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Docket: CI 17-01-08926
(Winnipeg Centre)
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Cited as: 2022 MBQB 32

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

MANITOBA FEDERATION OF LABOUR (IN ITS OWN RIGHT AND ON BEHALF OF THE PARTNERSHIP TO DEFEND PUBLIC SERVICES), THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION, THE MANITOBA NURSES' UNION, THE MANITOBA TEACHERS' SOCIETY, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCALS 2034, 2085 AND 435, MANITOBA ASSOCIATION OF HEALTH CARE PROFESSIONALS, UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 832, UNIVERSITY OF MANITOBA FACULTY ASSOCIATION, CANADIAN UNION OF PUBLIC EMPLOYEES NATIONAL, ASSOCIATION OF EMPLOYEES SUPPORTING EDUCATION SERVICES, GENERAL TEAMSTERS LOCAL UNION 979, OPERATING ENGINEERS OF MANITOBA LOCAL 987, THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, PUBLIC SERVICE ALLIANCE OF CANADA, UNIFOR, LEGAL AID LAWYERS ASSOCIATION, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS	)	Counsel: For the Plaintiffs: Garth Smorang, Q.C. Kristen Worbanski

7975, 7106, 9074, and 8223, WINNIPEG ASSOCIATION OF PUBLIC SERVICE OFFICERS IFPTE LOCAL 162, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA LOCAL UNION 254, BRANDON UNIVERSITY FACULTY ASSOCIATION, THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 63, THE UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION NO. 1515, PHYSICIAN AND CLINICAL ASSISTANTS OF MANITOBA INC., and UNIVERSITY OF WINNIPEG FACULTY ASSOCIATION, Plaintiffs, -and- THE GOVERNMENT OF MANITOBA, Defendant.	<u>For the Defendant:</u> Heather Leonoff, Q.C. Michael Conner Michael Bodner JUDGMENT DELIVERED: FEBRUARY 23, 2022

MCKELVEY J.

I. INTRODUCTION

[1] This matter involves the ***Charter***-based ramifications of the 2016 contract negotiations between the University of Manitoba ("UM") and the University of Manitoba Faculty Association ("UMFA") accompanied by the interplay with the Defendant Provincial Government of Manitoba ("Manitoba"). The trial was bifurcated to deal, firstly, with the issue of whether a ***Charter*** breach had occurred, and, secondly, the issue of damages in the event a breach was found

(***Manitoba Federation of Labour et al v. The Government of Manitoba***, 2020 MBQB 92 (CanLII)). In the trial's first stage I concluded that Manitoba had violated UMFA's right to freedom of association under s. 2(d) of the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***"). This conclusion was upheld by the Manitoba Court of Appeal ("Court of Appeal") (2021 MBCA 85):

> [155] In my view, a fair reading of the trial judge's entire reasons establishes that she concluded that Manitoba's conduct not only significantly disrupted the balance between the U of M and UMFA, but also significantly damaged their relationship, thereby seriously undermining what had been a meaningful and productive process of good faith collective bargaining.
>
> [156] It is my view that Manitoba has not, on this second ground of appeal, demonstrated any error in principle by the trial judge. Neither have I been persuaded that the trial judge committed any palpable and overriding error with respect to the facts or in regard to her application of the facts to the section 2(d) *Charter* provision. Deference is owed to her findings.

UMFA now seeks damages pursuant to s. 24(1) of the ***Charter*** for Manitoba's breach of its s. 2(d) rights:

> **Enforcement of guaranteed rights and freedoms**
> **24 (1)** Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Manitoba has appropriately conceded subsequent to the Court of Appeal decision that an infringement of UMFA's s. 2(d) ***Charter*** rights occurred. The only issue proceeding forward subsequent to the Court of Appeal decision is UMFA's claim for damages.

II. BACKGROUND

[2] UMFA is claiming damages on behalf of its individual members and on behalf of the union itself. The union's entitlement to claim damages under s. 2(d) is not challenged by Manitoba. Standing under s. 24(1) is afforded to "Anyone" whose rights have been infringed or denied. This appears to reflect a position of individual rights and a personal remedy. At one time, unions were not accorded the right to invoke standing to bring a claim on behalf of their membership: ***Commission des Ecoles Fransaskoises Inc. v. Saskatchewan***, 1991 CanLII 7999 (SK CA); ***Christian Labour Association v. B.C. Transportation Financing Authority***, 2000 BCSC 727 (CanLII), aff'd 2001 BCCA 437 (CanLII). However, later cases such as ***Saskatchewan Federation of Labour v. Saskatchewan***, 2016 SKQB 365 (CanLII) and ***British Columbia Teachers' Federation v. British Columbia***, 2014 BCSC 121 (CanLII) (***"BCTF"***), reversed on other grounds, 2015 BCCA 184, have held otherwise. As was decided in ***BCTF***, s. 2(d) rights do not "apply solely to individual action carried out in common, but also to associational activities themselves" (para. 628). Further:

> [627] In *Health Services*, the Court rejected the argument that the freedom of association guarantee provided by s. 2(d) of the *Charter* applies only to activities that can be carried out by individuals. The Court at para. 28 affirmed its previous judgment in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, which held that the freedom of association right also protects certain collective activities undertaken by a union, which would be incapable of being performed by an individual, as follows:
>
> > As I see it, the very notion of "association" recognizes the qualitative differences between individuals and collectivities. It recognizes that the press differs qualitatively from the journalist, the language community from the language speaker, the union from the worker. In all cases, the community assumes a life of its own and develops needs and priorities that differ from those of its individual members. ... [B]ecause trade

> unions develop needs and priorities that are distinct from those of their members individually, they cannot function if the law protects exclusively what might be "the lawful activities of individuals". Rather, the law must recognize that certain union activities -- making collective representations to an employer, adopting a majority political platform, federating with other unions -- may be central to freedom of association even though they are inconceivable on the individual level. This is not to say that all such activities are protected by s. 2(*d*), nor that all collectivities are worthy of constitutional protection; indeed, this Court has repeatedly excluded the right to strike and collectively bargain from the protected ambit of s. 2(*d*).... It is to say, simply, that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning.
>
> [Emphasis in original.]

[3] UMFA's members' individual rights are protected by virtue of s. 2(d) even though those rights are exercised in association with others. Consequently, I am satisfied that UMFA has the required standing for both itself and its members as regards this matter.

[4] UMFA was formed in 1951 and has been the certified bargaining agent for many of UM's full-time staff since 1974. In 2016, Dr. Mark Hudson ("Dr. Hudson") was UMFA's president for the approximate 1,200 employees in the bargaining unit. Greg Juliano ("Juliano") was the chief negotiator for UM, while UMFA's long-time chief negotiator was Dr. Robert Chernomas. Manitoba provided one-half of UM's funding in 2016.

[5] Collective bargaining had commenced between UM and UMFA prior to a new provincial administration being sworn into office on May 3, 2016. Notice to bargain had been provided by UMFA in early January 2016. A one-year, 1.5 per cent wage proposal with market adjustments put forth by UM was rejected by UMFA in March

2016. Wages were UMFA's top negotiation priority, as stipulated by over 70 per cent of its membership. Other priorities included metrics, performance indicators, collegial governance, and workload (Binder 5, Schedule A, Tabs Nos. 4 and 5).

[6] On September 13, 2016, after 20 "traditional" bargaining sessions, UM proposed a 7.0 per cent wage increase over a four year period – 1.0 per cent/2.0 per cent/2.0 per cent/2.0 per cent. This general wage increase, plus market adjustments, would have resulted in a 17.5 per cent increase in the average salary of UMFA members over the four years (Binder 5, Schedule A, Tabs Nos. 8, 9, and 10). This offer was described in a decision of the Manitoba Labour Board ("MLB") as one where UM felt that it had gone as far as possible with respect to monetary compensation and may not have gone as far on governance issues. That offer was rejected by UMFA.

[7] Manitoba had not provided UM with a negotiating mandate (or "directive") and was not in any way involved in the collective bargaining process prior to the September 13th comprehensive proposal. That said, it would not have been an unusual occurrence for a bargaining mandate to be invoked by a provincial government. At the time, UM salaries were at the bottom end of Canadian larger university salary ranges (U13) creating recruitment and retention issues for UM. UM President, Dr. David Barnard, had pronounced on August 3, 2016, that UM was in a healthy financial state (Binder 5, Schedule A, Tab 7). Dr. Barnard's message affirmed UMFA's own assessment of UM's financial health. Dr. Hudson testified that UMFA had estimated that UM had an approximate 96,000,000 dollar operating surplus at the time (Transcript of Dr. Mark Hudson's trial testimony ("Transcript")

p. T35, lines 36 and 37). Dr. Hudson testified that UMFA regarded UM's September 13th wage offer as a good start.

> It didn't obviously get us to where we wanted to go in terms of our ranking in the U13, but a start, something to talk about certainly. And we thought that it was, you know, not moving far enough on those other important items we had for bargaining. So we would continue bargaining.

(Transcript, p. T43, lines 12-16)

[8] A number of bargaining sessions occurred subsequent to the September 13, 2016 offer during which Juliano raised a concern with UMFA that Manitoba was being difficult (Binder 5, Schedule A, Tabs Nos. 11, 12, 14, 16, 18, and 25). UMFA could not evaluate the nature of Juliano's concerns with respect to UM's interactions with Manitoba as no details were provided. That said, by September 29, 2016, UM had improved certain aspects of its comprehensive settlement proposal as bargaining continued.

[9] On September 16, 2016, Manitoba, through Cabinet, had approved the formation of the Public Sector Compensation Committee ("PSCC"). The voting membership of the PSCC consisted of six Cabinet ministers, along with non-voting staff, which included Michael Richards ("Richards"), Deputy Secretary to Cabinet and Deputy Minister of Intergovernmental Affairs; Elizabeth Beaupré ("Beaupré"), Assistant Deputy Minister, Health Workforce Secretariat Division; Richard Stevenson (Stevenson"), Assistant Deputy Minister, Labour Relations Division; and, Gerry Irving ("Irving"), Secretary to the PSCC. The Premier also attended PSCC meetings from time to time (Agreed Facts, paras. 15-19).

[10] The PSCC met on September 21, 2016, and discussed extending public sector contracts for a one year minimum period with a zero per cent wage pause (Agreed Facts, para. 22). On September 30, 2016, Manitoba first heard about UM's September 13th wage offer to UMFA, and immediately raised concerns that it would create a bad precedent and be embarrassing for future negotiations with other provincial public sector bargaining units. Consequently, Stevenson advised Juliano that public sector wage controls were likely to be enacted. Despite such advice, bargaining continued. On October 5, 2016, PSCC was given an update on UM's/UMFA's collective bargaining negotiations which resulted in Juliano, Stevenson and Irving meeting the following day. At that October 6, 2016 meeting, Irving advised Juliano that Manitoba's negotiating mandate for UM required a one-year wage pause. "This direction was a mandatory order and non participation in the pause was not an option" (Agreed Facts, para. 90). Consequently, Juliano was instructed to return to the bargaining table with a message to UMFA that the previous wage offer was withdrawn. Juliano was told that financial repercussions for UM would be forthcoming in the event of non-compliance with Manitoba's mandate. Juliano was also directed not to disclose Manitoba's involvement in the stipulated mandate (Agreed Facts, para. 92). There were at least 30 separate meetings and updates between Manitoba and UM representatives during the period of September 30 to October 26, 2016. During this time, UM failed to provide UMFA with any specific information as to its communications with Manitoba or the existence of the mandate. A strike vote was held on October 11 and 13, 2016, with 86 per cent of the UMFA membership in favour of such action.

Dr. Hudson testified that a strike vote was a fairly standard part of the bargaining process.

[11] On October 24, 2016, Juliano wrote to Irving expressing concerns about Manitoba's mandate, particularly given the progress that had already been made through the bargaining process. He stated:

> ... the University fully appreciates the difficult financial situation that the new government finds itself in, and the desire to avoid precedence in settlements which could drive up overall public sector labour costs. However, given that our negotiations with our faculty union have progressed so far, complying with the government's wishes would mean moving backwards from previous offers, and expose the University to a claim of "bad faith bargaining", while severely damaging our relationship with faculty members and our six unions. The University feels that it cannot commit to doing something illegal, which would have serious consequences for our community, unless we have a credible defence and explanation. Therefore, if the government wants the University to bring our faculty bargaining process in line with its new mandate, we are going to need a strong statement from government that this is a directive....

(Binder 5, Schedule A, Tab 20)

These concerns had been raised with Manitoba by UM on prior occasions.

[12] Irving responded on October 25, 2016, by stating that any future compensation adjustments, beyond the pause year, would require a submission and the approval of PSCC. Additionally, he stated that the wage pause would not constitute bad faith bargaining (Binder 5, Schedule A, Tab 23). A further meeting was held involving PSCC and UM members on October 26, 2016. Dr. Barnard wrote to the Premier and copied the Ministers of Finance and Education, as well as Richards, Irving, and Stevenson, in an effort to alter Manitoba's mandate. He implored that Manitoba reconsider its position in order to facilitate the continuance

of good faith bargaining. He stressed that the mandate would lead to a divisive state and would have a devastating impact on the university community.

> I am respectfully asking you at this eleventh hour in the University's negotiations with UMFA, as we enter the mediation process and work around the clock towards a successful settlement, to please reconsider in this particular instance the decision to impose the salary pause on the University of Manitoba and allow us to continue to bargain in good faith.

(Binder 5, Schedule A, Tab 24)

UM had resisted Manitoba's directive to withdraw the wage compensation proposal. Further, it wanted Manitoba to take public ownership of the mandate. These requests for a reconsideration or ability to disclose received no response from Manitoba.

[13] As indicated, during the month of October 2016 there were at least 30 "secretive" communications between Manitoba and UM. The position of Manitoba was that anything short of compliance with its mandate would dangerously impact UM funding. Despite Manitoba's mandate and its secret communications with UM, bargaining sessions continued throughout October 2016 between the employer and the union without disclosure of the mandate. During October 2016, UMFA had substantially reduced its wage proposal (2.0 per cent). Dr. Hudson testified that negotiations with UM had been positively progressing with the parties coming closer to an agreement and that a contract resolution would have been achieved prior to a strike. Dr. Hudson said that, as of October 12, 2016, "... we don't see a strike as -- as imminent. We think it's bargaining as usual and our expectation is that we will bargain to a settlement prior to November 1" (Transcript, p. T48, lines 14-16). Further, he stated:

> So the CAC's [Collective Agreement Committee] role is to continually remind the bargaining team about what our members' priorities are. So these comments were made in the context of some degree of satisfaction at least with the starting point in compensation. We think that there is a salary increase coming, so we haven't quite ticked the box on compensation for our members, but we think that we certainly have some – a foundation to work from on it.
>
> And so given that, the priority then starts to shift toward other sticking points, within bargaining where we see that, you know, there is not adequate movement. And those are the two where we see that there is a real tension – and a sticking point.

(Transcript, p. T48, lines 35-40; p. 49, p. T49, lines 104)

He indicated that the "sticking points" were collegial governance and metrics.

[14] Mediation sessions were scheduled to take place between the parties on October 27, 29, and 30, 2016. During the October 27, 2016 mediation session, UM disclosed that Manitoba had, in the prior weeks, issued a mandate ordering the withdrawal of the September 13, 2016 wage offer. Instead, the revised compensation proposal was a one-year contract with no wage increase. Dr. Hudson explained UMFA's reaction as, "Shock, frustration. We had gone a long, long way in bargaining. We thought we were positioned to move to a settlement in mediation. And this is a – the ground shifting beneath you essentially" (Transcript, p. T51, lines 26-28). Dr. Hudson also testified, "... we felt pretty confident that we were in a position to come to a settlement that would have wages as a part of it, as well as some of the other important priorities that had been put forward by our membership" (Transcript, p. T69, lines 14-16). Further, when UMFA became aware of Dr. Barnard's October 26, 2016 letter to the Premier, Dr. Hudson indicated that its content affirmed "... our sentiment that had

this not happened, had – had the intervention not occurred, that we likely would have been able to come to a settlement" (Transcript, p. T55, lines 13-15).

[15] Despite UM's new positon on wage compensation, the mediation sessions continued on the understanding that UMFA had declared an ongoing right to bring an Unfair Labour Practice application to the MLB (binder 5, Schedule A, Tab 26). In order to achieve some type of a resolution, UMFA decided to proceed with the mediation sessions in order to negotiate governance and other non-compensatory issues. As a consequence of being unable to bargain with respect to wages, UMFA perceived that greater enhancements could be achieved on those issues.

[16] On October 28, 2016, UM and UMFA issued a joint statement:

> From the University of Manitoba's perspective:...
>
> We find ourselves in the unusual circumstance of having a newly articulated Provincial mandate regarding public sector compensation levels that will have a profound impact on the final compensation levels that we will be able to negotiate, despite having already made what we believe to be a fair and reasonable offer on September 13, 2016.
>
> ...
>
> From the University of Manitoba Faculty Association's perspective: This 11th hour action represents illegitimate government interference in a constitutionally-protected process of collective bargaining. Mediation continues, and our focus is to advance our Members' priorities through that process. The UM is an independent body whose Board must have the autonomy to engage in all aspects of negotiation. The Province has unnecessarily endangered a complex negotiation through this misguided interference, and its action has jeopardized the educational goals of every UM student. UMFA is currently exploring legal options, and continues to focus on negotiating a fair deal for its members.

(Binder 5, Schedule A, Tab 27)

[17] On October 30, 2016, UMFA proposed a contract resolution reflecting a zero per cent wage increase with improvements in governance, metrics and workload

issues. That proposal was rejected by UM (binder 5, Schedule A, Tab 28). Dr. Hudson had stated that, "...without governance we'd have to go out [on strike]" (Agreed Facts, para. 105). Dr. Hudson testified that:

> So discussion previous to that, I think, was about facing up to a new reality that we were facing in bargaining, a sudden new reality. We believe the university, that at least in their view, they could not move from a zero-percent salary offer.
>
> And so given the decision of the Collective Agreement Committee to try to move forward with mediation nonetheless, we need to shift attention to what are our most important priorities at that point, given that wages are no longer something that the university believes it can bargain on, where can we make movement. And so – it's on those non-monetary issues that we want to direct the attention of university administration. And to, I think, hammer home the point that unless there is really, really remarkable movement on those priorities, a settlement is a very distant prospect.

(Transcript, p. T56, lines 40-41; p. T57, lines 1-11)

The parties were unable to reach a collective agreement and, for only the third time since 1951, strike action commenced (November 1, 2016). Further, Juliano had intimated to UMFA that the, "Gov wants strike" (Transcript, p. T57, line 14). UMFA communicated regularly with its membership with updates on the strike action and what was characterized as Manitoba's interference in the bargaining process (Binder 5, Schedule A, Tabs 29, 35 and 36).

[18] The strike was settled on November 20, 2016, through conciliation on the basis of a one-year collective agreement with no wage increase. The parties also agreed on certain non-compensatory terms with small gains realized in workload requirements, tenure, promotion, metrics, and collegial governance (Binder 5, Schedule A, Tab 39). The resolution of the strike action was described by Dr. Hudson as achieving a "minimum threshold". The academic year was salvaged

and saved students from losing course credits and experiencing damage to their educational goals, as well as resolved other stresses on the membership caused by the strike action. As a consequence of what transpired, Dr. Hudson testified that union membership's trust relationship with UMFA was damaged, as was their relationship with UM. The membership's trust was particularly undermined as their number one priority of salary was not addressed. The membership was dissatisfied with what had been achieved on all fronts and particularly, the loss of 90 per cent of the September 13, 2016 wage proposal.

[19] On May 20, 2017, Bill 28: ***The Public Services Sustainability Act***, S.M. 2017 c. 24 was introduced in the Manitoba Legislature and received Royal Assent on June 2, 2017. This public sector wage restraint legislation was never proclaimed and, therefore, never in force. Further, it was repealed by the Legislative Assembly in 2021.

[20] UMFA submitted an Unfair Labour Practice complaint to the MLB against UM. A lengthy decision was rendered on January 29, 2018, in which the MLB found that UM had committed an unfair labour practice (Binder 5, Schedule A, Tab 41). The MLB determined that UM had failed to disclose relevant information on a timely basis to UMFA and had not been transparent during the bargaining process. In essence, UM had failed to disclose its decision to comply with and adhere to Manitoba's mandate, as well as the substance of the mandate itself. As a consequence, UM was ordered to pay a financial penalty, being 2.5 million dollars, accompanied by an apology to UMFA and all employees in the bargaining unit. This resulted in a 2,000 dollar payment to each UMFA member, as stipulated

pursuant to s. 31(4) of ***The Labour Relations Act,*** C.C.S.M. c. L10 (the ***"Act"***) for UM's failure to bargain in good faith and make every reasonable effort to conclude a collective agreement (s. 63(1)). Section 31(4) states:

> **Remedies for unfair labour practice**
>
> 31(4) Where the board finds that a party to a hearing under this section has committed an unfair labour practice it may, as it deems reasonable and appropriate and notwithstanding the provisions of any collective agreement,
>
> .....
>
> (e) where the unfair labour practice interfered with the rights of any person under this Act but the person has not suffered any diminution of income or other employment benefits or other loss by reason of the unfair labour practice, order the party to pay to the person an amount not exceeding $2,000.

[21] That said, the MLB was not prepared to find that UM's failure to disclose had caused the November 1-20, 2016 strike. Consequently, the MLB did not order the requested compensation against UM for monetary losses incurred by UMFA and its membership as a result of the strike action. It is that remedy that UMFA now seeks under s. 24(1) of the ***Charter*** against Manitoba, being the direct costs of the strike incurred by UMFA members which includes: strike pay; health benefits; strike fund; wages lost for those on strike, as well as UMFA's costs, such as setting up an office outside the university campus. Additionally, damages are sought to compensate UMFA's membership for their monetary losses incurred because of Manitoba's substantial interference and disruption in the collective bargaining process as demonstrated by the reduction of a 17.5 per cent wage increase to 1.75 per cent over four years.

III. POSITION OF UMFA

[22] UMFA submits, based upon Dr. Hudson's testimony, that the trust relationship between UMFA and its membership was seriously undermined in the circumstances of the 2016 collective bargaining process. The members' number one priority, being salary, and UM's withdrawal of the 17.5 per cent proposal for a zero per cent position (1.75 per cent over the four year period) was a fracturing occurrence. Further, Dr. Hudson commented on the damaged relationship between UM and UMFA. A difficult trust relationship was created and resulted in an unnecessary strike when, in all likelihood, there would have been contract resolution prior to November 1, 2016.

[23] UMFA relied during its submissions upon Dr. Robert Hebdon's testimony and his two reports dated September 19, 2017 and July 16, 2019, filed during the course of the trial of this matter. He testified that government interference in collective bargaining can seriously affect union/membership relationships, as well as those between employer and employee. Those trust relationships are hard to build and are easily broken.

[24] UMFA acknowledges that the MLB declined to conclude that UM caused the strike by virtue of its withdrawal of the 17.5 per cent settlement proposal. Instead, the MLB's unfair labour practice award reflected the consequences of UM's acceptance of and lack of disclosure of Manitoba's mandate to UMFA over the three week period after it was invoked. UMFA contends it was not afforded an opportunity to react to and deal with the mandated reality in a timely manner before the strike deadline and, hence, was denied the facility of a good faith

bargaining process. UMFA submits that this finding that UM did not cause the strike does not conclusively determine the actual cause. Further, the MLB decision does not engage or compensate for Manitoba's actions and its role in what transpired. At all times, UMFA thought that a contract settlement would be achieved, even though a strike vote had been held. This impression was substantially confirmed by Dr. Barnard's October 26th letter (Binder 5, Schedule A, Tab 24); Dr. Hudson's testimony; and, Juliano's e-mails including his October 24, 2016 communication (Binder 5, Schedule A, Tab 20), where he related that there was a high likelihood of a strike if the mandate was imposed. Juliano characterized the mandate as a backwards negotiating movement (October 24, 2016). Dr. Barnard asked Manitoba to reconsider its position which was expected to lead to a divisive and long strike. Manitoba's position was that a strike was not an "unhappy" occurrence in the circumstances. This area was also the subject of Dr. Hebdon's trial testimony (outlined in paras. 126-140 of the Court of Queen's Bench decision). Dr. Hebdon testified that the imposition of a pre-determined pay level allows no leverage to the collective bargaining process. Manitoba's actions crippled the joint ability of UM and UMFA to resolve their contractual dispute. UMFA submits that Manitoba's late-in-time directive of a zero per cent increase, and that it remain secret, facilitated and caused the strike action.

[25] UMFA poses that its claim for ***Charter*** damages is founded on six points:

1. the 2016 newly elected provincial government was fixated on imposing wage restraint legislation on public sector employees;

2. Manitoba was planning wage restraint legislation, but had not yet brought it forward in the fall of 2016;
3. Manitoba regarded UM's September 13, 2016 wage settlement offer of 17.5 per cent as a dangerous precedent in the context of public sector wage restraint legislation, as it could potentially weaken Manitoba's ability to impose such legislation;
4. on October 6, 2016, Manitoba mandated a zero per cent wage pause without regard to the impact it would have on UM, UMFA and the collective bargaining process that had taken place over the previous nine months;
5. Manitoba required that it not be identified to UMFA as having any involvement or responsibility for imposing the mandate. UM was told to keep that fact secret; and,
6. but for Manitoba's directive/mandate, the parties would, in all probability, have reached an agreement through collective bargaining, with strike action being averted. At a minimum, UM's 17.5 per cent offer over four years would likely have been the basis for the wage compensation component of the agreement.

[26] The calculations of the damages sought by UMFA members are outlined in Dr. Cameron Morrill's ("Dr. Morrill") affidavit, affirmed September 16, 2021 (Document No. 136). Dr. Morrill calculated the actual losses incurred by UMFA members based upon a 17.5 per cent over four year increase. Those losses were contended to be as a consequence of Manitoba's interference in the 2016 collective

bargaining process and, ultimately, through the 2017 unproclaimed ***PSSA*** wage restraints which affected the subsequent three years (para. 10). Dr. Morrill outlined how he calculated the losses, with the assistance of Dave Muir, UM's Director, Compensation and Benefits, Human Resources, based upon UM's September 13, 2010 settlement proposal of 1.0 per cent, 2.0 per cent, 2.0 per cent, 2.0 per cent, with market adjustments that resulted in a 17.5 per cent increase over the four year period. The losses incurred for the 1,535 UMFA members who were employed at UM for all or part of the sustainability period were individually broken down within Dr. Morrill's affidavit. The total loss to these members without interest was calculated to be 20,691,902 dollars, for an average payout per member of 13,500 dollars. The addition of an interest component increased the loss to 21,802,395 dollars. The interest is based upon rates for a one year guaranteed investment account as offered by the Tangerine Bank (1.3 to 2.8 per cent).

[27] UMFA argues that there were other losses incurred which were directly attributable to the three week strike, as outlined in the affidavit of Dr. Greg Flemming ("Dr. Flemming") (Document No. 135) affirmed September 16, 2021. Those losses include:

	Amount ($)
Strike pay	2,576,953.52
UMFA member benefits coverage	177,347.28
Strike headquarters operating costs breakdown	74,781.02
Lost salary of UMFA members	4,180,149.15
TOTAL	**7,009,230.97**

This, with the loss to UMFA members, results in a total claim of 28,811,626 dollars.

[28] UMFA submits that Manitoba cannot rely upon the MLB decision to argue that the 2,000 dollars paid to each UMFA member acted to satisfy the consequences of Manitoba's interference in this case. That 2.5 million dollar award was not granted to compensate for loss of earnings or benefits, but instead was meant to remedy UM's failure to disclose Manitoba's mandate during the collective bargaining process (s. 31(4)). The MLB award was also argued not to constitute a substitution for, or a duplication of, a ***Charter*** remedy as the consequences of what occurred were not the same and the award was not against the same party.

[29] UMFA relies on a number of cases:

1. ***R. v. Ferguson***, 2008 SCC 6, [2008] 1 SCR 96. The ***Ferguson*** decision concerned the imposition of a mandatory statutory minimum sentence of four years' imprisonment and whether such a penalty constituted cruel and unusual punishment. McLachlin C.J.C. held that, "A court which has found a violation of a *Charter* right has a duty to provide an effective remedy" (para. 34). Further, she held that remedies for breaches of the ***Charter*** are governed by s. 24(1) and by s. 52(1) of the ***Constitution Act***, 1982. Section 24(1) is generally used as a remedy for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional. Further, "[t]he wording of s. 24(1) is generous enough to permit this, it is argued, conferring a discretion on judges to grant 'such remedy as the court considers appropriate and just in the circumstances'" (para. 62).

UMFA argues that there is a duty to provide a remedy for Manitoba's ***Charter***-violating conduct. This inappropriate conduct was well outlined in the Court of Appeal decision (paras. 8, 9, 132, 147, 148).

2. The leading decision with respect to ***Charter*** damages as a constitutional remedy is the Supreme Court of Canada's 2010 decision in ***Ward v. Vancouver (City)*** 2010 SCC 27, [2010] 2 SCR 28, which set out four steps to be utilized in order to determine government liability when faced with a ***Charter*** damage claim. That approach was affirmed in ***Conseil scolaire francophone de la Columbie-Britannique v. British Columbia***, 2020 SCC 13, para. 167. UMFA contends the following analysis of the four steps should be adopted:

   - Step one: proof of a ***Charter*** breach. A breach by Manitoba was found by virtue of the decision of the Court of Queen's Bench, as affirmed by the Court of Appeal.
   - Step two: functional justification of ***Charter*** damages.

     Ward explains:

> [24] A functional approach to damages finds damages to be appropriate and just to the extent that they serve a useful function or purpose. This approach has been adopted in awarding non-pecuniary damages in personal injury cases (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229), and, in my view, a similar approach is appropriate in determining when damages are "appropriate and just" under s. 24(1) of the *Charter*.
>
> [25] I therefore turn to the purposes that an order for damages under s. 24(1) may serve. For damages to be awarded, they must further the general objects of the *Charter*. This reflects itself in three interrelated

> functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.

UMFA argues that all three aspects of step two have been satisfied. Manitoba's actions constituted a substantive disruption to the collective bargaining process and the alteration of the union members' relationships with UMFA and with UM. Deterrence and vindication are served by virtue of ***Charter*** damages constituting a message back to government to refrain from interfering in the collective bargaining process.

- Step three: countervailing factors. ***Ward*** states that:

> [33] ...even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.

Manitoba submits that the MLB complaint and award operated as an alternative remedy. Conversely, UMFA contends that Manitoba was not a party to the unfair labour practice complaint and, consequently, no award could be granted with respect to its conduct. The wrong UM committed, as found by the MLB, was its failure to disclose. There was statutorily-recognized

compensation afforded for that failure to comply with the requirement to bargain in good faith. This was not characterized within the MLB decision as a ***Charter*** matter.

In terms of the good governance aspect of the countervailing factors, Manitoba is not relying upon that area to afford it immunity in these circumstances.

- Step Four: quantum of damages. The Supreme Court held, "... the remedy must be 'appropriate and just'. This applies to the amount, or quantum, of damages awarded as much as to the initial question of whether damages are a proper remedy" (para. 46).

> [47] As discussed earlier, damages may be awarded to compensate the claimant for his loss, to vindicate the right or to deter future violations of the right. These objects, the presence and force of which vary from case to case, determine not only whether damages are appropriate, but also the amount of damages awarded. Generally, compensation will be the most important object, and vindication and deterrence will play supporting roles. This is all the more so because other *Charter* remedies may not provide compensation for the claimant's personal injury resulting from the violation of his *Charter* rights....

[30] In this case, the monetary compensation claim is set out in the affidavits of Drs. Flemming and Morrill. UMFA stipulates that this amount only serves to compensate the direct and calculable damages and does not reflect any recognition for the non-pecuniary harms inflicted by Manitoba's s. 2(d) ***Charter*** breach. Such harms include the impact on the trust relationships between UMFA and the membership and between UMFA and UM.

[31] UMFA asks that ***Charter*** damages be awarded for the total amount of 28,811,626 dollars.

IV. POSITION OF MANITOBA

[32] Manitoba is substantially in agreement with the six key points outlined by UMFA as regards an award of ***Charter*** damages, with one important exception, regarding point six:

1. the newly elected government was investigating and considering wage restraint legislation. That type of legislation was found not to infringe s. 2(d) of the ***Charter*** as set out in ***Meredith v. Canada (Attorney General)***, 2015 SCC 2, [2015] 1 SCR 125, and as held by the Court of Appeal;
2. Manitoba was planning for wage restraint legislation in the fall of 2016;
3. the UM offer of 17.5 per cent was thought by Manitoba to be an amount that would create turmoil with respect to its pending public service wage restraint legislation;
4. PSCC provided a wage directive and intervened in the UM/UMFA collective bargaining process;
5. Manitoba's interventions and not wanting those interventions to be made public were inappropriate;
6. that Manitoba takes issue with the contention that but for Manitoba's mandate UM and UMFA would likely have settled on similar contractual terms to UM's September 13, 2016 wage proposal prior to strike action taking place.

[33] Manitoba argues, in accordance with ***Meredith*** and ***Canada (Procureur général) v. Syndicat canadien de el fonction publique, section locale 675***, 2016 QCCA 163 (CanLII), that it was within its authority to invoke the zero per cent mandate. The only significant issue and inappropriate conduct in this case was Manitoba's direction to UM not to reveal its entrance into the collective bargaining milieu. To change a mandate or to impose a new mandate is not unconstitutional, nor does it constitute a ***Charter*** breach. It is the "secrecy" with respect to the mandate/directive that results in the need for a ***Charter*** remedy. That remedy should cover only the three-week period from when the mandate was imposed on UM until to its disclosure on October 27, 2016. In that time period, three bargaining sessions took place (October 12, 21, and 26, 2016). The October non-disclosure period constituted the constitutional violation as effective collective bargaining could not be achieved.

[34] Manitoba submits that despite the ultimate disclosure, UMFA continued the bargaining process on non-compensatory issues such as governance. Manitoba contends there is no evidence that UMFA contested UM's change of position with respect to the wage pause. Indeed, before the November 1, 2016 strike, UMFA accepted and put forward a zero per cent wage proposal highlighting the outstanding negotiable issues as being governance and other matters. UM turned down that proposal. UMFA's actions constituted a critical break in causation when it chose to strike, particularly subsequent to its acceptance of the wage pause. Further, UMFA could have remained on strike for a 60 day period which would have triggered the arbitration process. It is speculative as to what an arbitrator

might have awarded given the unusual set of circumstances, being a 17.5 per cent wage offer reduced to 1.75 per cent over a four year period. Instead, UMFA chose to end the strike for Manitoba's mandated wage proposal.

[35] Manitoba contends that it is also speculative to suggest that UMFA and UM would have settled at 17.5 per cent. The fact that governance and other non-compensatory changes were ultimately agreed to may have reflected an outcome where less money would have been on the table. The contents of a 2016 agreement is unknown. The breach revolves around the lack of disclosure, rather than the imposition of the mandate. This position was argued to be in keeping with the MLB decision (Document 14, Tab 2, pp. 77-79), which said:

> The critical question that the Board must decide is whether or not the unfair labour practice committed by the University caused the strike. As noted above, the Board has concluded that the University failed to comply with section 63(1) of the Act and, therefore, committed an unfair labour practice contrary to section 26, by failing to disclose information during bargaining which was tantamount to a misrepresentation. However, the Board has determined that the other unfair labour practice complaints advanced by the Faculty Association should be dismissed.
>
> The evidence indicates that, both before and after the disclosure by the University of the required information on October 27, 2016, the Faculty Association maintained that metrics and collegial governance were the critical issues that could lead to a strike. For example, during bargaining on October 12, 2016, S.D. told the University that metrics and collegial governance were the "big issues outstanding" and that if those could be resolved in a manner that was satisfactory to the Faculty Association, then "everything else goes away". At bargaining on October 21, 2016, S.D. similarly commented that "big issues" like collegial governance and metrics were the matters that "will cause a strike". The information that the University failed to disclose to the Faculty Association in violation of the Act concerned the decision respecting the imposition of a new mandate which impacted the University's financial offer. It did not relate to governance or other matters.
>
> The reaction of the Faculty Association to the ultimate disclosure of the decision by the University is important to consider. That disclosure came during the first day of mediation. Almost immediately thereafter, the Faculty

> Association said that it was prepared to continue bargaining with respect to governance issues without prejudice to its right to file an unfair labour practice application. Its representatives specifically indicated that governance issues were "the strike stuff" and that if a strike were to occur it would be because there was insufficient movement on the governance issues. There is no evidence that the Faculty Association contested the University's position that wages were no longer negotiable. Indeed, the Faculty Association ultimately advanced an offer at the end of the mediation which proposed a one-year collective agreement with a 0% wage increase and improvements to language respecting governance and other issues. Had that proposal been accepted, the strike would not have commenced.
>
> However, that offer was rejected and the Faculty Association commenced the strike on November 1, 2016. The Faculty Association agreed to stipulate that, when conciliation commenced, it indicated that it would accept a one-year agreement with a 0% wage increase but that it wanted to discuss other issues including governance. S.D. testified that if the University had offered a significant enough wage increase, then governance issues could have been deferred to subsequent bargaining and a strike avoided. Bargaining notes taken during conciliation, however, indicate that S.D. noted that workload issues were critical and that: "Our members would turn down salary for this – no one is worked up about salary". That statement is certainly consistent with the public position the Faculty Association conveyed. In public statements issued during the strike, it stated that: "We're fighting for a greater say over ever-increasing workloads, appropriate use of metrics in evaluation, and job security".
>
> Clearly, the impasse between the parties concerned the Faculty Association's demands regarding the governance and related issues. Hard bargaining over those issues occurred. The parties ultimately concluded a collective agreement, ratified by 90% of the Faculty Association's members who voted, that did not include any wage increase. To be sure, the failure of the University to disclose the de facto decision in violation of the Act complicated an already difficult negotiation. However, the Board is not satisfied that the conduct of the University, which we have concluded constitutes an unfair labour practice, caused the strike. As a result, the Board is not prepared to accede to the Faculty Association's request that the Board order compensation for losses incurred by it and its members as a result of the strike

[36] Manitoba submits that breaks in causation occurred which serve to negate or diminish any ***Charter*** damages payable:

1. It is lawful to change a mandate.

2. Manitoba was within its rights to have UM retract the 17.5 per cent offer.

3. UMFA accepted the zero per cent mandate before the November 1, 2016 strike began, but proceeded to engage in that action on primarily governance issues.
4. UMFA could have stipulated that it did not accept the mandate, proceed to take strike action and then to arbitration after 60 days. Instead, an agreement was reached after 21 days – how can there be damages for an accepted agreement? There was satisfaction with the non-compensatory gains made and resolution achieved.
5. A second agreement was signed for the next three years in 2017, based upon the ***PSSA*** wage increases.

[37] Manitoba recognizes that 28.8 million dollars is being sought with respect to this matter and takes no issue with how those damages are calculated. That said, Manitoba argues that ***Charter*** damages are generally modest in nature and reflect an appreciation and fairness for the position of the state and tax payer. In this case, UMFA went on strike for primarily governance issues when it had other remedies available to it, including arbitration. It chose not to exercise those remedies. The deal ratified in 2017 recognized the ***PSSA*** mandate of a zero per cent, 0.75 per cent, and 1.0 per cent increase over the next three years. This was accepted by UMFA and was the deal signed in 2017. Manitoba submits that there are five breaks in the causal chain. That said, UMFA does not want to live with its decisions and agreements made with UM.

[38] Manitoba submits that the ***Charter*** protects procedural rights and not substantive rights. What UMFA argues and seeks is contended to turn a remedy

for a procedural right into a substantive right – something not allowed under s. 2(d) of the ***Charter***: ***Saskatchewan Federation of Labour v. Saskatchewan***, para. 48

[39] The decision of ***Henry v. British Columbia (Attorney General)***, 2017 BCCA 420 (CanLII) is relied upon by Manitoba with respect to the principle against double recovery of damages under s. 24(1) of the ***Charter*** when coupled with damage claims in respect of other, but related, causes of action. Henry had been convicted of 10 counts of sexual assault and declared to be a dangerous offender. He spent approximately 27 years in prison and was subsequently acquitted of the charges. As a consequence, he sued the Province of British Columbia, the City of Vancouver, two members of the Vancouver Police Department, and the Attorney General of Canada for damages with respect to his arrest, conviction and imprisonment. The City and Attorney General of Canada reached out-of-court settlements with Henry, leaving only the claim against the Province to proceed to trial. A trial damage assessment in the amount of 7.5 million dollars was said to serve the vindication and deterrence functions of s. 24(1) of the ***Charter***. The Province applied for an order that the aggregate settlement amount of 5,150,000 dollars paid to Henry by the City and Attorney General of Canada be deducted from the damage award against it. The order sought by the Province was granted. The British Columbia Court of Appeal determined that the results flowing from the causes of action against the Province were indivisible from the damages flowing from the causes of action against the City and the Attorney General of Canada. In essence, the question to be asked was whether the damages sought against the

three defendants were the same such that retention of the settlement monies without deduction from the court damage assessment would amount to double recovery. Tysoe J.A. determined as follows:

> [55] Hence, the assessment of the damages made by the Chief Justice was based on the consequences of the *Charter* breaches and not on the nature of those breaches. As the consequences of the *Charter* breaches alleged against the City were the same as the ones flowing from the *Charter* breaches found to have been committed by the Province, it follows that the vindication damages that would have been awarded against the City if those alleged breaches were proven would have been the same as the vindication damages assessed against the Province, and not more. Further, if the breach of the *Charter* alleged against Canada had been proven, the vindication damages in respect of that breach would have been less the vindication damages assessed against the Province because the breach alleged against Canada did not result in Mr. Henry's conviction and related to only part of the time he was incarcerated...

[40] Manitoba argues that UMFA is in the same situation as depicted in ***Henry*** as compensation is afforded only with respect to procedural rights. In this case, compensation was provided by virtue of the MLB decision and, as was said in ***Ward***, double compensation should not occur. Manitoba accepts that a ***Charter*** violation occurred during the three week non-disclosure period. That said, 2.5 million dollars has been paid by virtue of the MLB decision. Care must be taken not to double compensate in these circumstances, albeit a small top up of the 2,000 dollars paid to each member might be appropriate in the circumstances (500-1,000 dollars). If any award is made in excess of 2.5 million dollars, that sum should be deducted to avoid an award duplication.

V. ANALYSIS

[41] I found in the 2020 Queen's Bench decision that Manitoba's conduct had substantially interfered with the good faith collective bargaining process and constituted a violation of s. 2(d) of the ***Charter***:

> [429] The bargaining that transpired in 2016 with UMFA, found to be an unfair labour practice, was remarkable in that what transpired was UM's proposal over four years of a 17.5 per cent general wage increase plus market adjustments, being reduced to 1.75 percent. This occurred because of a Government mandate, of which UMFA was not advised until arbitration had begun. The University of Winnipeg and BU had previously agreed to more substantive wage increases (a range between 1.5 per cent and 2.5 per cent for 2016–2018). Consequently, it cannot be said that the ***PSSA*** wage caps were consistent with the going rate reached in other agreements, as existed in ***Syndicat canadien*** and other ***ERA*** cases. Interestingly, as well, UM felt it was in a sufficiently advantageous financial position to offer increased monetary wages/benefits and pleaded with Government representatives to allow such bargaining to transpire. This represented a substantive disruption of the collective bargaining process, harmed the relationship between UM and UMFA, and, as the evidence demonstrated, significantly altered the relationship between the union and its membership – both with respect to the 2016 and the 2017 negotiations. What transpired was a violation of s. 2(d) of the ***Charter***...

This was affirmed by the Court of Appeal:

> [155] In my view, a fair reading of the trial judge's entire reasons establishes that she concluded that Manitoba's conduct not only significantly disrupted the balance between the U of M and UMFA, but also significantly damaged their relationship, thereby seriously undermining what had been a meaningful and productive process of good faith collective bargaining.
>
> [156] It is my view that Manitoba has not, on this second ground of appeal, demonstrated any error in principle by the trial judge. Neither have I been persuaded that the trial judge committed any palpable and overriding error with respect to the facts or in regard to her application of the facts to the section 2(d) *Charter* provision. Deference is owed to her findings.

[42] Section 24(1) is as stated in ***Ferguson***: "...a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional..." (para.

60). Further, in ***Francis v. Ontario***, 2020 ONSC 1644 (CanLII), aff'd 2021 ONCA 197 (CanLII), Justice Perell observed:

> [538] Section 24 (1) provides remedies for government conduct that violate the *Charter*.[258] Section 24 (1) of the *Charter* authorizes a court of competent jurisdiction to grant a personal remedy to anyone whose *Charter* rights have been infringed or denied.[259] Section 24 (1) of the *Charter* can be invoked only by a party alleging a violation of that party's personal constitutional rights.[260]
>
> [539] Section 24 (1) of the *Charter* is to be given a generous and purposive interpretation and application. The nature of the s. 24 (1) remedy is a matter for a court of competent jurisdiction to fashion. It is for the court functionally or purposely to design substantive legal remedies for *Charter* violations independent of, but informed by, the substantive common and civil law. The remedies of s. 24 (1) are new substantive legal territory and are to be developed incrementally without a pre-determined formula. Section 24 (1) gives the court a wide discretion to fashion meaningful remedies.[261]
>
> [540] Section 24 (1) provides the court with an extremely broad discretion - but not an unfettered or unguided discretion - to determine what remedy is appropriate and just in the circumstances of a particular case.[262] A *Charter* remedy will: (a) meaningfully vindicate *Charter* rights; (b) employ means that respect the different roles of governments and courts in the Canadian constitutional democracy; (c) be a judicial remedy that vindicates the *Charter* right within the function and powers of a court; and (d) be fair to the government actor against whom the order is made.[263]

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[258] *R. v. Ferguson*, 2008 SCC 6; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras. 15-22.
[259] *R. v. Ferguson*, 2008 SCC 6; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras. 15-22.
[260] *British Columbia Civil Liberties Assn. v. Canada (Attorney General),* 2019 BCCA 228 at paras. 225-272; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen* 2017 ONSC 7491 at para. 19, varied on other grounds, 2019 ONCA 243.
[261] *Doucet-Boudrea v. Nova Scotia*, 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3.
[262] *Vancouver (City) v. Ward*, 2010 SCC 27 at paras. 17 -19; *Mills v. The Queen,* 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863 at p. 965
[263] *Vancouver (City) v. Ward*, 2010 SCC 27 at para. 20; *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62.

[43] The Supreme Court of Canada's decision in ***Ward*** provides a comprehensive analytical framework to be utilized in the assessment of the appropriateness of ***Charter*** damage claims (para. 4). Such claims are described as a "unique public

law remedy". The Supreme Court has formulated a functional and flexible approach. Although case law suggests that ***Charter*** damages are to be relatively conservative, in most of the reported decisions where s. 24(1) damages have been granted, these awards have addressed vindication and deterrence, not the objective of compensation; i.e., actual loss caused by government action. The Supreme Court of Canada has said that compensation is the most important objective of ***Charter*** damages.

[44] It is necessary to apply the circumstances of this case to the four step ***Ward*** analysis:

- Step one: proof of a ***Charter*** breach. I found a breach of s. 2(d) of the ***Charter*** in the first stage of these proceedings with respect to UMFA rights in the collective bargaining process. That finding was affirmed by the Court of Appeal. Manitoba also acknowledges that a breach occurred.
- Step two: functional justification of ***Charter*** damages. In accordance with ***Ward***, the general purpose of ***Charter*** damages is to advance the general objectives of the ***Charter*** (para. 25). A damage award can do so by compensating for any personal loss that may have resulted from the ***Charter*** breach; by emphasizing the importance of ***Charter*** rights; and, by deterring any future breaches of the ***Charter*** by government. As stated by McLachlin C.J.C.:

> [31] In summary, damages under s. 24(1) of the *Charter* are a unique public law remedy, which may serve the objectives of: (1) compensating the claimant for loss and suffering caused by the

> breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for "appropriate and just" damages under s. 24(1) of the *Charter*.

The alleged losses suffered by UMFA members and UMFA have been set out in the affidavits of Drs. Morrill and Flemming. That said, the quantum of damages must be evaluated and analyzed, as must entitlement. Were there breaks in the causal chain as argued by Manitoba? A further issue to be considered is whether double compensation would be generated by virtue of the MLB damage award.

Ward determines that a goal of compensation is, as much as possible, to place a claimant in the same position as if the individual's rights had not been infringed. It focuses on a claimant's personal loss which is physical, psychological, and pecuniary. There is no established formula or juridical science utilized to assess ***Charter*** damages. The ***Charter*** remedy, if granted, must be appropriate and just as based upon the facts and circumstances of the case.

The second function of damages is vindication, which recognizes that ***Charter*** rights must be adhered to. The violation of a ***Charter*** right erodes public confidence and diminishes public faith in the efficacy of constitutional protection. The third function, being deterrence, is an obvious compensatory goal so as to regulate government behaviour and to secure compliance with the ***Charter***. Vindication and

deterrence are societal objectives. Consequently, ***Charter*** damages under s. 24(1) are not necessarily the same as common law damages which are compensatory in nature.

In this case, an award of ***Charter*** damages would serve one or more and, perhaps, all of the ***Ward*** objectives. The facts reveal that Manitoba's mandate resulted in a significantly different wage position for UM's adoption late in the bargaining process and created a s. 2(d) ***Charter*** infringement as stated by the Court of Appeal:

> [148] ... The impugned conduct has two facets: (1) the imposition of a mandate on the U of M late in the bargaining process that was significantly different from what it had offered UMFA three weeks prior, and (2) instructing the U of M not to tell UMFA that the new mandate came at the direction of Manitoba.

Further, as indicated, the directed non-disclosure of Manitoba's involvement was a significant breach in these circumstances.

Section s. 2(d) protects the good faith process of collective bargaining and not a particular bargaining model or outcome as was set out in ***Health Services and Support – Facilities Subsector Bargaining Assn v British*** Columbia, 2007 SCC 27, [2007] 2 SCR 391, paras. 91 and 310. Manitoba's imposition of the initial and late mandate, along with the non-disclosure of the mandate, resulted in UM altering its bargaining position from a 17.5 per cent wage increase offer over a four year period to what proved to be 1.75 per cent increase. ***Meredith*** and three Courts of Appeal decisions in ***Syndicat canadien***; ***Federal Government Dockyard Trades and Labour***

Council v. Canada (Attorney General), 2016 BCCA 156 (CanLII), leave to appeal to SCC refused, 33569; and, ***Gordon v. Canada (Attorney General)***, 2016 ONCA 625, leave to appeal to SCC refused, 37254, accepted that enacted and proclaimed legislation could roll back previously agreed wage increases. The Court of Appeal accepted this concept, albeit with respect to the unproclaimed and, therefore, ineffective ***PSSA***. That said, the 2016 collective bargaining that transpired and Manitoba's stipulated mandate and non-disclosure occurred before the ***PSSA*** was passed in 2017. As said by the Court of Appeal, the mandate constituted impugned conduct as it was imposed late in the bargaining process without disclosure being permitted. The mandate also reflected a very different wage position from that offered three weeks earlier and, consequently, significantly impacted the good faith bargaining process. This created a substantial interference in the ongoing collective bargaining and altered the dynamics of the negotiations. Manitoba was fully aware, through its communications with UM, as to the mandate's expected adverse consequences, accompanied by the reconsideration requests. Unquestionably, Manitoba's conduct undermined a meaningful process of collective bargaining. Indeed, both UM's President, Dr. Barnard, and Dr. Hudson stated an agreement was likely to occur and that the strike was a consequence of Manitoba's mandate. Further, Dr. Barnard, in his October 26, 2016 letter to the Premier, essentially

begged Manitoba to resile from its mandate. That request was met with a refusal by virtue of a non-response.

An award of ***Charter*** damages would compensate UMFA members and UMFA, in part, for that loss and assist in the vindication of the ***Charter*** rights breached by Manitoba. Further, it would serve to act as a deterrent for similar activity in the future. That said, it would not indemnify for any non-compensatory harms incurred or alter the current salary rates. It would constitute a one-time payment.

UMFA continued to bargain during the three weeks in October 2016 without any knowledge that its efforts would be fruitless. It is necessary for the "state" in collective bargaining situations such as this to remain vigilant to the s. 2(d) ***Charter*** requirements. ***Charter*** damages provides an "appropriate and just" remedy for a breach. As well, public confidence must be maintained with respect to the constitutional protection of collective bargaining rights.

- Step three: countervailing factors. In those circumstances where a plaintiff has presented a case for ***Charter*** damages by satisfying the functionality test, the state may still establish that other considerations render s. 24(1) damages inappropriate or even unjust. In those circumstances where other remedies adequately meet the need for compensation, vindication and deterrence, an additional award under s. 24(1) would be inappropriate and unjust. As stated in ***Ward:***

> [35] The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. For example, if the claimant has brought a concurrent action in tort, it is open to the state to argue that, should the tort claim be successful, the resulting award of damages would adequately address the *Charter* breach. If that were the case, an award of *Charter* damages would be duplicative. In addition, it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages.
>
> [36] The existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the *Charter*. Tort law and the *Charter* are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation...

Further, the "state", who has the burden with respect to this step, may argue that an award under s. 24(1) would have a chilling effect on government conduct and negatively impact good governance. "In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity" (***Ward,*** para 39). This is the qualified immunity approach utilized in the third step which was conceded by Manitoba to be satisfied in this case.

The primary issue to be determined under the third step is the existence or absence of countervailing factors in determining a functional approach to damages under s. 24(1) as regards alternative remedies. As

indicated, Manitoba submits that 2.5 million dollars has been paid to UFMA members by virtue of the MLB decision and, accordingly, would represent a duplication or satisfaction of potential ***Charter*** damages. I disagree. The MLB decision was only against UM. Manitoba was not a party to the application, and, accordingly, no award could be made by the MLB with respect to Manitoba's conduct. The unfair labour practice was committed by UM as found by the MLB by virtue of its failure to disclose Manitoba's mandate in violation of the ***Act***. I am satisfied that UM was directed by Manitoba to alter its wage proposal late in the day and not to disclose its entrance into the collective bargaining process. The actions of Manitoba undermined what had been meaningful and productive collective bargaining. The MLB award did not compensate for the membership's loss of income or benefits.

The MLB found that an important aspect of the duty to bargain in good faith is the requirement of unsolicited disclosure. "It has been described as 'tantamount to a misrepresentation' for an employer not to reveal during bargaining a decision or *de facto* decision that it has already made which will have a significant impact on the employees in the bargaining unit" (Binder 5, Tab 41, p. 52). There have been numerous legal decisions with respect to the obligation of timely disclosure of information during collective bargaining, and clearly that duty was breached in this case. This was particularly demonstrated when

bargaining continued during the month of October 2016 without UM's disclosure of the mandate.

The MLB decision outlined the issues respecting the duty to bargain in good faith and requirement that reasonable efforts to conclude an agreement be made pursuant to s. 63(1) of the ***Act***. A breach of that duty was found and a remedy imposed (s. 31(4)). UM's failure to disclose and the late mandate were not considered by the MLB in the context of any ***Charter*** obligations that might exist by Manitoba to UMFA. The MLB did not accede to UMFA's request that compensation be ordered against UM for losses incurred by it and by its membership as a result of the strike action. The MLB was not satisfied that UM's conduct, even though an unfair labour practice, had caused the strike. That said, the MLB had no jurisdiction to award a ***Charter*** remedy with respect to Manitoba as it was not a party to the application before it, nor was such a remedy sought.

I am not bound by the MLB's findings with respect to causation, nor do those findings render the issue of causation to be *res judicata*. I am satisfied that UM's actions were directed by Manitoba. The cause of the strike was Manitoba's late mandate during the negotiations and instructions to UM not to reveal its involvement. These actions resulted in substantial interference in the collective bargaining process. Further, I have concluded that the wrongs and damages under consideration are distinct and not a duplication of an award such as occurred in the

Henry decision. The MLB award was not granted to compensate for UMFA's loss of income, benefits or other compensatory areas outlined in Drs. Morrell and Flemings affidavits. I accept submission and position of UMFA in this regard:

> So it was that failure to disclose and the resultant damage it did to the ability of the members to do those very things that the Manitoba Labour Board was addressing under *The Labour Relations Act* and that cannot be considered a substitution for, or as a reduction in a *Charter* remedy. Those are two distinct duties and two distinct breaches: a duty upon the Government not to substantially interfere in a process of good faith bargaining by directing the University to withdraw its wage offer, and secondly and distinctly, a duty upon the University to disclose its decision to abide by the Government directive to the union at the earliest opportunity so as to give UMFA members an opportunity to react and deal with that new reality in the course of the next several weeks prior to the strike deadline. The consequences upon employees of these two violations are simply not the same and in the circumstances of this case it is appropriate that a remedy be awarded against the Government for *Charter* violation in addition to the remedy given by the board regarding the University's failure to make its acceptance of the Government directive known to the Association in a timely manner.

(Transcript of Submissions, Volume I, dated November 22, 2021, p. T19, lines 8-22)

Further, in terms of vindication and deterrence, it is important to emphasize that UM's unfair labour practice was orchestrated by Manitoba. UM was directed not to disclose Manitoba's intervention and entrance into the collective bargaining process. With its very late mandate intruding on what had been a productive negotiating process, Manitoba's mandate constituted a significantly different wage position from what had been offered three weeks previously. Manitoba was

"calling the shots". Indeed, UM implored Manitoba to remove its mandated position so good faith collective bargaining could continue.

Were the damages awarded by the MLB sufficient to compensate in these circumstances or, alternatively, do they constitute a duplication of ***Charter*** damages? As indicated, an award of ***Charter*** damages in this case does not duplicate the available and paid private law damages by UM. I am not satisfied that an alternative remedy has been proven in this case. There are distinct differences with respect to the MLB award against the UM for non-disclosure with that of s. 2(d) ***Charter*** damages sought against Manitoba for its interference in the collective bargaining process. Manitoba acted, interfered and inserted itself into bargaining negotiations that had been ongoing for nine months.

Another alternative remedy is that of a declaration. Such a remedy is often found where there is no specific or outlined loss: ***Saskatchewan Federation of Labour***. Further, as was said in ***Brazeau v. Canada (Attorney General)***, 2020 ONCA 184 (CanLII), at para. 45:

> ... the availability of a declaration should not displace damages in these cases. A declaration would fail to satisfy the need for compensation or provide meaningful deterrence of future breaches of the *Charter* right.

Accordingly, a declaration would not fulfill the functions of ***Charter*** damages and the need to meet the necessary compensatory goals in this case. Manitoba's actions also must be deterred with respect to the possibility of future breaches. UMFA, and its membership, suffered

actual and compensable damages. The availability of a declaration, and the MLB award against UM, does not make ***Charter*** damages inappropriate or unjust with respect to a remedy for Manitoba's conduct.

- Step four: quantum of s. 24(1) damages: The damages granted must be appropriate and just and constitute a meaningful award in the sense that such compensation adequately recognizes, affirms and vindicates the ***Charter*** rights of the claimant (***Ward***, para. 47). The objectives of vindication and deterrence are to be considered on a proportionate and rational basis. A meaningful award must serve one or more of the functional objectives of compensation, vindication and deterrence. The seriousness of the breach needs to be addressed when evaluating the objectives of s. 24(1). How egregious was Manitoba's conduct, and what impact did that conduct have on UMFA and its members? The more egregious the conduct, the greater the likelihood of the need to emphasize vindication and deterrence, which impacts the amount awarded. That said, the award must be fair to both parties (***Ward,*** para. 53) and cannot overstate a defendant's level of liability. It is necessary to consider that a large award of public funds, being taxpayers' monies, may not be in the parties' best interests. It is important to reiterate that most of the Supreme Court of Canada cases deciding ***Charter*** damage awards did not address

circumstances where a quantifiable compensatory loss was sought and articulated, as is the case here.

[45] In these circumstances, I am satisfied that ***Charter*** damages are in order. That said, the quantum of those damages must be evaluated, as well as a determination as to whether the chain of causation was broken so as to prevent damages from extending into the November 1, 2016 strike period. The award must also consider the best interests of all the parties, as well as societal interests.

[46] Manitoba's position is that the s. 2(d) breach for failure to disclose and bargain in good faith ended on October 27, 2016. Soon after being apprised of Manitoba's mandate, UMFA put forth an offer to accept the zero per cent pause but took strike action with respect to non-compensatory issues. Manitoba argues that this terminated the consequences of the non-disclosure breach and substantiates the position that its actions did not precipitate the strike. Additionally, and ultimately, UMFA chose to settle for a one year agreement at a zero per cent wage increase with certain improvements to governance and other metrics issues. In many respects, Manitoba relies on the MLB findings. As indicated, I am not bound by those findings, nor do they render the issue of causation to be *res judicata*. It is incumbent upon me to weigh the evidence brought forward and determine causation.

[47] I am not satisfied that UMFA's counteroffer to UM's September 13, 2016 wage offer in early October 2016 served to reject the 17.5 per cent monetary compensation proposal in such a manner that it allowed UM to fundamentally and radically change its bargaining position on wages. UM had offered wage increases

as far back as March 9, 2016, when it proposed a 1.5 per cent wage increase plus weighted market adjustments. The bargaining throughout the spring, summer, and fall of 2016 culminated in the September 13, 2016 comprehensive settlement proposal. On October 3, 2016, UMFA prepared a counter-proposal with respect to wages, being a 2.0 per cent general salary increase in addition to market adjustments. This reflected a proposal that was less than half of its original bargaining position. Progress towards a resolution of the wage issue was being accomplished. The bargaining in the month of October 2016 continued. The MLB decision outlined the dynamics and ramifications of such collective bargaining (Binder 5, Tab 41, p. 66):

> ... The fact that a party rejects a proposal or makes a counteroffer during collective bargaining does not change the fact that the parties remain bound by the statutory duty to bargain in good faith and make every reasonable attempt to conclude a collective agreement. Put another way, a counteroffer does not necessarily permit the other party to collective bargaining to fundamentally deviate from previous positions taken. Principles applicable to contractual negotiations at common law cannot simply be applied to collective bargaining without regard to the obligations imposed by the duty to bargain in good faith; see, for example, *Consolidated Bathurst, supra*, at paragraph 43.
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> Collective bargaining, as many labour relations boards have noted, takes place against a "fluid backdrop of events" such that a change in circumstance may necessitate a change in position. However, a sudden unexplained change of position may constitute a violation of the duty to bargain in good faith, depending upon the circumstances. Rejection of a bargaining package or a counteroffer does not give the other party carte blanche to fundamentally alter its bargaining position...

That said, the case law, including ***Meredith*** and ***Syndicat canadien*** indicates that enacted and proclaimed legislation can result in a rollback or overturning of negotiations and completed agreements. Such conduct was found to not necessarily equate to substantial interference in the collective bargaining process:

Health Services, paras. 80, 92, and 127-128. In this case, the ***PSSA*** had not yet been introduced in the Legislative Assembly and, instead, Manitoba's directive/mandate was premised upon its intention to legislate wage restraint on the public service.

[48] I have concluded that UMFA's zero per cent proposal made on October 30th was undertaken as a reaction to Manitoba's ***Charter***-infringing actions and was made in light of the sudden and impactful reality imposed upon it. The new reality, as described by Dr. Hudson, caused a need for UMFA to pivot its priorities to governance and other non-compensatory issues. Effectively, Manitoba's actions of non-disclosure, and the imposition of the late mandate with a drastically altered wage position, caused the three week strike which was settled for governance and other limited concessions and to facilitate students returning to the classroom. The unchallenged testimony of Dr. Hudson was that resolution of the strike issues was expected prior to November 1, 2016. This position was supported by Dr. Barnard's letter of October 26, 2016, to Manitoba.

[49] Manitoba's mandate, imposed on UM, served to substantially impact the capacity of union members to come together, react to, and pursue their collective goals related to wages. Without question, UM was moved backwards in its bargaining position by Manitoba as regards monetary compensation. UMFA was left with no choice but to follow through on strike action as non-compensatory issues became increasingly important when it was left with the reality that a zero per cent wage mandate had been imposed.

[50] UMFA, as said by Dr. Hudson, had shown a degree of satisfaction with the September 13, 2016 UM position on compensation. This resulted in UMFA's shifting to address the other and "lesser" priorities of the membership. On October 30, 2016, UMFA accepted the zero per cent wage pause, albeit without prejudice to its right to bring an unfair labour practice application, as monetary compensation, being the number one priority of the membership, was no longer on the table for negotiating purposes. UMFA endeavoured to pursue resolution on governance, workloads, metrics, and other issues of importance to its membership. Finally, after strike action and conciliation efforts, there was agreement on aspects of those issues without the wage increase.

[51] UMFA's actions and position subsequent to the October 27th disclosure was reactive to Manitoba's s. 2(d) ***Charter***-infringing actions and the new reality imposed. I do not accept that the chain in causation was broken as argued by Manitoba. What occurred was founded on Manitoba's imposition of a late mandate, the non-disclosure of that mandate, and the fact it was significantly varied from what had previously been proposed. Further, it is untoward to suggest UMFA should have remained on strike for 60 days in order to trigger the arbitration process. At what cost would such an approach have weighed on affected third parties, particularly the student body? No doubt governance and metrics issues became critical to UMFA because that was all that remained when wages were removed from the bargaining table. Indeed, compensation had become less of an issue during the October 2016 bargaining process as UMFA had shown a degree of satisfaction with UM's September 13th wage proposal. UMFA disclosed at certain of

the October 2016 bargaining sessions that governance and metrics were outstanding significant issues, as documented in UM's notes taken during those meetings. The reasonable inference to be drawn from that position is that 17.5 per cent was substantially acceptable as a wage increase.

[52] In all respects, I am satisfied that Manitoba's late disclosure of the mandate, as well as the significantly altered wage position, served to effectively precipitate the strike action. It constituted a substantial interference with the collective bargaining process and demonstrated a significant blow to the concepts of the collective right to undertake good faith negotiations and consultations as required by s. 2(d) of the ***Charter***.

[53] The Court of Appeal affirmed, in keeping with the legal tests set out in ***Health Services***, *supra*, that s. 2(d) protects the good faith process of collective bargaining:

> [153] Key to the trial judge's decision was her finding regarding the impact the impugned conduct (imposing on the U of M a mandate late in the bargaining process that was significantly different from what it had offered UMFA three weeks prior and instructing it not to tell UMFA that the new mandate came at the direction of Manitoba) had on the good faith bargaining process. The trial judge listed elements of good faith bargaining (at para 310):
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> > . . . The Supreme Court considered certain elements of good faith bargaining: a duty to engage in meaningful dialogue with a willingness to exchange and explain positions; an obligation to meet and engage in good faith discussions; the need for both parties to approach the bargaining table with good intentions; hard bargaining can transpire, however, it cannot be approached with the intention of avoiding a collective agreement or destroying a bargaining relationship; past processes of collective bargaining cannot be disregarded; a temporary limit to collective bargaining restraint does not render the interference insubstantial. In essence, did the measures adopted disrupt the balance between employees and employer to such a degree as to substantially interfere with the collective bargaining process? . . .

[54] I am satisfied that Manitoba's conduct significantly disrupted the balance between UM and UMFA and damaged their relationship. This served to seriously undermine and substantially interfere with what had been a meaningful and productive process of good faith collective bargaining. Manitoba has a right to play a role in public sector bargaining. However, it must do so honestly, openly and fairly. This did not occur in these circumstances, or with respect to the 2017 agreement. Further, I conclude that Manitoba's actions should result in a ***Charter*** damage remedy as a consequence of the significant process irregularities that transpired which served to create and promote the events that took place. The remedial provisions of s. 24(1) provides for those process guarantees pursuant to s. 2(d) of the ***Charter.*** It is an associational right to a fair and meaningful collective bargaining process which, in this case, was denied by virtue of Manitoba's interference and intrusion.

[55] As indicated, the quantum of damages in ***Charter*** remedy cases must be appropriate and just. Further, the quantum must be meaningful so as to adequately recognize, affirm and vindicate the ***Charter*** rights of the claimant. Such an award will serve the functional objectives of compensation, vindication and deterrence. It is also necessary to assess the seriousness of the breach which, in this case, I find to be egregious. That said, any amount awarded must be fair to both parties. As was stated in ***Ward***:

> [57] To sum up, the amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the

> seriousness of the state conduct. The award must be appropriate and just from the perspective of the claimant and the state.

[56] The purpose of ***Charter*** damages is to compensate and to place a claimant in the same position as if rights had not been infringed. An infringement of a right and freedom under the ***Charter*** must be regarded as serious in nature; however, the assessment of the extent of the injury in monetary terms may be difficult to evaluate. A low award could well serve to trivialize the right, while a high award would create other difficulties such as the deterrence of government to undertake new programming, the cost to taxpayers, and the avoidance of an unjustified windfall.

[57] Section 24(1) of the ***Charter*** affords the court a wide discretion to fashion the remedy for a claimant whose ***Charter*** rights have been infringed or denied. The decision in ***Francis v. Ontario,*** 2020 ONSC 1644 (CanLII) at para. 542 includes the comments of Justices Iacobucci and Arbour in the decision of ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, 2003 SCC 62 at paras. 55-59 as follows:

> 55. First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, on one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore no appropriate and just (see *Dunedin, supra,* at para. 20, McLachlin C.J. citing *Mills, supra*, at p. 882, *per* Lamer J. (as he then was)).
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> 56. Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature,

> the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24 (1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.
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> 57. Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of the courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.
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> 58. Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.
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> 59. Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

[58] In this case, as previously indicated, Manitoba has the right to play a role in public sector bargaining, but must do so honestly, openly and fairly. As said by the Court of Appeal, Manitoba's actions had two s. 2(d) ***Charter*** violating facets:

1. the imposition of a mandate on the UM late in the bargaining process that was significantly different from what it had offered UMFA three weeks prior; and,
2. instructing the UM not to tell UMFA that the new mandate came at the direction of Manitoba (para. 148).

What occurred was a substantial and surreptitious insertion by Manitoba into the ongoing, nine-month good faith collective bargaining process which, in accordance with the evidence, was likely headed to resolution without strike action. There was no break in the causal chain as everything that transpired, such as the zero per cent proposal by UMFA, not prolonging the strike for 60 days so as to trigger arbitration and the ultimate conclusion of an agreement was a reaction to Manitoba's unconstitutional conduct and the altered reality imposed.

[59] I accept that there is a speculative element as to whether UM and UMFA would have agreed to a 17.5 per cent salary increase over the four year period. That proposed increase may well have been enhanced if meaningful negotiations had been allowed to continue or reduced if the issues relating to non-compensatory areas became of increasing importance in the bargaining process. It can reasonably be inferred from UMFA's conduct and Dr. Hudson's testimony that a level of satisfaction existed with an increase in and around 17.5 per cent over four years. This satisfaction resulted in a partial pivoting of its focus to non-compensatory issues during October 2016. That said, after a careful review of the evidence, I cannot be satisfied that 17.5 per cent would have been the figure arrived at, but for Manitoba's insertion into the collective bargaining process.

[60] Dr. Morrill's affidavit outlines the total loss to the membership without interest to be 20,691,902 dollars. In order to account for the possibility of a contract resolution at less than 17.5 per cent because of enhancements in non-compensatory areas, as well as other contingencies, I am prepared to award the membership the sum of 15 million dollars, recognizing that this figure may be

somewhat arbitrary. However, even assuming other enhancements could have reduced the proposed wage increase, it is unlikely it would have been substantially reduced. Interest on that amount is set at the relevant Court of Queen's Bench rate. This reduction in the amount requested also embraces the concept of ***Charter*** damage awards being appropriate, just and fair to both parties accompanied by the interests of the taxpayer and state.

[61] Dr. Flemming has outlined the costs and losses associated with UMFA's three week strike in the amount of 7,009,230.97 dollars. There are items of loss outlined that UMFA paid to or on behalf of the membership. The membership pays monthly union dues to UMFA based on the Rand formula, as well as contributions into a national Canadian Association of University Teachers Defence Fund. UMFA's funding is based entirely on membership dues. Consequently, when monies are paid out, as occurred here, there is a reduced availability to fund other union-based endeavours or purposes. The members were afforded strike pay and benefits coverage in the amount of 2,754,320.80 dollars. Not all members were in receipt of strike payments from UMFA. Additionally, the costs associated with operating a strike headquarters were 74,781.02 dollars. These components of UMFA's claim totals 2,829,101.82 dollars.

[62] UMFA also contends that 4,180,149.15 dollars is payable as loss of salary for the membership. This figure represents the amount of unpaid salary by UM to its striking members. The areas of loss of salary, not paid by UM, and the strike pay paid by UMFA, represent a possible double recovery. I recognize the variance between the two "sources" of these monies; however, in the circumstances, I have

concluded that a double recovery situation is represented. For this reason, and in the interests of the ***Charter*** damage award being just and fair to both parties, I am reducing the loss of salary component to 1,603,195.63 dollars. Such an award is meaningful and vindicates the breach of ***Charter*** rights in this case. Again, the interest component with respect to those funds should be calculated at the relevant Court of Queen's Bench rates.

[63] As previously indicated, I have concluded that this award is not one that duplicates that provided by the MLB and, accordingly, there will be no reduction from the damages ordered.

VI. CONCLUSION

[64] Manitoba's conduct significantly disrupted the balance between UM and UMFA along with their relationship, as well as causing significant discord between UMFA and its membership. There was a serious and substantial undermining and interference with what had been a meaningful and productive process of collective bargaining. Accordingly, ***Charter*** damages are awarded in the amount of 19,357,516.40 dollars accompanied by interest at the relevant Court of Queen's Bench interest rates. There is to be no payout by Manitoba of these amounts until the appeal period has expired. Costs may be spoken to if they cannot be agreed upon.

J.