships, and for jobs. In many courses, faculty members must supervise tutorial leaders, and people who assist with the marking of tests, problem sets, and essays. In other courses, faculty members prepare and mount on-line materials. (Some courses are delivered entirely on-line). In addition to the work for each course, it is the responsibility of professors to read and remain up-to-date in the academic literature of their field and particular specialization. Also, faculty members are responsible to think carefully about their pedagogical practices and to strive to improve their teaching. Being up-to-date in one's field and pedagogy can involve attending conferences.

Conducting and publishing research is an equally diverse activity, but much more difficult to describe and characterize. Research of course involves reading the existing literature and recognizing what is known and how others are analyzing the issues. Then it involves conceiving of something new, something that will contribute to what is already known. The 'new' can be new information, new synthesis, new analytical techniques, models or theories, new explanations, new tests of existing theories, and even (although very rare) new paradigms of thinking about the world. After conception, the work must be carried out, and then written up, often first for preliminary circulation to others who work in the field. Interaction with others in the field, many, indeed most of whom, will not be at your home university is vital during all stages of the research process - understanding the current literature, conceiving of a project, conducting the project, and writing up the findings. On many occasions, after the work was begun, the researcher realizes that their conception was unsound or not-so-original as they thought. The work to date is a false start - even a dead end. But this apparent failure is an inevitable and essential part of the creative research process. On completion of the work, it is written up and submitted to a journal or publisher (or other means of dissemination). For the journal editors, the question becomes: is this worthy of publication? To answer the question, the work is sent

for review by others in the field: that is, for review by one's peers. Here we return to this fundamental aspect of academic freedom: the work of faculty members should be judged by their peers. The academic community places great weight on the peer review process for research.

Service is also diverse, but perhaps easier to describe. The majority of service comes through participation in collegial self-governance of your university, through the Senate, Faculty Councils, department councils and all the committees of each level of the governance of the university. It also involves the work of the faculty association, task forces, and other initiatives, often related to the student's out-of-class experience. There is also service to one's profession, provided for example, through reviewing papers/articles/chapters submitted to journals and other publishers, organizing conferences, sitting on research grant adjudications committees, and participating in the governance of scholarly associations in one's field. (At some universities, these service-to-the-profession activities might be classified as research.) And finally, there is service to the community. This can involve many, many things, but might be summarized as faculty members engaging with the world as public intellectuals. For example, it might involve radio or TV interviews, writing articles for non-academic media, participating as an expert in some community deliberation.

Professor Fallis concludes that because of the unusual nature of the university as a public institution (having regard to the concepts of academic freedom and collegial self-governance) and because of the diverse and complex nature of the responsibilities of faculty members, the university is an unusual employer.

In the course of his report, Professor Fallis finds that Lakehead University shares the fundamental character of other universities in that it is an autonomous institution whose Professors enjoy academic freedom and that with regard to academic matters, it operates under a system of collegial self-governance. In considering the responsibilities of faculty members at Lakehead, Professor Fallis refers to various provisions of the collective agreement and to the extent that he is involved in interpreting the agreement, I do not propose to consider his comments. The interpretation of the

collective agreement is not a matter in respect of which it is necessary or appropriate to consider expert evidence.

Turning then to the events that led to the shutdown of the University from December 21 to 24, 2009, the evidence indicates that the process of establishing an annual operating budget begins in the fall of each year with the review and recommendation of budget guidelines by the Administrative Executive Committee ("AEC"). This committee consists of the President of the University, currently Dr. Fred Gilbert, the four Vice-Presidents, the Dean of the Orillia campus and the President's Executive Assistant, who serves as the Secretary of the Committee. Mr. Pawlowski testified that the AEC is responsible for administrative matters, including day-to-day operations of both an academic and non-academic nature. The President reports to the Board of Governors on the activities of the AEC.

The 2009/10 budget guidelines begin by providing that the operating budget will be balanced, consistent with Board requirements. In this regard, the evidence indicates that in the summer of 2002, the Board of Governors passed a motion which provided that only balanced budgets were to be presented to the Board for approval and that no deficit was to occur as a result of overspending. Mr. Pawlowski testified that in accordance with the motion, balanced budgets have always been achieved and he agreed that, in some cases, this was accomplished by using surplus funds from previous years. He also agreed that in some years, the actual surplus

exceeded projections and he testified that in some cases, additional funding was received from the Provincial government.

The 2009/2010 budget guidelines provide, among other matters, for an overall reduction of 6% in expenditures and a hiring freeze for positions funded from the operating budget with the proviso that AEC approval was required to fill essential positions. Mr. Raslack testified that prior to the freeze which was implemented in December, 2008, the Human Resources Department could take steps to fill certain positions and although AEC approval was required, this approval was largely a formality. Following the freeze, specific authorization of the AEC was required to fill positions. In accordance with the usual practice, the 2009/2010 budget guidelines were subsequently reviewed by the Senate Budget Committee and the Finance Committee of the Board of Governors, following which they were passed by the Board.

On December 3, 2008, a town hall meeting was held to discuss the operating budget for the coming year. The evidence indicates that town hall meetings are held two or three times each year to provide information and give members of the university community, including faculty, staff and students, an opportunity for input. Mr. Pawlowski testified that at the outset of the meeting, there is usually a presentation by a member of the AEC, which is followed by a question and answer session. The meetings are held in Thunder Bay and videocast to the Orillia campus.

Mr. Pawlowski testified that at the town hall meeting on December 3rd, he made a presentation in which he explained the difficulties that the University was facing in balancing the budget. In the course of the presentation, he advised that there would be a permanent reduction of 6% in expenditures as well as a hiring freeze for positions funded from the operating budget. Following the presentation, a number of questions and concerns were raised regarding matters such as borrowing and capital costs associated with the Orillia campus.

Professor Phillips, who attended the town hall meeting on December 3rd, testified that he understood that the 6% reduction in expenditures would be sufficient to address the University's financial difficulties and that no further action would be required. He testified that no reference was made to the possibility of a shutdown. Professor Knutson, who also attended the town hall meeting on December 3rd, testified that she did not recall Dr. Gilbert or the Vice-Presidents asking for suggestions as to how a balanced budget could be achieved and that no mention was made of a layoff or the possibility of a shutdown. She testified, as well, that at the conclusion of the meeting, Dr. Gilbert indicated that there would be an opportunity for further discussion on the budget and that a town hall meeting would be held the following term. She testified, however, that no meeting took place prior to April 23, 2009 when representatives of the Association were advised of the proposed shutdown.

In a message from Dr. Gilbert, which was prepared in early 2009 and published in the Agora, an online newsletter, he referred, among other matters, to the

need for a 6% reduction in expenditures in order to balance the 2009/2010 operating budget. His message also included the following:

I want to emphasize that Lakehead and the entire Ontario university system is in a crisis situation. There will be debates over deficit budgeting, how growth in the GTA will be dealt with, and the role to be played by each institution. It is important that, to the greatest extent possible, we continue to control our own destiny. This will require change uncomfortable to some, redistribution of limited funds, and the evolution of an agile, responsive, and even more strategic Lakehead University. We have the opportunity to reposition the University in such a way that it can contend more effectively with the budgetary crisis of today and those that will occur in the future. I am confident that the people of this University understand the gravity of the situation and have the capacity and the commitment to make us a stronger, more resilient institution providing quality education through the academic programs and distributed learning originating from our campuses in northwestern and central Ontario. We will continue to be strategic in decision-making and the new Strategic Plan will assist in that regard.

Mr. Pawlowski testified that following the town hall meeting in December, 2008, Vice-Presidents worked with their organizational units to achieve an overall reduction of 6% in expenditures. He explained that in Finance and Administration, for which he is responsible, there was not a 6% reduction in all areas because in some areas, there was no discretionary spending. He also testified that in the academic unit, a significant portion of the cost is attributable to salaries and because of the need to deliver academic programs, it was difficult to achieve the necessary savings. In this regard, Dr. Laurie Hayes, Vice-President (Academic) and Provost, testified that in early 2009, she met weekly with the Deans' council to discuss the progress being made in her unit and she reported regularly to the AEC. Dr. Hayes also testified that by mid-March, her unit was approximately \$1 million short of its goal.

Mr. Pawlowski testified there was subsequently a great deal of discussion and debate among members of the AEC as to how an overall reduction of 6% in expenditures could be achieved in all units. In the end, because of the shortfall in the academic unit, it was determined that such a reduction was not possible and Mr. Pawlowski testified that it then became necessary to consider other means by which a balanced budget could be achieved. Although various options were discussed, Mr. Pawlowski testified that in the end, a decision was made to shut down the University from December 21 to 24, 2009, inclusive.

Mr. Pawlowski testified that there was nothing in the collective agreement to preclude the University from taking this action and that it was the view of the AEC that the proposed shutdown would satisfy the requirement for a balanced budget and have the least impact on operations. According to Mr. Pawlowski, the AEC was also of the view that the shutdown would affect all areas of the University equally as employees would not report for work for four days and there would be a corresponding reduction in pay. Mr. Raslack testified that the shutdown was intended to ensure that a small group of employees did not bear the burden of the deficit.

Mr. Pawlowski also testified that in the spring of 2009, he and Dr. Gilbert conferred and decided that the criteria for a layoff for financial reasons set out in Article 31 of the collective agreement had not been met. In this regard, Article 31.01 provides as follows:

31.01 Lay-offs of members for financial reasons shall occur only when a bona fide financial crisis exists and only to the extent required to alleviate the crisis. A bona fide financial crisis exists when there has been a substantial financial deficit, which is projected, on the basis of reasonable assumptions, to continue for at least one year, and which threatens the long-term well-being on the University, in particular its academic functions. The onus of proof shall be on the Board to establish that a bona fide financial crisis exists.

The balance of Article 31 sets out a series of steps to be followed when the President has reason to believe that the circumstances described in Article 31.01 exist and that a layoff of members is required. Article 33.01 provides that within departments or schools that have been identified pursuant to the procedures outlined in Article 31, members are to be laid off in the following order: (a) members on limited term appointments; (b) members on probationary appointments in reverse order of hire; and (c) tenured members or continuing members, as appropriate, in reverse order of date of hire. Article 33.03 provides that the sequence of layoffs set out in Article 33.01 may be varied in order to preserve the primacy of the University's academic function.

Mr. Pawlowksi noted that the University's operating budget was for a one year period and he testified that he and Dr. Gilbert were of the view that a deficit of approximately \$1 million in a total budget of approximately \$110 million did not constitute a *bona fide* financial crisis which threatened the long-term well-being of the University. As a result, they concluded that there was no basis for laying off Association members. Mr. Pawlowski noted that in the event of a layoff for financial reasons, the collective agreement provides that faculty members are entitled to notice ranging from three to six

months or pay in lieu of notice. They are also entitled to termination allowances, ranging from a minimum of six months' to a maximum of twenty months' salary.

On April 23, 2009, Mr. Pawlowski and Mr. Raslack met with representatives of the Association and with other bargaining agents to advise them of the shutdown. Mr. Pawlowski agreed that prior to that time, the possibility of a shutdown had been discussed only among members of senior management and the Director of Human Resources. Professor Phillips, who attended the meeting on April 23rd, testified that Association representatives were advised that the shutdown was necessary as a cost-saving measure and that there was no alternative. He also testified that Association representatives were advised that no one would be permitted on campus during the shutdown. Professor Phillips testified, as well, that when he asked whether the shutdown would be a one-time event, he was told that there was no guarantee that would be the case.

At the hearing, Mr. Pawlowski did not rule out the possibility of a shutdown in the future if the University were to experience financial problems. He also testified that had there been a smaller budget deficit in 2009/2010, it was possible that the shutdown might have been three days, rather than four. However, even if there had been a larger deficit, he thought that it was unlikely that the shutdown would have extended for more than four days. Mr. Pawlowski also testified that during the shutdown in December, 2009, faculty members would have the same access to their offices that they have on evenings or holidays when the buildings are locked.

The notice announcing the shutdown, which is set out earlier in this award, was issued on April 24, 2009. In a special communication bulletin to its members, which included the text of a press release, the Executive of the Association expressed the view that the proposed shutdown violated the collective agreement and advised that action would be taken. The Executive also suggested that questionable decisions on the part of the administration, rather than salaries, were the source of the University's financial problems. Professor Phillips, who prepared the bulletin, testified that he was disappointed that the University made a unilateral decision regarding the shutdown, rather than adopting a collegial problem-solving approach that had been used in the past. As noted previously, the grievances before me were filed in May, 2009.

Professor Phillips testified that on previous occasions when the University experienced financial problems, those problems were resolved by means such as attrition and early retirement and that, in one instance, faculty and staff contributed a percentage of their salaries. In another case, faculty members contributed to a scholarship fund and obtained matching contributions from the government. Professor Johnston also recalled two occasions when no purchases were made in her department in the spring in order to address a budget shortfall. In 2009, however, in contrast to earlier occasions, Professor Phillips questioned certain financial decisions on the part of the University and suggested that its financial problems were avoidable.

On May 25, 2009, a town hall meeting was held during which [REDACTED]

Pawlowski made a presentation on the 2009/2010 operating budget and explained how a balanced budget was achieved. In this regard, the evidence indicates that a deficit of approximately \$3.3 million was offset by accumulated surpluses from previous years and Mr. Pawlowski testified that the figure for salaries included savings that would be achieved by the four-day shutdown. For purposes of the budget, income was based on enrolment of 6500 full-time students or 7200 full-time equivalents ("FTEs"). Mr. Pawlowski testified that FTEs are significant because it is on the basis of FTEs, rather than a head count of students, that government funding is provided. Following Mr. Pawlowski's presentation at the meeting on May 25th, questions and concerns were raised regarding matters such as capital expenditures, indebtedness, investments and issues related to the shutdown.

Mr. Pawlowski testified that during the town hall meeting in May, he could not recall any alternatives to the shutdown having been proposed and although

In May, 2009, Dr. Gilbert issued a message regarding the University's financial sustainability. The introduction to the message indicated that like most institutions of higher learning, Lakehead University was facing fiscal challenges that threatened its long-term health but that the administration had focused on creating a balanced budget which avoided a structural deficit and reductions in staff. In the message, Dr. Gilbert indicated that the Board of Governors and the administration were committed to a balanced budget and avoiding a structural deficit that could hamper the University's ability to rebuild when economic conditions improved. He also indicated that with almost 80% of the budget being taken up with salaries and wages and with operational budgets at bare-bones levels, it was apparent that in order to effect any real cost savings, there would have to be an impact on personnel. Dr. Gilbert advised that the savings in salary from the proposed shutdown were necessary to balance the budget and expressed the view that the shutdown was the most equitable solution as it would affect everyone in the organization. He also indicated it would allow the University to continue to provide CDIs and to honour salary commitments contained in its collective agreements and allow further time to achieve the necessary 6% budget reductions.

The evidence indicates that in July, 2009, representatives of the Association met with Mr. Pawlowski and Mr. Raslack to discuss the proposed shutdown. Mr. Pawlowski testified he did not recall any alternatives to the shutdown being proposed by the Association. Professor Johnston testified that during the meeting, Mr. Pawlowski indicated that if the University had 100 additional students, there would be no need for the shutdown. While Mr. Pawlowski could not recall precisely what he said, he did not

dispute the Association's understanding of his comment. Professor Allingham testified that Mr. Pawlowski made a similar comment during a Senate meeting in May, 2009. According to Professor Allingham, Mr. Pawlowski was referring to full-time students for whom the University receives government funding.

As noted previously, the academic schedule for 2009/2010 which was approved by Senate in November, 2008, provided that the examination period would extend from December 7th to 19th with an examination contingency date of December 21st. The schedule also provided that final marks were due by noon on December 24th. In fact, there was no dispute that the academic schedule routinely provides a start and end date for examinations, an examination contingency date and a due date for the submission of marks. There was also no dispute that Senate did not approve any changes to the 2009/2010 academic schedule.

On October 16, 2009, a notice was posted for students and staff with the timetable of examinations for December, 2009. Dr. Hayes testified that the examination period was shortened and she agreed that there was no longer an examination contingency date. Dr. Hayes also identified a notice to faculty and staff, which was posted on November 19, 2009, indicating that final marks for fall term courses were due in the office of the Registrar by noon on December 18th with the exception of marks for examinations written on or after December 15th which were due by noon on January 4, 2010. Dr. Hayes testified that in view of the shutdown, there was concern about the requirement to submit marks by noon on December 24th and, as a result, the amended

schedule provided time for faculty to complete marking before or after the shutdown. Dr. Hayes assumed that if faculty were not marking examinations from December 21st to 24th, they would perform the work at another time. She also testified that the changes described were the result of an administrative decision and that academic units were consulted.

In the course of her evidence, Dr. Hayes identified minutes of a number of Senate meetings in which the academic schedule or revisions to the academic schedule were approved by Senate. She disputed, however, that changes to the schedule require the approval of Senate. She testified that the examination timetable is the responsibility of the Registrar and that University Regulations provide that the Registrar is to post the timetable for December examinations by mid-October. In this regard, Dr. Hayes referred to Regulations, which include the following:

IV Examinations

(a) The Senate constitutes the examining body for all University examinations.

(b) The Registrar is responsible for the organization of examinations and the complete releasing of final grades. He shall make available to all students complete examination regulations. He shall also post timetables for examinations on a bulletin board.

...

(d) The timetables for December examinations shall be published by mid-October. The timetable for April examinations shall be published by early February. Any changes in the timetable that become necessary after mid-October (in the case of December examinations) or early February (in the case of final examinations) shall be posted on a bulletin board.

Dr. Hayes testified that paragraph (d) of the Regulations would include a change in the date on which final marks are due. She also agreed that the Regulations contain provisions dealing with an examination contingency date and those provisions are as follows:

Examination Cancellation Contingency Plan

The President, or delegate, will decide, in consultation with the Registrar, or delegate, whether to proceed with or to postpone examinations in the event of extreme weather conditions or any other general emergency which occurs when final examinations are in session.

If the decision is made to postpone examinations, the postponement will apply to all examinations scheduled for a particular day or part thereof.

In anticipation of the need for such action, each examination schedule will list a date on which any or all postponed examinations would be re-written at the same hour and location as originally scheduled.

The date chosen will be the earliest possible date, other than a Sunday or statutory holiday, following the last day of regularly scheduled examinations.

Dr. Hayes acknowledged that the revised schedule did not include an examination contingency date and she testified that the date was not needed.

In contrast to the evidence of Dr. Hayes was the evidence of Dr. Mary Louise Hill, a Professor of Geology, who was called as a witness by the Association. Professor Hill served as Vice-President (Academic) and Provost from 1999 to 2004 and, accordingly, was Dr. Hayes' predecessor. Professor Hill testified that for much of her career with the University, which began in 1999, she has served in various capacities on Senate. She testified that in accordance with the *Lakehead University Act, 1965*,

Senate is responsible for the academic program, including instruction and assessment and it is Senate's responsibility to set the academic schedule. She also testified that to her knowledge, Senate has always approved the academic schedule and any changes to that schedule, apart from changes to the schedule in the fall of 2009. She testified, as well, that Senate establishes the examination period and the Registrar schedules examinations within that period. She expressed the view that the length of the examination period is important because it may have a bearing on student performance. Professor Hill testified, as well, that the Registrar has no authority to establish a date for the submission of marks.

The announcement of April 24, 2009, which is set out earlier in the award, indicates that employees would not be scheduled to work during the four-day shutdown in December, except where work was required to protect university assets or for health and safety reasons. In this regard, Dr. Hayes testified that a form was developed to be submitted by employees requesting authorization to carry out time-sensitive research work where failure to perform the work would result in potential loss or substantial damage to the project. In each case, the employee was required to outline the nature of the loss or damage that would occur as well as the hours of work that would be involved. Dr. Hayes agreed that employees were to be paid only for actual hours worked from December 21st to 24th and she acknowledged that she could not point to a provision of the collective agreement providing that faculty members would be paid on an hourly basis.

Dr. Hayes testified that she received a total of 15 requests to perform work during the shutdown, of which ten were approved. With regard to Professor Dang, Dr. Hayes testified that he initially requested authorization to perform work on each day of the shutdown following which he was asked to specify the amount of time involved and the potential damage if the work was not performed. Dr. Hayes testified that she then learned that Professor Dang had also submitted a request for vacation during the shutdown and that when she sought clarification, he did not pursue his request to work at that time.

With regard to student enrolment for the 2009/2010 academic year, the evidence indicates that during meetings held in the fall of 2009, members of the AEC were provided with enrolment updates. Mr. Pawlowski and Dr. Hayes testified that the information pertained to student enrolment in the fall term as well as projections for the following year. Mr. Pawlowski also testified that the information, which was provided by the Office of Institutional Analysis, consisted of a head count of students whereas government funding is based on FTEs. He testified that the University uses a figure of \$10,000.00 per FTE to obtain a rough estimate of revenue.

Mr. Pawlowski also explained that the cut-off date for determining actual enrolment is November 1st and that the Registrar then begins a complex process of categorizing students and it is on the basis of this categorization that government funding is provided. For this purpose, the Registrar prepares a report annually for the Ministry of Training, Colleges and Universities and when Mr. Pawlowski gave evidence

on January 7, 2010, he testified that to his knowledge, the report had not been completed. He was not certain whether a draft report existed at that time. Based on anecdotal information, Mr. Pawlowski believed that there had been an increase in student enrolment in the fall of 2009.

After Mr. Pawlowski completed his evidence on January 7th, he received a copy of the preliminary report to the Ministry of Training, Colleges and Universities dated December 18, 2009 from the Registrar, Brenda Winter. The report was subsequently produced to counsel for the Association and when the hearing reconvened, at the request of the Association, Mr. Pawlowski was recalled. At that time, Mr. Pawlowski testified that he received the preliminary report after giving evidence on January 7th and that sometime later, he was provided with a copy of the final report, which was issued once Dr. Gilbert verified the accuracy of the numbers contained in the report.

The report of December 18th indicates a total of 7483 eligible students and 3611.816 FTEs for the fall term and Mr. Pawlowski testified that the latter number was approximately half of the 7200 FTEs that had been budgeted for the full academic year. The final report indicated a total of 7485 eligible students and 3613.816 FTEs for the fall term. Mr. Pawlowksi testified that the University would not know for certain whether it would receive government funding for all students until the spring. He testified, as well, that during the year, there may be unforeseen expenditures and that both revenue and expenditures must be considered in order to determine whether a balanced budget can be achieved. Mr. Pawlowski also testified that the University proceeded with the

shutdown in December, 2009 because there was no indication that there had been any significant change in revenue and expenditures.

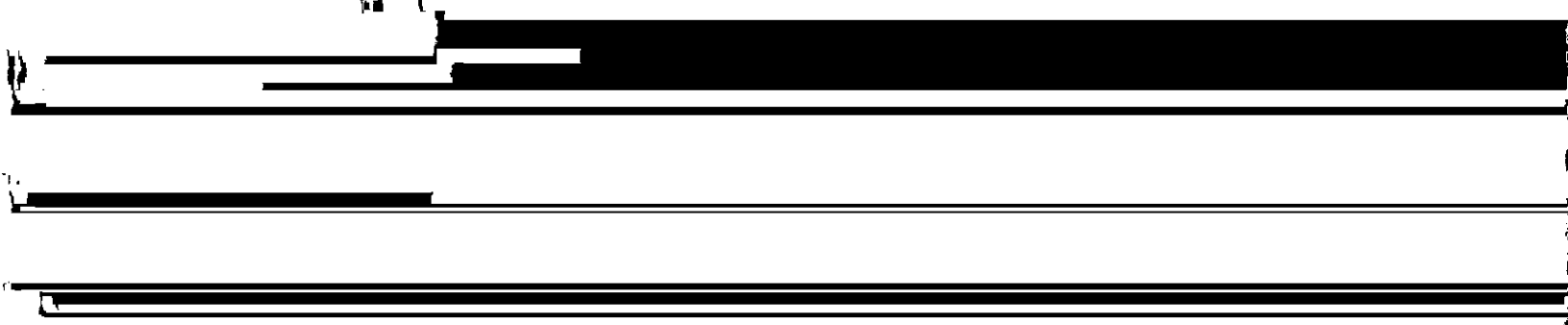
Ms. Winter testified that she finished inputting information required for the report to the Ministry of Training, Colleges and Universities at approximately 6:00 p.m. on December 18th. She also testified that there was a fire at the University on January 1st and that after she returned to work on January 4th, she and her staff were busy relocating classes and notifying affected students. As a result, she did not have an opportunity to review the report which the Ministry had sent to her by email and she testified that she forwarded a copy of the report to Mr. Pawlowski on January 7th. While Ms. Winter acknowledged that it is a simple matter to obtain a head count of students, she testified that it is necessary to calculate the number of eligible FTEs to determine the funding that will be provided.

Professor Hill testified that in projecting revenue for budget purposes, actual and projected student enrolment are taken into account and that information regarding enrolment can be quickly and easily obtained from the Registrar or the Office of Institutional Analysis. She also testified that by late September or early October, an estimate of revenue for the year can be obtained based on tuition paid by students and government grants announced the previous spring. She explained that few students withdraw after early October and that students enrolled in the fall generally continue their studies in the winter term. Professor Hill testified, as well, that for budget purposes, the University uses the figure of \$10,000.00 per student to arrive at an approximation of total

revenue. She also testified that based on slip year funding, the grant spent in 2009/2010 was based on student enrolment in 2008/2009.

With regard to the responsibilities of faculty members, Mr. Pawlowski agreed that teaching involves more than delivering a lecture and can include a significant amount of time outside the classroom. In this regard, he acknowledged that, among other matters, faculty members are required to be available on a reasonable basis to provide academic counselling. As well, he did not disagree with a statement contained in Professor Fallis' report that teaching generally accounts for 50% to 60% of a faculty member's time and that the balance of his or her time is devoted to research and other scholarly activities, administrative functions and service to his or her profession and the community.

Mr. Pawlowski also agreed that consistent with the principle of academic freedom, research responsibilities are not formally assigned by the University and that research work is not necessarily performed on campus. He testified that the University does not dictate the time at which research is carried out unless the work conflicts with teaching responsibilities and suggested that such work need not be performed at a specific time. Moreover, while Mr. Pawlowski acknowledged that the University could not prevent faculty members from carrying out research during the shutdown, he testified that it could choose not to compensate them, just as they are not compensated



doing so voluntarily. He agreed that faculty members are not paid for particular hours of work although he noted that the collective agreement provides for additional remuneration if an extra course is taught.

Mr. Pawlowski acknowledged that employees who perform cleaning and maintenance work at the University are paid on an hourly basis and are eligible for overtime pay. He also agreed that these employees carry out all of their work on campus and, accordingly, unless they were called in, they would not be working during the shutdown and would not be paid. He agreed, as well, that if work accumulated during the shutdown so that on their return to work, cleaning and maintenance staff were required to work hours in addition to their regular hours, they could be entitled to overtime pay, depending on the provisions of the applicable collective agreement. Mr. Pawlowski also agreed that if faculty members were to work long hours following the shutdown to mark examinations, respond to email or conduct research, they would not be eligible for overtime. Mr. Pawlowski acknowledged that there was no change in the teaching obligations of faculty members as a result of the shutdown but disputed that they had the same responsibility with regard to marking regardless of the shutdown. Further, while he agreed that faculty members had to complete work for purposes of their annual reports, he testified that it was not critical that it be done during the four-day shutdown.

Dr. Hayes testified that she did not believe that Association members were compromised by the shutdown. In this regard, she testified that while the collective

agreement refers to the responsibilities of faculty members in the areas of teaching, research, scholarly activity and service, only classroom instruction is time-sensitive and quantifiable. She also testified that faculty members generally teach two and a half courses a term and that the courses typically have a scheduled time and faculty members create a plan to progress through the 12 weeks of instruction and the examination period. She testified that in other areas, such as scholarly activity, there is no measure and faculty members report their accomplishments in those areas on their annual reports. Dr. Hayes agreed that the University has high expectations of its faculty and that the University did not suggest that its expectations were different from the previous year or that there was any change in its expectations with respect to promotion or tenure. She also agreed that the standards are annual, that the performance of faculty is reviewed annually and that an annual salary is paid.

Dr. Hayes testified, as well, that apart from teaching which is assigned by

~~the Dean, the other responsibilities of faculty members are not subject to pricing~~



faculty members may mark examinations and assignments off campus and that marks are now submitted electronically.

Mr. Raslack acknowledged that faculty members may teach courses in the evening and that in fulfilling their responsibilities, they may attend conferences or present papers at conferences held on the weekend. He also agreed that while teaching time is scheduled, the University does not schedule research or scholarly activity. He testified, however, that there is nothing in the collective agreement to preclude a temporary shutdown and that the University can state its expectations with regard to work and that compensation is directly related to the performance of work. Mr. Raslack also testified that faculty members would not be paid during the shutdown because there was no expectation of work at that time and while he agreed that there was no reduction in the amount of teaching and marking required of faculty members, he testified that there was a change in timing. Moreover, although Mr. Raslack could not say whether there was any reduction in the University's expectations with regard to research or scholarly activity, he testified that it was his understanding that there was no stipulated volume of research required for purposes of a faculty member's annual report. He also understood that there was no stipulated volume of service required.

Mr. Raslack acknowledged that unionized employees performing housekeeping and maintenance duties at the University are paid on an hourly basis and are eligible for overtime pay. He testified that these employees carry out all of their duties on campus and would not be paid during the shutdown because they would not

be working at the University. He testified that if those employees were required to work additional hours following the shutdown to carry out work that had accumulated during that time, it was possible that they would be entitled to overtime pay. He agreed that faculty members have no right to overtime. During the course of his evidence, Mr. Raslack also identified a policy dealing with inclement weather which provides that in the event the University is closed due to inclement weather or other unusual circumstances, faculty and staff members will be paid.

Mr. Raslack agreed that certain unionized lead hands and non-unionized supervisors have a right to bank overtime hours and that a university policy applicable to non-unionized staff provides that in certain circumstances, lieu time not taken by the end of the year will be paid out. Although Mr. Raslack testified that such payments would typically be made after the end of the year, he identified a memorandum from Hugh Briggs, the Director of the Physical Plant, to supervisors and lead hands indicating that all time in lieu of overtime not taken by December 4, 2009 would be paid out by December 17th. Mr. Raslack agreed that if supervisors and lead hands had accumulated sufficient time, they could avoid a loss in pay during the shutdown.

During the course of his evidence, Mr. Raslack also referred to a number

member is on leave pursuant to Article 37 of the agreement. The provisions of Article 37 referred to by Mr. Raslack are as follows:

37.01 Sabbatical Leave

...

37.01.06 A member who takes a twelve-month Sabbatical Leave shall receive 85% of his/her Regular Salary. Upon his/her return all accumulated years of eligibility entitlements shall be exhausted. A member who takes a six-month Sabbatical Leave shall receive one hundred percent of his/her Regular Salary, and upon his/her return all accumulated years of eligibility entitlements except two shall be exhausted. The member may apply to receive part of this remuneration as a research grant to cover his/her research and travel expenses; applications are available in the Office of Research.

...

37.02 Study Leave

...

37.02.03 A member on Study Leave shall receive 13.33% of his/her Regular Salary for each year of service in the University uninterrupted by a Sabbatical or Study Leave, to a maximum of 80% of his/her Regular Salary. Effective July 1, 2004, this will increase to 14.17% for each year of service to a maximum of 85% of his/her Regular Salary. Time spent on any other type of leave with a period of more than six months, including Long Term Disability Leave, shall not count toward the eligibility requirement of three years, nor toward years of service for the purpose of determining salary while on Study Leave.

...

37.04 Other Leaves

37.04.01 Maternity/Parental/Adoption Leave

(A) A female member who has been employed by the Board for at least thirteen weeks preceding the estimated date of delivery is entitled to seventeen weeks of unpaid leave of absence for pregnancy. Such leave may be commenced up to seventeen weeks before the expected date of delivery. A member wishing to take maternity leave shall provide her Dean/University Librarian with two weeks

notice in writing of the date the leave is to begin, together with a medical certificate estimating the day of delivery.

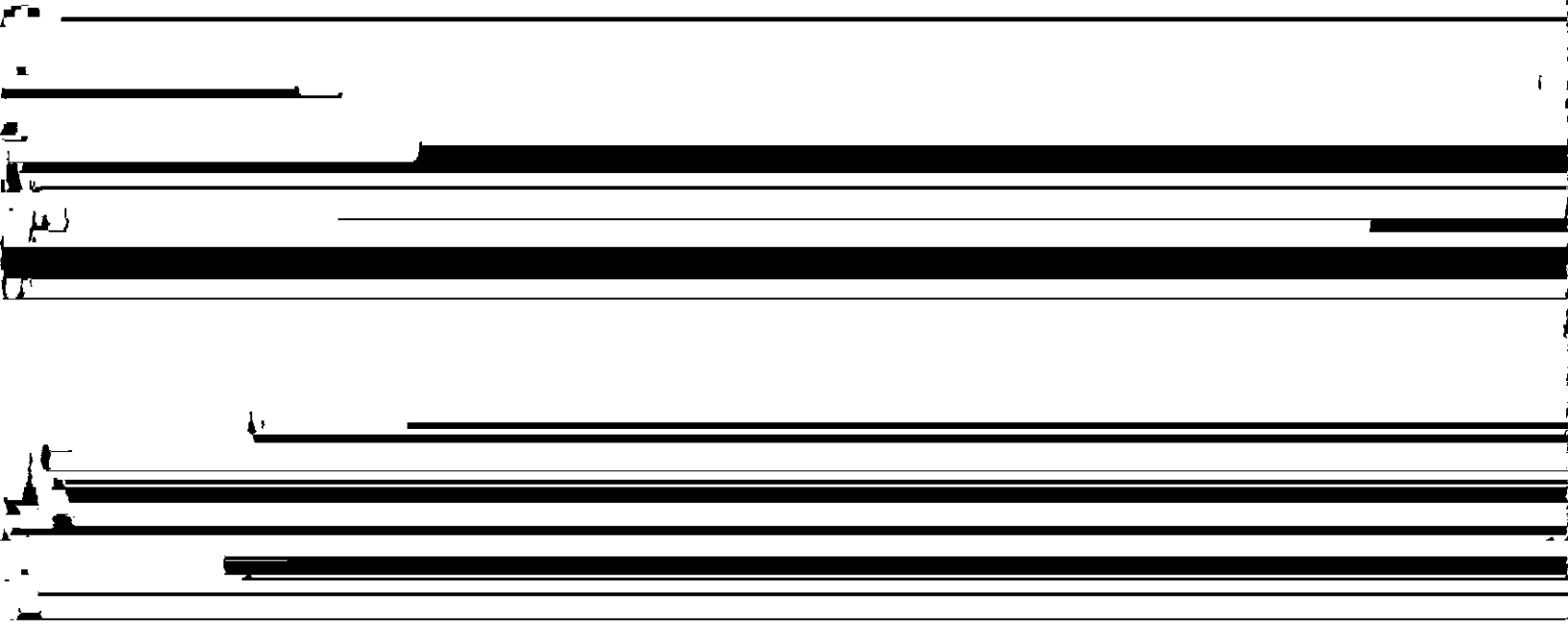
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(C) A faculty member who has held a probationary or tenured appointment for one year or a librarian member who has held a continuing appointment for one year, shall for a seventeen week period have her maternity benefits payable under the Employment Insurance Act topped up to 95% of the member's regular salary. All payments made under this policy must be in accordance with the agreement that is filed by the University with the applicable federal regulator.

(D) A faculty member who has held a probationary or tenured appointment for one year or a librarian who has held a continuing appointment for one year is entitled to ten (10) weeks for Adoption or Parental leave topped up to 95% of the member's regular salary provided he/she meets the eligibility criteria for Employment Insurance. The member shall receive the difference between Employment Insurance benefits and 95% of his/her regular salary during this period. Should a child be the natural child of one of the two parents, and is adopted by the spouse of the natural parent, the spouse shall not be entitled to this leave. Should both parents be employees of the University, the parental leave may be split in accordance with prevailing legislation.

....

07 0/00 Partial Leave: A member may only for a Partial Leave with reduced



applicable. A request for Partial Leave from a Librarian which would result in a workload of less than twenty-one (21) hours per week should not be considered.

Mr. Raslack also noted that Article 34 of the collective agreement provides for the pro-rating of salary when a member is on a phased retirement program and the Letter of Understanding dealing with Continuing Contract Lecturers provides for the pro-rating of salary where less than six HCEs are taught. In addition, the collective agreement provides that a faculty member may be compensated when his or her teaching load is excessive in relation to the teaching load of other faculty members and a Contract Lecturer may receive additional compensation based on the number of students in a distance education course. Finally, Mr. Raslack noted that Article 35 provides that all or part of a CDI may be withheld if a faculty member's performance is unsatisfactory.

During his evidence, Mr. Raslack also identified a number of letters offering employment to faculty members for less than a full academic year and testified that in each case, annual salary was prorated. He referred, as well, to a number of letters offering partial leave to faculty members and, again, there was a reduction in annual salary to reflect the period of the faculty member's absence. Mr. Raslack also pointed out that in one case involving a term appointment, the faculty member worked for only one day during the initial pay period and, in those circumstances, a daily rate of pay was calculated based on the number of working days and salary was adjusted to coincide with the days worked. In another case, the faculty member was unable to work for some

of the period covered by the appointment and Mr. Raslack testified that, again, a daily rate was calculated and the faculty member's salary was adjusted to reflect the days worked. Mr. Raslack testified that a similar method was used to calculate the pay of faculty members during the shutdown. In cross-examination, Mr. Raslack acknowledged that all of the letters referred to involved an offer on the part of the University, which was subject to acceptance on the part of the faculty member. He testified, however, that the salary of the faculty member who was unable to work throughout the period of her appointment was adjusted without discussion.

Turning, then, to the individual grievance filed by Professor Phillips regarding the denial of vacation, in its announcement of April 24, 2009, the University advised that as its objective was to generate savings, vacation requests would not be granted during the shutdown. In the course of his evidence, Mr. Pawlowski also testified that vacation requests are granted only when the University is open.

Article 36.03.02, which deals with vacation scheduling, provides as follows:

36.03.02 After consultation with his/her Chair/Director and provided the Dean is notified in advance of the vacation period(s), a member may take his/her annual vacation at any time which does not coincide with a period in which he/she has undertaken a particular responsibility such as teaching or counselling students.

Professor Phillips testified that in April, 2009, he advised Dr. Bahram Dadgostar, the Dean of Business Administration, that he could assist with the planning for an alumni event to be held on December 26th but that he would be away at the time

of the event. Professor Phillips testified that this discussion took place prior to the announcement of the shutdown on April 24th. In this regard, he explained that his mother, who lives in Saskatoon, is in poor health and that he has to travel there twice a year, once in August and once in December. In April 2009, Professor Phillips knew that he had to be in Saskatoon on December 22nd and testified that he intended to take vacation at that time. He also testified that depending on the examination schedule, he would likely mark examinations while he was away and submit his marks by email. At the time that Professor Phillips gave evidence in the fall of 2009, examination dates for the courses that he was teaching had not yet been set and based on the academic schedule, marks were due by noon on December 24th. Professor Phillips noted that the collective agreement provides that there is to be no remuneration in excess of annual salary in the event that a member chooses to work through all or part of his or her vacation.

On May 5th, Professor Phillips wrote to Dean Dadgostar confirming that in accordance with Article 36.03 of the collective agreement, the two had consulted that day and that he would be taking vacation from December 21 to 24, 2009. Professor Phillips noted in his letter that Dean Dadgostar had indicated that the University had advised that vacations would not be permitted during the period proposed and that he would be seeking clarification with regard to the matter. On May 7th, Dean Dadgostar wrote to Professor Phillips confirming that in accordance with the announcement of April 24th, no employee would be permitted to take vacation from December 21 to 24, 2009. Accordingly, he advised that he could not approve Professor Phillips' request.

Professor Phillips testified he had never been denied vacation in the past and that vacation would be denied only if a faculty member had teaching or counselling responsibilities during the period in question. Professor Phillips also testified that he applied for vacation in December, 2009 because he had to travel to Saskatoon to be with his mother and because he believed that he was entitled to vacation under the collective agreement.

Mr. Raslack testified that Professor Phillips was not the only Association member to request vacation during the shutdown and, in fact, by the time he gave evidence in December, 2009, he had received some 90 requests for vacation during this period. With regard to these requests, Mr. Raslack identified a notice prepared by the Association in which it advised its members that even if its primary claim did not succeed, those who applied for vacation might still be eligible to be paid on the days in question and might have a claim for damages in the event that their requests for vacation were denied. In the notice, the Association set out a procedure which it recommended that its members follow, which included advising their Chair or Director of their intention to take vacation from December 21 to 24, 2009.

Finally, some evidence was introduced with regard to members on sabbatical leave during the fall term of 2009 and Contract Lecturers, who were the subject of the grievances that were conceded by the University. With regard to those on sabbatical, the collective agreement provides for leave of six or 12 months. Professor Phillips testified that a rigorous application process is involved in which the faculty

member must set out the academic activities that he or she intends to pursue while on leave, the value of the work and manner in which the work will be reported as well as potential sources of funding for the work. He also testified that the activities of those on sabbatical vary and that while some may teach, others conduct research on which they would report and collaborate with their colleagues following their return to the University. Professor Phillips testified that the University cannot assign teaching duties to a faculty member on leave, nor can it require the faculty member to attend on campus. The salary payable during a sabbatical is dealt with in Article 37.01.06 of the collective agreement, which is set out earlier in the award and Professor Phillips noted that after returning from leave, a faculty member is required to provide his or her Dean with a report setting out his or her accomplishments while on leave.

Mr. Pawlowski testified that the University took the position that the financial implications of the shutdown would not apply to faculty members on sabbatical because they had no scheduled duties. He agreed that while on leave, faculty members may or may not be on campus and have no teaching obligations at the University. He also agreed that while on sabbatical, a faculty member may teach elsewhere or be engaged in research on a full-time basis and that the University does not mandate the research to be carried out. The faculty member, rather than the University, also determines research methodology.

With regard to Contract Lecturers, Professor Phillips testified that they are paid to teach particular courses and are required to mark examinations and assignments

and submit marks in the same manner as other faculty members. Mr. Pawlowski testified that the University took the position that the financial implications of the shutdown would not apply to Contract Lecturers because they are paid to teach particular courses and their teaching assignments would be completed by the time of the shutdown. In this regard, Mr. Pawlowski testified that Contract Lecturers would have no assigned work from December 21 to 24, 2009 whether or not the University was open. He agreed that in addition to classroom teaching, Contract Lecturers mark examinations and submit marks for the courses they teach.

Conclusion

As indicated at the outset, there are three outstanding grievances before me, the first of which is an Association grievance and the second, a group grievance. With regard to these grievances, it was the submission of Mr. Edwards, on behalf of the Association, that the shutdown of the University from December 21 to 24, 2009 violated Article 35 of the collective agreement, which deals with salaries. Alternatively, Mr. Edwards contended that in instituting a shutdown, the University breached its duty under Article 8.01 of the collective agreement to exercise its management rights in a fair and reasonable manner. In the further alternative, Mr. Edwards contended that the shutdown improperly circumvented the layoff provisions of the collective agreement.

The third grievance is an individual grievance filed by Professor Phillips claiming that he was improperly denied vacation during the shutdown. In support of this

grievance, Mr. Edwards contended that the University violated the vacation scheduling provisions contained in Article 36.03.02 of the collective agreement. Although the evidence indicates that a number of other grievances have been filed by Association members claiming that they, too, were improperly denied vacation during the shutdown, the only vacation grievance before me at this time is the grievance filed by Professor Phillips.

In addressing these grievances, it is necessary to begin by considering certain submissions by Mr. Bickford, on behalf of the University, that I do not have jurisdiction to intervene. Firstly, Mr. Bickford contended that in effecting the shutdown, the Board of Governors was exercising its exclusive jurisdiction to manage the University pursuant to the *Lakehead University Act*. In this regard, he referred to section 12 of the Act, which provides that with the exception of matters specifically assigned to the Senate under the Act, the government, conduct, management and control of the University, of its property, revenues, expenditures, business and affairs are vested in the Board of Governors. Section 12 also provides that the Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University, including but not limited to the powers enumerated in that section.

Mr. Bickford submitted that the powers granted to the Board of Governors under the *Lakehead University Act* are paramount and cannot be circumscribed. As a result, he submitted that I am without jurisdiction to review the action taken. Mr. Bickford further submitted that my jurisdiction is ousted by Article 8.01 of the collective agreement

which incorporates the *Lakehead University Act* into the agreement by reference. In the first sentence of Article 8.01, the Association recognizes the rights, powers and responsibilities of the Board of Governors to operate and manage the University in accordance with the Act. Mr. Bickford noted, as well, that Article 30.09 of the collective agreement provides that an Arbitrator does not have jurisdiction to amend or add to any of the provisions of the agreement, nor to substitute any new provisions in lieu thereof, nor to render a decision inconsistent with the terms of the agreement.

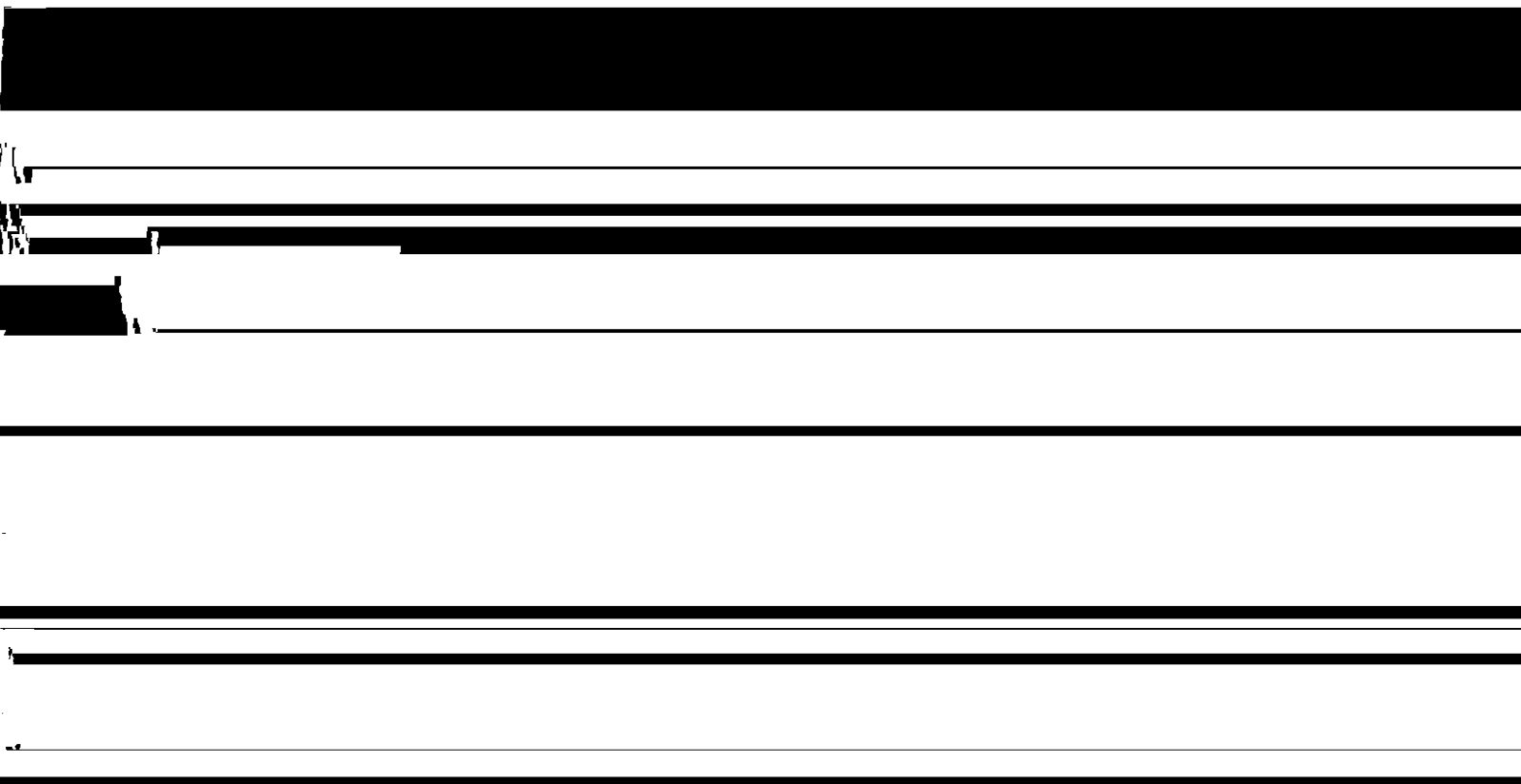
Having carefully considered the matter, I cannot accept the University's submission. Section 12 of the *Lakehead University Act* involves a general grant of authority to the Board of Governors to govern and manage the University, apart from matters specifically assigned to the Senate under the Act. Although section 12 makes reference to the management and control of property, revenues and expenditures, the Board of Governors is also party to a collective agreement with the Association which contains certain rights and obligations. On this basis, I find that section 12 of the *Lakehead University Act* and the Association's acknowledgement of the rights, powers and responsibilities of the Board to operate and manage the University in accordance with the Act, which is contained in Article 8 of the collective agreement, do not have the effect of ousting my jurisdiction.

There is clearly a dispute between the parties regarding the interpretation and application of the collective agreement which is a matter over which I have jurisdiction as an Arbitrator. Moreover, although the collective agreement makes no

specific reference to a shutdown, the Association contended that the action taken by the University violated a number of provisions of the agreement, including Articles 35 and 36. In the result, while it will be necessary to consider the provisions of both the *Lakehead University Act* and the collective agreement in determining the grievances, I do not accept the submission of the University that based on the Act and the reference to the Act in Article 8.01 of the collective agreement that I lack jurisdiction to consider the merits of the grievances.

In my view, the circumstances of this case are also distinguishable from *Kulchyski v. Trent University* (2001), 204 D.L.R.(4th) 364 (Ont. C.A), which was relied on by the University. In that case, two faculty members challenged a decision of the board of governors to close and sell two downtown colleges and transfer faculty, staff and students to new facilities on the main campus. The faculty members contended that the maintenance of the colleges at their existing location was a matter of educational policy over which the senate had jurisdiction. The Court of Appeal concurred with the Divisional Court that the board of governors had authority to make the decision it did under section 10 of the *Trent University Act*, which is similar to section 12 of the *Lakehead University Act*. Accordingly, the issue in the *Kulchyski* case was whether the relocation of the colleges required senate approval or whether it was a matter within the jurisdiction of the board of governors. The case did not involve the alleged violation of a collective agreement.

As to *University of British Columbia v. University of British Columbia Faculty Association* (2007), 278 D.L.R.(4th) 445, which was also relied on by the University, in that case, the faculty association filed a grievance contesting the decision of the president not to recommend a faculty member for promotion. The association



claimed that the decision was unreasonable and that a procedural error had also occurred as the faculty member was not given an opportunity to address concerns of a particular committee regarding his candidacy for promotion. The collective agreement provided that if an arbitration board determined that there was a procedural error, the board could, among other matters, remit the matter for reconsideration. The agreement also provided that where unreasonableness was a ground of appeal, the arbitration board was required to reverse the decision if it found on the evidence that the decision

agreement was inconsistent with the provisions of the *University Act*. The Labour Board rejected the university's submission and an application for judicial review was also dismissed. However, an appeal to the Court of Appeal was allowed. The Court held that in exercising her remedial authority, the Arbitrator had to look beyond the provisions of the collective agreement and construe and apply the *University Act*. The Court also found that the term "reverse" in the collective agreement had to be considered in light of the provisions of the Act under which there was an express grant of power to the president to make recommendations for promotion. The Court determined that under the Act, the recommendation of the president was a necessary condition to the board of governors' exercise of its statutory authority to promote a member of the teaching staff. In the circumstances, the Court concluded that the parties to the collective agreement could not agree to fetter the statutory authority of the president and that allowing an Arbitrator to reverse the president's decision would be inconsistent with the statutory scheme. The Court also noted that only in unusual cases would a statutory decision-maker, such as the president, not be given the opportunity to reconsider a decision once directions were given regarding the proper criteria to be applied. The Court concluded that the collective agreement provided for a number of remedies in the event of a procedural error or an unreasonable decision and that any conflict with the *University Act* could be avoided by remitting the issue of the faculty member's promotion to the president for reconsideration. The Court noted that there was nothing to indicate that the president would not or could not fairly reconsider the matter.

In the result, in the *University of British Columbia* case, the Court did not find that the Arbitrator lacked jurisdiction to deal with the grievance but only that she ought to have exercised her remedial authority in a manner which avoided a conflict with the *University Act*. I note, as well, that the issue in this case does not concern a specific and express power to be exercised only by the President. Instead, the section of the *Lakehead University Act* relied on by the University vests in the Board of Governors general authority over the government, conduct, management and control of the University, its property, revenue, business and affairs, subject to the powers granted to the Senate under the Act. The Board of Governors is also party to a collective agreement with the Association and, in some respects, the language contained in the introductory paragraph of section 12 of the *Lakehead University Act* is similar to the type of language that might be found in the management rights clause of a collective agreement. Accordingly, while it will be necessary to consider both the collective agreement and the *Lakehead University Act* in determining the grievances before me, for the reasons set out, I do not accept the University's submission that my jurisdiction is ousted by the provisions of section 12 of the Act or the reference to the Act in Article 8.01 of the agreement.

Moreover, given my jurisdiction to deal with disputes relating to the interpretation, application, administration or alleged violation of the collective agreement, I find that this case is distinguishable from a number of decisions relied on by the University in which Courts expressed some reluctance to interfere with internal university

shutdown. Mr. Bickford contended that the Association had a similar intention when it issued a notice advising its members that even if its primary claim did not succeed, those who applied for vacation might still be eligible to be paid for the days in question and might have a claim for damages if their vacation requests were denied. In these circumstances, Mr. Bickford submitted that the only plausible inference to be drawn is that the vacation grievance is the ostensible grievance and that the real or actual grievance concerns the University's right to institute a shutdown.

The Association took issue with the University's characterization of Professor Phillips' evidence and Mr. Edwards contended that Professor Phillips did not testify that he applied for vacation in order to thwart the shutdown. Mr. Edwards submitted that before the shutdown was announced, Professor Phillips had made a commitment to travel to Saskatoon to be with his mother in December. Mr. Edwards further submitted that distinctions have been drawn between real and ostensible grievances in cases where a particular claim is made on a grievance form and when the hearing is convened, a somewhat different claim is advanced. It was contended that no issue of that nature arises in this case.

As noted by the University, it has been held in a number of cases that grievances should not be won or lost on a technicality of form. It has also been held that a grievance ought to be construed so that the real, rather than the ostensible, complaint can be addressed in order to fully resolve the dispute between the parties: see *Newfoundland and Labrador Oil Development Allied Trades Council and Hibernia*

Employers' Association Inc. [1997] N.J. No. 134 (Newfoundland S.C.); *Re Spruce Falls Inc. and I.W.A.- Canada, Local 2995* (2002), 106 L.A.C.(4th) 41 (Knopf) and *District of Parry Sound Social Services Administration Board v. Ontario Public Service Employees Union, Local 324* [2003] 2 S.C.R. 157.

As noted by the Association, in the cases referred to, statements regarding the real, as opposed to the ostensible, complaint or grievance, were made in circumstances where it was alleged that there was some difference between the claim set out on the grievance form and the claim advanced at the hearing. No issue of that nature arises in this case. On the grievance form, Professor Phillips claimed that he was improperly denied vacation during the shutdown and a similar claim was advanced at the hearing. Moreover, while Professor Phillips' claim for vacation may be advanced as an alternative to the Association's claim that the shutdown and corresponding reduction in salary constituted a violation of the collective agreement, that does not affect my jurisdiction to hear and determine the grievance. Similarly, in my view, Professor Phillips' reasons for filing the grievance are not matters going to my jurisdiction. In this regard, Professor Phillips testified that he filed the grievance because he had planned to travel to Saskatoon to see his mother before the shutdown was announced and because he believed that he had a right to vacation under the collective agreement.

Turning then to the merits of the grievances, the evidence indicates that as a result of financial difficulties, the University imposed a hiring freeze and proposed an

overall reduction in expenditures of 6% in an effort to balance its operating budget for the 2009/2010 fiscal year. It was subsequently determined that such a reduction was not possible in all areas and, accordingly, in order to achieve a balanced budget, a decision was made to shut down the University from December 21 to 24, 2009. It was the view of senior management that this was the most equitable solution as all employees, apart from those required to work to protect university assets or for health and safety reasons, would not be scheduled to work and would not be paid. With regard to Association members, in particular, Mr. Pawlowski testified that in the spring of 2009, he and Dr. Gilbert conferred and decided that a *bona fide* financial crisis did not exist within the meaning of Article 31.01 of the collective agreement. Accordingly, in their view, the criterion for a layoff for financial reasons had not been met.

Dealing firstly with the Association grievance and the group grievance, as noted previously, Mr. Edwards claimed that the shutdown violated the salary provisions contained in Article 35 of the collective agreement. In the alternative, it was submitted that the University breached the duty to act in a fair and reasonable manner pursuant to Article 8.01 of the agreement. That Article refers to the rights, powers and responsibilities of the Board of Governors to operate and manage the University in accordance with the *Lakehead University Act* and specifies that the Board will exercise those rights, powers and responsibilities which are pursuant to the agreement in a fair and reasonable manner. In the further alternative, Mr. Edwards contended that the shutdown circumvented the layoff provisions of the collective agreement and in this regard, reference was made to Articles 31 and 33.

In response to these claims, Mr. Bickford relied on section 12 of the *Lakehead University Act* and the first sentence of Article 8.01 of the collective agreement, both of which are set out above. Mr. Bickford further submitted that there is no express language limiting or restricting the University's right to institute a shutdown and that as the University was exercising its residual rights, rather than rights pursuant to the agreement, it was not subject to the requirement contained in Article 8.01 that it act in a fair and reasonable manner. In any event, Mr. Bickford submitted that the University acted fairly and reasonably throughout and that there is no basis on which to impugn the action taken.

In this case, there was no dispute that the collective agreement makes no reference to a shutdown of the University and, accordingly, does not expressly preclude such action. However, it has been held that even where a matter is not specifically addressed in the collective agreement, it is necessary to consider the agreement as a whole to determine whether there is a restriction on the exercise of management rights: see *Canadian National Railway Co. and Canadian Telecommunications Union Division No. 43 of the United Telegraph Workers et al.* (1976), 10 O.R.(2d) 389 (Ont. C.A.) and *Re Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild, Local 87* (1983), 10 L.A.C.(3d) 1 (P.C. Picher).

With regard to Article 35 of the collective agreement, which is relied on by the Association, Article 35.01.01 provides that regular salary is the annual salary of a

member engaged in full-time employment with the University excluding any stipends and/or payments for overload teaching or in the case of a librarian, for overtime work. Article 35.01.02 provides that regular salaries shall be adjusted annually and that the adjusted salaries shall take effect as of July 1st or as otherwise indicated. The Article also provides that salary adjustments for individual members shall include some or all of the following components: (a) a scale increment; (b) a career development increment; (c) a merit increment; and (d) an anomaly adjustment. These increments and adjustments are then described in other provisions of Article 35 and the Article also sets out salary floors and ceilings for faculty and librarian ranks for each year of the collective agreement. Article 35.01.03 provides that the scale increment, which is referred to in Article 35.01.02(a), is the minimum percentage increase applied to the salary floor and ceiling of each faculty and librarian rank and to the regular salaries of all members within the rank. Articles 35.05 and 35.06 provide that for both faculty and librarian members, the scale increment for the period from July 1, 2009 to June 30, 2010 was 3.3%. The amounts of other increments and adjustments are also set out in Article 35.

In addition, reference was made to a number of Articles of the collective agreement which provide for the pro-rating of salary. In this regard, Article 35.01.01 provides that the salary of a member employed on a full-time basis for less than the academic year shall be prorated based on his/her regular salary. The Article also provides that the salary of a member who is on leave pursuant to Article 37 shall be similarly prorated. Article 37 deals with various types of leave, including sabbatical leave, study leave, pregnancy, parental and adoption leave as well as partial leave.

With respect to these leaves, the Article specifies the percentage of salary payable during the particular leave or sets out the manner in which prorated salary is to be determined. Reference was also made to Articles providing for adjustments in compensation based on workload and for the withholding of all or part of a CDI due to unsatisfactory performance.

Mr. Edwards submitted that the provisions referred to are sufficiently extensive that they must be taken to have occupied the field and are exhaustive of the circumstances in which the University is permitted to prorate the salary of Association members. In contrast, Mr. Bickford submitted that the provisions referred to support the conclusion that it is appropriate to prorate salary when Association members are not working. In this regard, he noted that Mr. Raslack referred to a number of instances in which faculty members received less than the regular or annual salary and Mr. Raslack explained the formula used to calculate a daily rate of pay.

Based on the provisions referred to, it is apparent that in certain circumstances, an Association member may receive less than his or her regular or annual salary. In the case of certain leaves of absence or the employment of a full-time member for less than an academic year, the parties have specifically agreed that annual salary is to be prorated and the collective agreement sets out the percentage of salary that is payable or the manner in which prorated salary is to be determined. However, in my view, the fact that the parties have agreed that salary is to be prorated in such cases is not sufficient to find that the provisions of the agreement referred to occupy the field

so as to preclude the University from instituting a four day shutdown with a corresponding reduction in pay.

On this basis, I find that this case is distinguishable from *Canadian Broadcasting Corp. v. Communications, Energy and Paperworkers Union of Canada* (2002), 112 L.A.C.(4th) 449 (Knopf), which was relied on by the Association. There, the union challenged a policy under which the employer offered to pay out unused annual leave credits at the end of the fiscal year. The Arbitrator noted that the collective agreement contained detailed provisions dealing with earning, crediting, scheduling and accumulating annual leave. The agreement and a back-to-work protocol entered into by the parties following a strike also allowed for the cash-out of annual leave credits in certain circumstances and those provisions persuaded the Arbitrator that the cash-out of annual leave credits was limited to those circumstances. Accordingly, in the *Canadian Broadcasting Corp.* case, the collective agreement contained provisions which dealt specifically with the cash-out of annual leave credits, which was the subject of the employer's policy. In this case, in contrast, the subject of a shutdown is not referred to in the collective agreement and I am not persuaded that provisions dealing with the pro-rating of salary in the event of a leave of absence or employment for less than a full academic year, for example, are sufficient to preclude the University from instituting a shutdown and pro-rating members' salaries.

As to other provisions of the collective agreement, as noted by the Association, Article 16.01.02 provides that the responsibilities of faculty members (excluding those appointed as contract lecturer members) shall encompass an appropriate combination of teaching, research and other scholarly and creative activities, administrative activities, and service to the profession and the community. The Article then addresses each of these responsibilities individually and with regard to teaching, Article 16.02.01.01 provides that normally, a full-time faculty member shall receive his or her teaching assignment and schedule no later than July 1st for fall/winter term and full year courses and no later than March 15th for spring/summer courses. The Article further provides that a faculty member shall accept his or her teaching assignments and schedules communicated to him or her by his or her Dean as set out in his or her letter of appointment. Article 16.02.01.02 provides that the teaching load for a full-time faculty member shall not exceed five HCEs during an academic year. The Article also provides that for faculty members who are more active in teaching and service and less active in research and other scholarly and creative activities, the teaching load shall not exceed six HCEs during an academic year. Mr. Pawlowski did not dispute that teaching generally accounts for 50% to 60% of a faculty member's time and involves more than classroom instruction. In addition, faculty members are responsible for course preparation, setting examinations and assignments and evaluating student performance. They are also required to be available on a reasonable basis to provide academic counselling.

With regard to research and other scholarly and creative activities, Article 16.03.01 provides that faculty members have the right and responsibility to devote a reasonable proportion of their time to these activities so as to advance knowledge and understanding and to maintain scholarly competence in their discipline. The Article further provides that insofar as possible, the Board shall provide adequate facilities and support for these purposes. Research and other scholarly and creative activities are then described in Article 16.03.03 and while not purporting to be exhaustive, this Article refers, among other matters, to investigations, studies and various types of works, the results of which are available for peer review.

With regard to administrative responsibilities, Article 16.04.01 provides that consistent with their primary teaching and scholarly responsibilities, faculty members shall participate in the governance of the University through active membership on appropriate bodies such as department and faculty councils, and shall participate to a reasonable extent in other University bodies, including faculty and university committees and Senate. Article 16.04.02 provides that members are responsible for providing evidence of their active participation in administrative activities. Service to the profession and the community is dealt with in Article 16.05 and Article 16.05.01 provides that a member has the right to participate in the governance of his or her professional organizations, including but not limited to membership on committees of such organizations. Article 16.05.02 provides that the parties encourage service to the community that enhances or extends the reputation of the University and Article

16.05.03 provides that a faculty member's active participation in the activities of the Association is recognized as service for purposes of the Article.

Article 16 of the collective agreement also includes a requirement for faculty members to submit an annual report to their immediate supervisor by May 31st each year and Article 16.06.02 sets out the information to be included in the report which relates to the responsibilities of faculty members. Among other matters, the Article refers to teaching responsibilities undertaken, books and papers published, conference papers delivered, research and other scholarly work in progress, graduate degrees or studies, awards and honours received. The Article refers, as well, to departmental, faculty, Senate, Board, Association and other University activities and to contributions to the faculty member's profession and community. Dr. Hayes acknowledged that the standards are annual and that the performance of faculty members is reviewed on an annual basis.

In considering the provisions of Article 16 of the collective agreement, it is apparent that a distinction has been drawn between teaching and the other responsibilities of faculty members referred to in that Article. In this regard, only Article 16.02.01.01 refers to "assignments" and provides that a faculty member shall accept his or her teaching assignments and schedules from his or her Dean. Quite different language appears in other provisions of Article 16 and, in this regard, Article 16.03.01 provides that faculty members have the "right and responsibility" to devote a reasonable

proportion of their time to research and other scholarly and creative activities. Similar language also appears in Article 16.05 which deals with service.

Consistent with the provisions of the agreement referred to, Professor Johnston testified that only teaching and occasional meetings are scheduled and that even in the area of teaching, faculty members have input. She also testified that for the most part, she sets her goals and decides how she allocates her time among her responsibilities as a faculty member. Similarly, Professor Knutson testified that apart from class time, she decides how she allocates her time and documents her progress in her annual report. The evidence also indicates that faculty members perform their work both on and off campus and that even when the University is closed in the evening or on weekends, faculty members may work on campus as they have keys to their offices. Similar access to the University was provided during the shutdown.

Dr. Hayes also acknowledged that apart from teaching, which is assigned by the Dean, the other responsibilities of faculty members are not subject to precise scheduling and that faculty members decide how they allocate their time on a daily basis. Moreover, consistent with the principle of academic freedom which is referred to in Article 15 of the collective agreement, Mr. Pawlowski, Mr. Raslack and Dr. Hayes acknowledged that research is not scheduled or assigned by the University and that there is no expectation that faculty members will carry out such work on campus or that it will be performed at a particular time. Dr. Hayes testified that faculty members carry out research as they deem necessary and appropriate.

In the result, it is apparent that in a number of respects, faculty members can be distinguished from employees who carry out their duties entirely at the employer's premises during scheduled hours of operation. Such employees are often paid an hourly rate and are eligible for overtime for duties performed outside their regular or normal hours of work. In this case, the collective agreement provides for the payment of annual salary and, in contrast to many collective agreements, makes no reference to regular daily or weekly hours for faculty members. A number of faculty members who gave evidence, including Professor Knutson, testified that they work in the evening, on weekends and during vacation periods. Professor Chambers testified that she may mark assignments on the weekend and return to teaching on Monday, that she may write for long periods if she is productive and that ideas may come to her even when she is on vacation. Professor Johnston testified that when carrying out research, she needs time to think and consider ideas and that if there is an issue or problem she is trying to resolve, she may work until 2:00 a.m. She also referred to one case when she worked with a colleague on an article until after midnight. Professor Carastathis testified that he works in the evening, on vacation and holidays and that he often does his most creative work between 9:00 p.m. and 3:00 a.m. Mr. Raslack also acknowledged that faculty members may attend conferences or present papers at conferences held on the weekend. In fact, it appears that the parties recognized that faculty members may work at unusual times because, as the Association noted, Article 36 of the collective agreement provides that there shall be no remuneration in addition to annual salary in

the event that a member chooses to work through all or part of his or her vacation period.

In this case, the University instituted a shutdown from December 21 to 24, 2009 and reduced the pay of all employees by four days, apart from those required to work for health and safety reasons or to protect university assets. As noted by both parties, a distinction has been drawn between a layoff and a shutdown in which the hours of all employees are reduced: see *E.S. & A. Robinson (Canada) Ltd. v. Printing Specialities & Paper Products Union, Local 466* (1976), 11 L.A.C.(2d) 408 (Swan). In that case, which was referred to by the Association, reference was made to an earlier decision of the Supreme Court of Canada in *Air-Care Ltd. v. United Steel Workers of America* [1976] 1 S.C.R. 2. In the latter case, it was held that as the company retained the right to schedule production, it could reduce the work week of all employees, rather than impose a layoff. The collective agreement provided for a work week of 40 hours consisting of eight hours a day, Monday to Friday but specified that nothing in the agreement was to be construed as a guarantee of days of work per week. In a number of cases, which were referred to by the Association in which the collective agreement set out normal or regular hours of work, it was held that an abnormal schedule was permitted in certain circumstances but the employer could not establish a new norm by unilateral action: see, by way of example, *E.S. & A. Robinson (Canada) Ltd. v. Printing Specialities & Paper Products Union, Local 466* (*supra*); *Ballycliffe Lodge Ltd. v. Service*

Employees International Union, Local 204 (1984), 14 L.A.C.(3d) 37 (Adams) and *Aeroguard Eastern Ltd. v. United Steelworkers* (2008), 176 L.A.C.(4th) 72 (Davie).

By the time of the shutdown in this case, classes for the fall term were over and the faculty members who gave evidence described the month of December after the end of classes as a particularly busy time. The evidence indicates that some faculty members are involved in research, scholarly and creative activities and a number testified that they need an uninterrupted period of time to do this work. They also testified that it is difficult to find the time when they are teaching. Faculty members may also attend meetings both at the University and elsewhere, mark examinations and assignments, prepare courses for the following term, provide counselling, prepare reference letters and supervise graduate students.

With regard to marking, the evidence indicates that in the fall of 2009, a change was made to the academic schedule to provide that final marks for fall term courses were due in the office of Registrar on December 18th with the exception of marks for examinations written on or after December 15th which were due on January 4th. Prior to the change, the academic schedule provided that final marks were due by noon on December 24th and Dr. Hayes testified that the change was made to allow faculty members time to complete their marking before or after the shutdown. Many of the faculty members who gave evidence described marking as extremely time consuming and there was no suggestion that there was any change in the amount of marking to be

done. Dr. Hayes acknowledged that if faculty members did not mark examinations between December 21st and 24th, they would have to do the work at another time.

Although the University also submitted that apart from teaching, there was no stipulated volume of work to be done and no expectation of work during the shutdown, the responsibilities carried out by faculty members in the month of December after classes are over are not scheduled by the University, nor does the collective agreement associate those responsibilities with particular hours of work. Consistent with the principle of academic freedom, the University does not assign or schedule research and other scholarly and creative activities, nor does it dictate research methodology or the time at which this work will be performed. The amount of work to be done may depend on the nature of the research, scholarly or creative activity undertaken and the same may be said of other aspects of a faculty member's responsibilities involving committee work as well as service to a member's profession and community.

Many of the faculty members who gave evidence in this case testified that they intended to work during the shutdown and that otherwise, they would have to do the work at another time. While Mr. Pawlowski acknowledged that he could not prevent faculty members from carrying out research during the shutdown, he testified that if they chose to work, they would be doing so voluntarily. Although he also testified that the University could choose not to pay faculty members just as it does not pay them for work on weekends and holidays, again, the collective agreement does not set out regular daily or weekly hours of work for faculty members. The time at which work is performed

may depend on a variety of factors which are external to the University, such as conference schedules, publications or, as Professor Carastathis testified, the need to respond in a timely way to requests for his work. Faculty members are expected to manage their time, to fulfill the responsibilities set out in the collective agreement and to record their activities in a report which they file annually with the Dean in return for which an annual salary is paid.

In these circumstances, I find that by instituting a shutdown, it was not open to the University to calculate a daily rate of pay and unilaterally reduce the annual salary of faculty members by four days. In doing so, I find that the University breached the provisions of Article 35 of the collective agreement which provides for the payment of regular or annual salary. Although the salary rates of faculty members are not set out (apart from salary floors and ceilings), Article 35 provides for a scale increment of 3.3% for the period from July 1, 2009 to June 30, 2010. Faculty members were denied the full benefit of the negotiated increase by the action taken by the University in this case. Moreover, although in reaching this conclusion, I have carefully considered section 12 of the *Lakehead University Act*, which was relied on by the University, in my view, the general empowering provisions contained in section 12 of the Act do not override the specific provisions of the collective agreement to which the Board of Governors is a party.

In my view, this case is also distinguishable from a number of decisions relied on by the University. While I do not propose to list all of the decisions relied on,

they included the following: *Re U.A.W. Local 456 & Electric Auto-Lite Ltd.* (1957), 7 L.A.C. 331 (Thomas); *Re United Steelworkers of America and Russelsteel Ltd.* (1966), 17 L.A.C. 253 (Arthurs); *Re Corporation of the City of Windsor and Ontario Nurses' Association* (1985), 19 L.A.C.(3d) 1 (McLaren); *Re DeHavilland Aircraft of Canada Ltd. and Canadian Automobile Workers, Local 112* (1987), 27 L.A.C.(3d) 98 (Foisy); *Re H.E. Vannatter Ltd. and U.A.W., Local 251* [1992] O.L.A.A. No. 560 (Watters); *Re Maritime Telegraph and Telephone Co. and Atlantic Communication and Technical Workers' Union et al.* (1994), 119 D.L.R.(4th) 634 (N.S. C.A.); *Re Auto Haulaway Inc. and Teamsters, Local 927* (1995), 47 L.A.C.(4th) 301 (Outhouse) and *Catalyst Paper v. Communications, Energy and Paperworkers' Union of Canada, Local 592* [2007] B.C.C.A.A.A. No. 253 (Korbin).

These decisions dealt with matters such as contracting out, home visits by an employer nurse, a change in the procedure to be followed after wash-up, layoffs and the assignment of work from one classification to another. In each case, it was found that in the absence of an express provision in the collective agreement, there was no restriction on management rights and, accordingly, the employer was free to take the action which was the subject of the grievance. None of the decisions, however, dealt with a temporary shutdown and a corresponding reduction in salary in circumstances where the language in the collective agreement was similar to the language in this case.

Although the collective agreement between the parties admittedly makes no reference to a shutdown, as noted previously, the provisions of the agreement must be considered as a whole to determine whether there is a restriction on management rights. In this case, those provisions include specific Articles dealing with the responsibilities of faculty members (apart from contract lecturers) and providing for the payment of annual salary. Having carefully considered these provisions and the submissions of the parties, I find that by instituting a shutdown, it was not open to the University to unilaterally reduce the annual salary of faculty members by four days. In my view, this action on the part of the University constituted a breach of Article 35 of the collective agreement.

I note, however, that the provisions of the agreement dealing with the responsibilities of faculty members (apart from contract lecturers) set out in Article 16, which have had a significant bearing on my decision, do not apply to Librarians to whom separate workload provisions apply. Continuing Contract Lecturers are also dealt with in a Letter of Understanding which includes some reference to the assignment of work. In the result, at this juncture I remit the matter of these classifications to the parties for further discussion based on the conclusions reached in this award. The grievances with regard to other faculty members are allowed and I shall remain seized to deal with remedial issues which cannot be resolved by the parties.

It is necessary, then, to consider the grievance filed by Professor Phillips in which he claims that he was improperly denied vacation during the shutdown. In support

of this grievance, the Association alleged that the University breached the vacation scheduling provisions contained in Article 36.03.02 of the collective agreement. This Article provides that after consultation with his or her Chair/Director and provided the Dean is notified in advance of the vacation period, a member may take his or her annual vacation at any time which does not coincide with a period in which he or she has undertaken a particular responsibility such as teaching or counselling students.

In this case, Professor Phillips testified that some time prior to the announcement of the shutdown on April 24, 2009, he advised Dr. Dadgostar that he would not be attending an alumni event at the University on December 26th because he would be away at that time. Professor Phillips explained that he had to travel to Saskatoon to be with his mother who was in poor health. On May 5th, Professor Phillips consulted with Dr. Dadgostar and advised that he would be taking vacation from December 21st to 24th. Dr. Dadgostar subsequently indicated that in accordance with the announcement of April 24th, vacation would not be permitted during the shutdown.

There was no suggestion that at the time of his proposed vacation, Professor Phillips had undertaken a particular responsibility such as teaching or counselling. On the contrary, his proposed vacation period coincided with the shutdown. Mr. Bickford submitted, however, that Professor Phillips' grievance ought to be dismissed because an employee is eligible for vacation only when he would otherwise be at work. In support of this submission, Mr. Bickford did not point to a particular provision of the collective agreement but relied on *Re Northern Electric Co. Ltd. and*

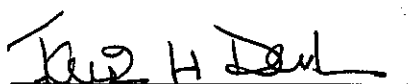
United Automobile Workers, Local 27 (1975), 8 L.A.C.(2d) 385 (Palmer). In that case, an employee who was on maternity leave claimed vacation during a two-week vacation shutdown which took place during the course of her leave. Arbitrator Palmer found that an employee could only take vacation when he or she would otherwise be at work and as the grievor was on maternity leave, she could not take vacation until she returned to work.

In contrast to the *Northern Electric Co. Ltd.* case, the Association referred to a number of cases which dealt with vacation during a full or partial shutdown of operations: see *Toronto Catholic District School Board and Canadian Union of Public Employees, Local 1280* [1999] O.L.A.A. No 456 (Stanley); *Ottawa Hospital and Canadian Union of Public Employees, Local 4000* (2002), 113 L.A.C.(4th) 121 (Goodfellow) and *Atlasteel Ltd. v. United Steelworkers of America, Local 5220* [2004] C.L.A.D. No. 225 (Ponak). In those cases, the employer scheduled employees on vacation during the shutdown and the issue in each case was whether the employer's right to schedule vacations was unfettered or whether employees had a choice with respect to their vacation periods. It was not suggested that vacation could not be scheduled during a shutdown because employees would not otherwise be at work. Moreover, it is apparent from the University's notice of April 24, 2009 that the decision to deny vacations during the shutdown was a cost-saving measure. In this regard, the notice provides as follows: "As our objective is to generate bottom-line savings, the University will not be granting paid vacation requests during the shutdown".

In this case, the consultation contemplated by Article 36.03.02 of the collective agreement took place when Professor Phillips met with Dr. Dadgostar in early May, 2009. At that time, Professor Phillips advised of his intention to take vacation from December 21 to 24, 2009 and, as noted previously, it was not suggested that he had undertaken particular responsibilities such as teaching or counselling during this period. Absent such responsibilities, Article 36.03.02 provides that a faculty member may take his or her vacation "at any time". Accordingly, this Article does not restrict the time at which vacation may be taken, nor did the University point to any other provision of the collective agreement which would restrict the scheduling of vacation provided for in Article 36.03.02. In my view, the general provisions contained in section 12 of the *Lakehead University Act* and the first sentence of Article 8.01 of the collective agreement do not have that effect. In the result, based on the language of Article 36.03.02, I find that Professor Phillips was entitled to take vacation during the shutdown and it was not open to the University to deny vacation at that time as a cost-saving measure. Professor Phillips' grievance is therefore allowed and I remit the matter of remedy to the parties and remain seized to deal with that issue.

I shall also remain seized for purposes of implementation or clarification of this award.

DATED AT TORONTO, this 23rd day of November, 2010.


Sole Arbitrator