Manitoba

MANITOBA LABOUR BOARD
Suite 500, 5th Floor - 175 Hargrave Street, Winnipeg, Manitoba, Canada R3C 3R8
T 204 945-2089 F 204 945-1296
www.manitoba.ca/labour/labbrd
MLBRegistrar@gov.mb.ca

CASE NO. 215/16/LRA

IN THE MATTER OF: ***THE LABOUR RELATIONS ACT***

- and -

IN THE MATTER OF: **An Application by**

University of Manitoba Faculty Association,

Applicant,

- and -

UNIVERSITY OF MANITOBA,

Respondent/Employer.

BEFORE: **C.S. Robinson, Chairperson**

P. Wightman, Board Member

W. Comstock, Board Member

APPEARANCES: **G. Smorang, Q.C., Counsel for Applicant**

G. Fleming, on behalf of Applicant

R. Chernomas, on behalf of Applicant

M. Hudson, on behalf of Applicant

R. Roy / K. Dolinsky, Counsel for Respondent

G. Juliano, on behalf of Respondent

REASONS FOR DECISION

I. Introduction

This case raises issues respecting the duty to bargain in good faith. In the Fall of 2016, representatives of the Provincial government communicated with the University of Manitoba (hereafter referred to as the "University"), respecting a new mandate requiring a minimum one year pause in wage increases. Collective bargaining had, by that point, been ongoing for an extended period of time. The alleged failure of the University to disclose its communications with the government in a timely manner is a central feature of this case. In addition, a number of other allegations respecting the University's conduct during collective bargaining were raised and shall be addressed herein. The Manitoba Labour Board (the "Board") was also asked to consider whether any proven instance of bad faith bargaining by the University caused or contributed to the strike which ultimately occurred and to determine what, if any, remedy is appropriate in this case.

On November 7, 2016, shortly after the legal strike commenced, the University of Manitoba Faculty Association (hereafter referred to as the "Faculty Association"), through counsel, filed an Application (the "Application") with the Board alleging that the University failed to bargain in good faith and make every reasonable effort to conclude a collective agreement contrary to section 63(1) of *The Labour Relations Act* (the "*Act*") and seeking remedy for alleged unfair labour practices contrary to section 26 of the *Act.*

The University, through counsel, filed its Reply on November 22, 2016. In the cover letter to the Reply, counsel advised that the strike between the parties had ended and the parties settled their collective agreement. Counsel added that "if the Board does not consider that the matters addressed in the application are now moot due to the settlement of the dispute, please contact this office for the purpose of setting hearing dates". In the

Reply itself the University denied that it had failed to bargain in good faith or failed to make every reasonable effort to conclude a collective agreement, and further asserted that the Application did not disclose a *prima facie* case and should be dismissed without a hearing. On December 2, 2016, counsel for the Faculty Association disputed the University's claim that the matter was moot.

The Board directed that the matter proceed to a hearing and informed the parties that it was satisfied that a live controversy between the parties still existed and, as such, it did not consider the matters raised in the Application to be moot. The Board scheduled a case management conference for February 22, 2017 which continued on March 1, 2017.

The Faculty Association seeks, *inter alia*, the following remedies:

a) A declaration that the University committed an unfair labour practice;
b) An order that the University compensate each member of the Faculty Association for all lost wages and employment benefits they would have earned had the strike not occurred;
c) An order that the University compensate the Faculty Association for all of its costs associated with the strike;
d) An order that the University restore its monetary proposals as they existed on September 13, 2016;
e) An order that the University pay each member of the Faculty Association and the Association itself the amount of $2,000.00 for the interference with their rights under the *Act*; and
f) An order that the University rectify any situation resulting from the unfair labour practice and that it apologize, in writing, to all members of the Faculty Association.

The parties jointly requested that the Board determine whether or not an unfair labour practice had been committed and, if so, to order the remedies which it deemed appropriate but to defer any decision respecting the quantum of any compensatory remedies ordered.

On March 6, 7, 13, 14, May 2, 3, 5, June 14 and 15, 2017, the Board conducted a hearing, at which time the parties each presented evidence and argument.

II. Evidence

A. Introductory matters

The material facts in this case are, for the most part, not in dispute. The parties submitted extensive documentation to the Board and entered into a written agreement with respect to the documents (a copy of said agreement was also provided to the Board). In addition, the parties proposed that the Board issue an order respecting the confidentiality of the documents. Having regard to that joint proposal, the Board issued the confidentiality order requested by the parties.

In addition to the documentary evidence provided, the Board received *viva voce* evidence through three witnesses, namely:

- Dr. Robert Chernomas ("Chernomas"), a Professor in the Department of Economics, Faculty of Arts at the University since 1980 and the chief bargainer for the Faculty Association during collective bargaining in 2016;
- Dr. Mark Hudson ("Hudson"), an Associate Professor in the Department of Sociology, Faculty of Arts at the University since 2009 and the elected President of the Faculty Association at the material time; and
- Mr. Greg Juliano ("Juliano"), the Associate Vice-President Human Resources of the University and the chief negotiator for the University during collective bargaining in 2016.

B. The Parties and their Bargaining Teams

Formed in 1951, the Faculty Association was certified by the Board in 1974 as the exclusive bargaining agent for employees in a bargaining unit comprised of full-time

academic staff at the University as currently set forth in Manitoba Labour Board Certificate No. MLB-6968. According to Chernomas, it represents nearly 1,300 full-time employees.

Chernomas reviewed the organizational and decision-making structure of the Faculty Association. He testified that the Faculty Association's highest authority is the general membership. A Board of Representatives that includes representation from all faculties and an Executive Council, comprised of the President and Vice-President along with a number of appointed individuals, govern the Faculty Association. Chernomas also described the Faculty Association's Collective Agreement Committee (the "CAC") and the Bargaining Team. The Bargaining Team is a group of members chosen by the Board of Representatives, upon the recommendation of the President, which is charged with representing the Faculty Association during collective bargaining. The CAC generally advises and directs the Bargaining Team and they work together to develop bargaining proposals.

As noted above, Chernomas was the chief bargainer for the Faculty Association during collective bargaining with the University in 2016. An experienced negotiator, Chernomas has served on the Faculty Association's Bargaining Team since 1987 and he has acted as chief bargainer during the last seven rounds of collective bargaining with the University.

The University is a body corporate established by the provincial legislature in *The University of Manitoba Act*, C.C.S.M. c. U60 (the "*UM Act*"). Juliano described the bicameral governance structure under which the University operates as provided in the legislation. The University's Board of Governors is the governing body of the University. In accordance with section 8 of the *UM Act*, the University Board is comprised of 23 members, the majority of which (12) are appointed by the Lieutenant Governor in Council. The Senate is the academic body of the University.

The University provided evidence that on January 18, 2017, the Provincial government revoked the appointments of several individuals on the Board of Governors and appointed other individuals as their successors. Once appointed, all members of the Board of Governors have a fiduciary duty to act only in the best interests of the University. This duty is expressly set forth in the *Board of Governors Code of Conduct*.

The University's Board of Governors may exercise comprehensive powers on behalf of the University as set forth in section 16 of the *UM Act*. Other than such powers as are specifically reserved for the Senate, the Board of Governors is the ultimate decision-making authority for the University. Juliano testified that human resource matters, including the negotiation of collective agreements, fall within its jurisdiction. He added that the Board of Governors has the power to appoint senior University officials including, but not limited to, the President and Vice-Presidents, and to fix their salaries. With respect to the office of President of the University, according to Juliano, the Board of Governors plays an active and direct role in relation to the appointment.

As noted in the University's policy respecting "Administration and Control of Operating Funds", the Board of Governors approves an annual budget. The University engages in a comprehensive budget planning process each year. In May of 2016, the 2016/17 operating budget was presented to, and approved by, the Board of Governors. A number of planning assumptions guided the budget development including the assumption of a 2.5% increase in the provincial operating grant and a 1.2% inflationary increase for tuition and course-related fees. Juliano acknowledged that those assumptions turned out to be accurate. Approximately, three-quarters of the University's operating expenditures goes towards salaries and benefits.

The University is not a branch or department of the Provincial government. However, the University depends upon the Provincial government for a large portion of its funding. Juliano noted that the University currently receives 50% of its annual operating

budget (approximately $347,000,000) from the Provincial government. This operating grant is determined by the Province annually. In addition, the Provincial government regulates the tuition that the University may charge students. Tuition accounts for approximately 25% of the Employer's operating budget (approximately $122,000,000). Over and above the operating grant, the Provincial government also provides capital funding to the University on a project-by-project basis and additional funds that go towards maintenance. Juliano testified that the Provincial government recently committed $150,000,000 to a large University capital spending campaign.

As noted above, Juliano, who is a lawyer, was the chief negotiator for the University during collective bargaining with the Faculty Association in 2016. Although he was a member of the University's bargaining team during the prior round of collective bargaining, this was the first time he served as its chief negotiator. As head of the bargaining team, Juliano took instructions from a group called the President's Executive Team (referred to as "PET") which includes: President David Barnard ("Barnard"), four Vice-Presidents, the University Secretary, and the Executive Director of the President's Office. No one from the PET was called as a witness. Juliano agreed that the PET is answerable to the Board of Governors. Juliano also noted that he is required to obtain a mandate respecting collective bargaining from the University's Board of Governors. With respect to this mandate, he testified that he makes a recommendation to the University Board which, in his experience, has been approved.

Prior to 2016, there had been two strikes by the Faculty Association. The last strike occurred in 2001 and lasted 4 days.

C. Past Bargaining and the Role of the Provincial Government

Historically, the Provincial government has indirectly involved itself in collective bargaining in the broader public sector by issuing mandates to public sector employers respecting employee compensation. Prior to the 2016 round of collective bargaining, the

Provincial government had established mandates that applied to the University's bargaining with the Faculty Association. Juliano testified that when the 2010-2013 collective agreement between the parties was bargained, the Provincial government of the day set a mandate calling for a 0% increase in each of the first two years of the agreement. Notwithstanding that mandate, and despite the fact that there was no general wage increase in those years, the parties negotiated modest increases in compensation for employees in the first two years of the agreement by providing "market adjustments" to base salaries. According to Juliano and Chernomas, previous mandates permitted some flexibility with respect to increasing overall compensation beyond the percentage limit imposed on general salary increases. Hudson also testified that he assumed that the University would have discussions with the Provincial government regarding bargaining as he understood that to be "regular practice".

D. Collective Bargaining in 2016 - Initial Proposals

The previous 2013-2016 collective agreement between the parties expired on March 31, 2016. Chernomas testified that the Faculty Association provided the University with notice to bargain in early January of 2016. Soon after, the University responded to the notice by proposing interest based bargaining. This proposal was rejected by the Faculty Association which indicated that it preferred to negotiate using conventional collective bargaining.

The collective agreement between the parties establishes a complex set of terms and conditions of employment and includes provisions that are unique to University settings. During the 2016 round of collective bargaining, in addition to issues related to compensation, there was considerable negotiation on provisions relating to performance indicators (also referred to as "metrics"), collegial governance, and workload.

Following the rejection of the interest based bargaining approach, Juliano wrote to Chernomas on March 9, 2016 to propose to the Faculty Association a "time-limited offer

covering a very limited term and scope of issues". Juliano indicated that the University anticipated that it would face "an uncertain fiscal environment" for "at least the next year". Specifically, Juliano stated as follows:

> The University's administration anticipates that, for at least the next year, we will face an uncertain fiscal environment. After this timeframe, we suspect that the University will continue to need to exercise fiscal restraint, but funding levels and other factors may be more certain. In particular:
>
> 1. A Provincial election is scheduled to occur in slightly over a month. The University is committed to work collaboratively with whatever party forms government. A new government may be elected, bringing new approaches to post-secondray education issues. The current government may be re-elected, but new MLA's (*sic*) and changing fiscal realities might similarly cause them to take a different approach.
> 2. The current government has made certain representations as to the future of grant funding for the University, but should there be a change, a new government would have the freedom to depart from those commitments. The current commitment of a grant increase of 2.5% would, if fulfilled, result in an additional 1.25% in the University's overall operating revenue (the grant represents approximately half of the operating budget).
> 3. The financial markets continue to be unstable, and this has a significant impact on the health of the University's pension plans. The University is already required to spend several million dollars each year to stabilize these plans; money which could otherwise be spent to support our faculty and our University mission.
> 4. The Province has traditionally set a "mandate" for financial bargaining in the public sector, and a new government could change the mandate so as to create significant problems with the competitiveness of faculty salaries.
>
> We expect that some uncertainty will remain throughout the time we anticipate bargaining with UMFA; it won't all be resolved on the day after the election. Although the University's financial situation is already challenging, the above eventualities could compound and lead to a protracted and divisive round of bargaining, for which our students and faculty members would suffer.

Described as a "money only offer", the proposal was for a one-year collective agreement which would provide: a general salary increase of 1.5%; market adjustments of $1,500 for all ranks except Professor, Senior Instructor, and Librarian; and additional increases to compensation for employees in the Faculty of Dentistry and the Asper School of Business.

Juliano also committed the University to meet with the Faculty Association during the term of the one-year collective agreement to discuss other issues of concern to both sides.

Noting that the "Provincial election will take place on April 19, 2016, and other contingencies may occur", Juliano insisted that the Faculty Association provide confirmation that the proposal was "something your bargaining team would recommend" no later than March 21, 2016. Juliano warned that "should we be required to enter substantive bargaining" then "the terms (including the length of the agreement and the financial terms) we offer will likely differ from those contained in this letter, and will be responsive to the election results and other changing circumstances".

The Faculty Association rejected the offer. While it looked favourably upon a one-year collective agreement, Chernomas testified that the offer did not provide adequate increases to compensation and failed to address issues related to "governance" which were of significant concern to the Faculty Association. With respect to compensation issues, Hudson emphasized that a significant percentage of the Faculty Association's membership had expressed the view that salary increases should be a collective bargaining priority. Clearly, the Faculty Association did not accept that the increases to compensation proposed by the University were sufficient particularly in light of the limited nature of the offer.

Chernomas testified that the Faculty Association did not intend to allow a potential or actual change in government to affect how it engaged in collective bargaining. Having regard to his previous experience, he viewed government mandates as "guidelines" rather than limits. He emphasized that the University remains an autonomous and independent institution that has the authority to spend money as it sees fit. Hudson also testified that the looming election did not affect the Faculty Association's approach to bargaining. The Faculty Association was firmly of the view that the University was in good financial shape and that it understood the importance of providing more competitive salaries in relation to

other comparable Canadian universities. Salaries for faculty at the University rank at or near the bottom in relation to comparable Canadian universities (the "U15").

In April of 2016, the parties engaged in "expedited bargaining", during which the Faculty Association presented positions with respect to issues such as governance, workload, metrics and job security. The parties ultimately agreed that the issues could not be resolved through an expedited process and, as a result, substantive bargaining meetings were scheduled for May of 2016.

E. Exchange of Proposals and Discussion of University Finances

On May 25, 2016, the Faculty Association presented a comprehensive proposal to the University for a one-year collective agreement with a general salary increase of 2%, plus market adjustments and stipend increases. The proposal further addressed a significant number of provisions relating to non-salary issues including, but not limited to, workloads, layoff protection for librarians, metrics, and governance. The University provided its non-salary related proposals during the same meeting.

At a bargaining session held on May 27, 2016, Juliano assured the Faculty Association that the University was not proposing a 0% increase for a four-year collective agreement. Indeed, he expressly indicated that the University would counter the Faculty Association's monetary proposal but prior to doing so, it wanted to "take time and opportunity to seek clarity on our position" having regard to an assessment of the new Provincial government's position, the stock market and "whatever else informs our financial position". Juliano stressed that the University was committed to keeping an open mind and, further, that one of its goals was to improve the relationship between the parties. In this regard, Juliano noted that improvement to the relationship "only happens when we're honest".

During bargaining meetings in July of 2016, the parties made presentations regarding their perspectives regarding the overall financial health of the University. Evidently, the parties did not agree on the financial state of the University. The Faculty Association maintained that the University was in a better financial position and, as a result, had significantly greater budget flexibility than the University indicated was the case.

On July 14, 2016, Juliano commenced the bargaining session with a statement that the University was dedicated to reaching a settlement as quickly as possible. He described the negotiations to that point as "productive" and confirmed that the University was not planning for an impasse and hoped that the Faculty Association was not either. During this session, Juliano contended that many of the proposals on the table had the potential to impact the University's finances. Moreover, he testified that a number of the Faculty Association's demands were, in his view, "extreme" or "dangerous". Despite his declaration that the University was dedicated to a quick settlement, Juliano did not present a financial offer on that date and indicated that the University would only present a "counter-offer on money along with a full comprehensive settlement proposal which deals with all issues" in late August. As it turned out, the University's comprehensive settlement offer was not made until mid-September.

On August 3, 2016, President Barnard issued a message regarding the financial position of the University that appeared in *UM Today News*, an online publication produced by the University. He indicated that the University was in an "overall healthy financial position" and that adjustments to budgets "help us to pay for our top priorities and commitments, including our salaries". Noting his belief that the University had made "competitive, albeit modest, increases to salaries and benefits", President Barnard expressed pride for "how our approach to the budget has ensured the fiscal well-being of the University of Manitoba so that you and your families have enjoyed these benefits".

The Faculty Association published its own analysis of the University's finances in its *Bargaining Newsletter*. That analysis maintained that the University's net operating revenue was being diverted away from teaching and research and into capital spending. It further contended that the salaries of employees represented by the Faculty Association constituted a declining portion of the University's operating revenue. Based upon its financial analysis, the Faculty Association concluded that the University "is in strong and improving financial condition" due to increasing operating revenues and declining operating expenses.

In addition, the Faculty Association communicated with its membership regarding bargaining and sought feedback and advice through surveys and other means. Survey results from late 2015, entered into evidence during the hearing, indicated that salary was a key issue for Faculty Association members who responded. Additional surveys were conducted in the summer of 2016, a summary of which was released by the Faculty Association in correspondence dated September 15, 2016. At that time, the Faculty Association indicated, amongst other things, that workload issues were a key concern for a significant percentage of its members.

The relationship between the University and the Provincial government was discussed during bargaining on July 19, 2016. Juliano stated that the relationship is "hard", and added that "we can't bite the hand that feeds us". Chernomas, however, encouraged the University to stand with the Faculty Association and students to publically resist government intervention. A past example of the University vehemently opposing government intrusion, which had resulted in the government backing down from its position, was discussed. In cross-examination, Juliano conceded that the University's message to the Faculty Association during this discussion was that the University had the ability to stand up to government and had, in fact, done so in the past.

On September 13, 2016, the parties held another bargaining session. The University presented a comprehensive settlement proposal for a four-year collective agreement with wage increases in each year of 1%, 2%, 2%, and 2% plus additional market adjustments aimed predominantly at the lower academic ranks. The offer, prepared with the PET's involvement, was described by Juliano as a "package deal". At the bargaining table, he told the Faculty Association that it would be "wonderful if you just accepted it, but we expect some discussions". He further commented, *inter alia*, as follows:

- "If we change one article, it might affect how we feel about another article, particularly money articles re: governance issues";
- "We've tried to push our principles (*sic*) as far as we could"
- "Tried to get you best money package we could – they may not have gone as far on governance because money is there"
- "Positions are not nec (*sic*) our final positions; came to them with lots and lots of discussion with our principles (*sic*)"

The University claimed that the September 13, 2016 offer represented an average salary increase of 3.66% in the first year. According to paragraph 7(d) of the University's Reply, the total cost to the University was $4,719,000 in the first year. Juliano testified that the cost of the salary increase for the four-year proposed term was "in the range of $7 million". The Faculty Association asserted that the non-compounded wage increase offer was actually over $9 million for four years.

The University, without first seeking the Faculty Association's consent, decided to publish its offer on the University website. It included a description of the offer along with a hyperlink to the settlement proposal that was presented to the Faculty Association. With respect to compensation, the University indicated that the proposed 7% increase would "be in addition to existing annual increments and proposed salary increases to address areas of need, which would result in the average UMFA member's salary being increased by 17.5% over four years".

The University's September 13, 2016 comprehensive offer was not accepted by the Faculty Association. In cross-examination, Hudson acknowledged that the Faculty Association determined that each part of the University's offer with respect to wages, workload, metrics, and job security for Instructors and Librarians was unacceptable.

During a bargaining session held on September 26, 2016, Juliano commented that the University was continuing "to work on revising proposals and negotiating with you". Chernomas indicated that the Faculty Association was "not angling for a strike". He also flagged the fact that surveys of Faculty Association members suggested the two critical issues that had emerged - the ability of members to do their jobs in light of budget cuts and decanal authority. By September 29, 2016, the University had improved certain aspects of its September 13, 2016 comprehensive settlement offer as the parties continued to bargain towards achieving a collective agreement.

F. University and Provincial Government Communications while Collective Bargaining Continued

According to Juliano, prior to the University making its multi-million dollar offer on September 13, 2016, it did not have any specific discussion with the new Provincial government regarding a mandate for bargaining. In cross-examination, he testified that one week prior to the provincial election, he had a brief discussion with a government representative that "did not offer much insight". After the election, which resulted in a change in government, Juliano was contacted by another government official doing a survey on public sector negotiations. He asked that individual if the new Provincial government was going to set mandates on public sector compensation, but the official said that he did not know. Thus, despite Juliano's previous statement to the Faculty Association, during bargaining on May 27, 2016, that the University needed to assess factors including the new Provincial government's position prior to making a wage offer, neither he nor anyone else on behalf of the University made inquiries of the new Provincial government with respect to any mandate respecting public sector compensation that might

apply to the University prior to making the September 13, 2016 offer to the Faculty Association.

Nevertheless, on September 30, 2016, the parties held another collective bargaining session at which time Juliano made a number of introductory remarks relating to the new Provincial government. He referred to an article that had appeared in the *Winnipeg Free Press* that morning which discussed the Provincial government's desire to address Manitoba's deficit and public sector wages (later in the day, he provided a copy to Chernomas). The bargaining notes of that day reflect that Juliano commented that the contents of the article were worrisome for the University and the Faculty Association because "we want to give you money we've proposed, think it's important for us to remain competitive" and that it would be problematic if the Province's fiscal situation was "driving things".

At the meeting, Juliano alluded to an "unreturned call" that he had received from the Secretary of the Province's Public Sector Compensation Committee, Mr. Gerry Irving ("Irving"). Chernomas was generally dismissive of Juliano's comments and pointed to a recently negotiated public sector collective agreement that provided for wage increases. However, Juliano persisted, claiming that "there's now some urgency to wrapping this up" and further that the University did not want to "get 9/10 finished and be told we can't give you that money". Thereafter, bargaining continued on that date and Chernomas emphasized that workload had become "issue number 1" for the Faculty Association and further that "metrics" was also a major issue.

Juliano testified that on the evening of Friday, September 30, 2016, he received a call from a senior Provincial government official. In an email sent on that date at 5:35 p.m. to the PET, with the subject heading "government on umfa bargaining", Juliano advised:

> .... We had planned to connect anyway, but the call became urgent due to coincidence that news regarding our offer to umfa broke at the exact same time as the government was announcing the need for restraint in public sector wage

> settlements. He said this was a bit embarrassing for the government – or at least it has led to some very hard questions for the Minister.
>
> (the official) said it was highly likely that the government would be moving on public sector wage control. He understood that we could not withdraw our offer to umfa (unless the government ordered us to do so). However, he said it would not be good for the University's relations with the new government if we gave anything more than we already have on the table.
>
> We aren't really allowed to say this to umfa yet, but (the official) expects that there will be more public statements from the government upon which we will be able to rely in the very near future.

Collective bargaining recommenced on Monday, October 3, 2016. Notwithstanding his discussion with the senior Provincial government official, Juliano acknowledged that he did not obtain any further instructions from the PET prior to the resumption of bargaining. Juliano also agreed in cross-examination that he did not say anything to the Faculty Association about the discussion. He agreed that the Faculty Association still could have accepted the University's offer that included wage increases at that time. Had the Faculty Association done so, Juliano said that he would not have considered the University to have violated the Provincial government's order. Asked if there was any doubt in his mind that the information conveyed by the government official on September 30, 2016 was critically important to the Faculty Association to know about, Juliano responded that he was "sure they would have liked to know about it". While acknowledging in cross-examination that there is a duty to disclose a material change in circumstances in bargaining, Juliano said that "if we had come to the conclusion that we were bound to follow a certain direction we would have to". He claimed that he did not view what had occurred to that point to constitute a material change in circumstances.

During bargaining on October 3, 2016, the Faculty Association made a counter-offer to the University with respect to wages and market adjustments. This offer represented a substantial reduction from its original proposal. However, the Faculty Association was still proposing that salaries rise by 2% (plus market adjustments) for one year. In response, Juliano indicated: "I'll take that back, but when we gave you our money we said this was

pretty much all you'd get". Questioned in cross-examination regarding why he made that comment in light of the Provincial government's warning that it would not be good if any further money was offered, Juliano claimed that he did not know what to make of the Provincial government official's comments.

On October 4, 2016, the Faculty Association held a general membership meeting at which it made a presentation to its members. In addition, a vote authorizing the taking of a strike vote was conducted. Chernomas and Hudson testified regarding the bargaining update provided at the meeting. The strike vote authorization was approved and the actual strike vote was held on October 11, 12, and 13, 2016. Of those who cast a vote, 86% authorized strike action. The Faculty Association set a strike deadline of November 1, 2016.

On October 6, 2016, Juliano had a lengthy and pivotal meeting with Irving and the official he spoke to on September 30, 2016. Juliano testified that, between the two officials, he believed Irving was in charge. Juliano testified that he did not invite anyone from the PET to attend because he "had no idea of the bomb that was going to be dropped". At the meeting, Irving advised that a new mandate was going to be imposed upon the University requiring a pause (meaning 0%) in any wage increases for one year. Juliano testified that Irving told him that this direction was a mandatory order and that non-participation in the pause was not an option. According to Juliano, Irving said that there were concerns in government that providing a wage increase for members of the Faculty Association would set a pattern for other public sector bargaining such that a 1% increase could effectively result in a $100 million cost to government across the broader public sector. Juliano testified that Irving warned him that any failure of the University to cooperate with the directive "would lead to some financial consequences" for the University. No specifics regarding the "financial consequences" were referenced; however, according to Juliano, Irving did indicate that government would not fund any increase in compensation. During cross-examination, Juliano emphasized that this was an "order" rather than a "request",

and that "anything other than compliance would be dangerous". He also noted that the government directed that these discussions remain confidential.

Despite Irving's clarity with respect to the Provincial government's order regarding the new mandate on compensation at the University, Juliano testified that he remained unsure of three matters:

1) Whether the University would actually be required to participate in the mandated one-year pause in wage increases;
2) The specific details of the mandate including whether wage increases could be offered for subsequent years following the one-year pause; and
3) The details regarding how the Provincial government's direction would be publicly conveyed.

The University (most often Juliano) continued to have discussions with Irving and other government officials throughout October of 2016. In its written submission, the Faculty Association states that at least 30 separate communications took place in the 27-day period commencing September 30, 2016 to October 26, 2016.

One such communication was an email to a senior official in the Provincial Advanced Learning Division of October 7, 2016, wherein Juliano suggested that: "based upon conversations this week, I think there is a high likelihood of a strike, and perhaps a long one. We should all be planning for this". In cross-examination, Juliano claimed that one of his reasons for pessimism was the October 3, 2016 bargaining session, notwithstanding the fact that the Faculty Association had reduced its proposal respecting compensation by approximately one-half.

On October 11, 2016, Juliano communicated again with an official of the government. He recorded his recollection of the conversation in an email sent on that date to the PET, in which he indicated that the government official understood that the Provincial

government would need to "stand behind the decision" if the University had to follow the government's mandate. Clearly concerned about the potential legal implications of the new mandate, it was Juliano's evidence that he told the government official that the parties were at an advanced stage of bargaining and the "University could not go backwards in its position without some reasonable explanation". In the email, Juliano indicated that he advised that "we would be hinting things this week, but waiting for [President Barnard's] meeting with the Minister before being more direct with UMFA". During cross-examination, Juliano claimed that he wanted to hint at the danger that the government would require the University to participate in the wage pause and that, in so doing, he was attempting to be as "transparent" as he felt he could be. He further recorded that government provided additional clarity with respect to the mandate, advising that the University should not "sneak money into market adjustments" but that more peripheral things like "benefits and other supports might be tolerated".

On the same date, Juliano sent a bargaining update to the University's Deans in which he divulged that the Provincial government had signaled, both publicly through the media and in direct communications with the University, that there would be a marked shift in public sector compensation and, further, that salary increases of the magnitude presented in the University offers of March 9 (1.5% for one year) and September 13 (7% over four years) "fall outside of current provincial public sector compensation expectations". Juliano also expressed his view that the University foresaw this development and had, therefore, encouraged early settlement, only to have those attempts rejected by the Faculty Association. He added that he viewed the legal implication of the Faculty Association's counter-offer on October 3, 2016 as a rejection of the University's September 13, 2016 offer, which he claimed was "no longer open for acceptance". With respect to this position, Juliano admitted in cross-examination that he was already looking for ways to avoid an unfair labour practice complaint as he was aware of the potential risks.

The parties did not have another bargaining meeting until October 12, 2016. At that time, the University again failed to provide the Faculty Association with any specific information regarding the discussions that Juliano had with Irving or other government officials. At bargaining, Juliano did indicate that his principals had been "distracted" dealing with government and that the Provincial government's public statements regarding the economy and public sector compensation had raised "concerns on our part". According to the University's notes of that meeting, Juliano went on to state:

> We're having a private conversation, not permitted at this point to disclose details. David Barnard has been summoned to meet with the Minister of Finance on Monday, along with other University presidents; we're hoping for clarity of the govt's view at that mtg. You'll have to do your own risk assessment, but we thought we would raise it. Leading up to vote this week, UMFA promoting compensation as one of the main issues – you say you need more money, govt says less. I'm very concerned about where this is going to take us.

Chernomas pointed out that it was problematic that the University had publicly claimed that the average member of the Faculty Association would see an increase of 17.5% over four years based on its offer of September 13, 2016. Chernomas expressed confidence that none of the Faculty Association's proposals would call for more than a 2% increase. Juliano responded that he did not know "whether the new government has any tolerance for that thing…They have said other settlements at 2% unacceptable".

Later during the same bargaining meeting, Juliano revisited his comments regarding the Provincial government which were recorded in the bargaining notes as follows:

> While you were out, my team tells me I was not direct enough regarding our worries of govt. I don't want to be patronizing, but we are really worried about this; I appreciate you have experience with previous govts but the comments we've received indicate there will be a different pattern from the past. You say we drew attention with 17.5% - not the case, this govt is concerned with 2%. They have mentioned past contracts where various costs were hidden within them as examples of what they're unhappy with. Still waiting for the Minister to meet with the President.

Chernomas responded that Juliano had been clear and that there was reason for concern. He added that the issues of metrics and collegial governance were the two "big issues outstanding" and that if those could be satisfactorily resolved then "everything else goes away".

In cross-examination, Juliano was asked what he expected the Faculty Association to do based on his "hinting" of a challenge at this point. He responded that he thought the parties might still get an agreement and perhaps "we could sneak under the wire and get something good for our community". It was Juliano's evidence that he was attempting to alert the Faculty Association to the danger and to warn it not to create expectations that could not be met. The need to provide hints as to the challenges rather than disclosing the details of the conversations was based on his view that there was lingering uncertainty respecting the mandate and the requirement to maintain confidentiality. Juliano's evidence was that the University did not, at this stage, know that the mandate "was absolutely going to apply to us".

President Barnard and the other Presidents of the province's universities met with the Minister of Finance on October 17, 2016. The state of the provincial economy and public sector compensation was reviewed and discussed. President Barnard did not testify at the hearing. In Juliano's view, that meeting did not resolve any of the three lingering questions that the University had about the mandate. He testified that he reported to the Faculty Association that "the meeting did not resolve things for us", but he provided no other details as to what was discussed.

On October 18, 2016, Juliano and another member of the University's bargaining team met with Irving. In an email to President Barnard and other officials, Juliano indicated that there was discussion at the meeting surrounding the issue of how the new government mandate would be publicly communicated. Juliano referred to the fact that there was, in his view, common understanding at the meeting that "we need to have some kind of

explanation for why we had changed course". With respect to the details of the mandate, Juliano noted that: "we are not required to offer only one year – we could offer longer – but probably still at 0%". He added that "in future negotiations we would only be able to offer more than 0% if we can demonstrate savings". In an email to Irving that evening, Juliano thanked him for his "directness and transparency" and asked for his thoughts regarding "how we can nuance this message in a way that both explains why the University is changing course in the middle of bargaining, but also doesn't completely blame Government". Juliano testified that, at this point, the University was starting to come to the conclusion that it did not have much negotiating room with the Provincial government and was "starting to think about how to convey that" to the University community. He conceded that the University was attempting to create a joint communication with the Provincial government regarding the situation that addressed the University's desire to have protection against an unfair labour practice complaint and negative community perceptions.

In an email to the PET dated October 19, 2016, Juliano discussed the Provincial government's position regarding communications and related his view that the government's approach would not be sufficient to protect the University against a bad faith bargaining complaint or mitigate the anticipated anger of the University community. He reiterated that the mandate was "not 0% for one year, it is 0% for at least one year". Juliano testified that he was told that the University would have to apply to the Provincial government for wage increases in subsequent years. Furthermore, Juliano expressed his view that the government was "second guessing and essentially dictating, not just the mandate, but our bargaining strategy".

President Barnard and some other University officials met with government officials, including Irving, on October 20, 2016. Although he did not attend the meeting, Juliano testified that it did not go well and that offence was apparently taken to some of President Barnard's remarks. Indeed, Juliano testified that Irving told him that the meeting

was "decidedly unhelpful" to the University's cause and that they would not accept any more "high level" meetings and would only deal through him in the future.

On October 21, 2016, the parties met to bargain once again. Juliano commenced the meeting by indicating that the University had continuing discussions with government and found itself in a "very difficult and uncertain position". Lamenting the fact that he was "not at liberty to tell you about the situation with the government at the present time", Juliano related that he was frustrated and that the situation with government remained unresolved. He then told the Faculty Association that "this means that the University has not made a decision as to how it will respond to the government's viewpoint" and shared that "the government has some pretty strong opinions about what has happened in this round of bargaining". Juliano did not elaborate on the details of the University's recent discussions with government officials.

In response to Juliano's statements during bargaining on October 21, 2016, Chernomas asked if the government was preoccupied with money or whether it intended to interfere at the level of collegial governance. He was clear that the "big issues" like collegial governance and metrics were the matters that "will cause a strike". When the discussion returned to the issue of money, Juliano advised that he wished to "officially record that we are rejecting UMFA's last proposal on money". He added that the Faculty Association's monetary proposal was more than was necessary to preserve or improve the University's competitiveness and was "beyond anything that we could justify in the current economic circumstances". However, according to the notes of the meeting, Juliano then went on to state that "we need to make more progress of (sic) some of the outstanding language issues before we can get back to a money discussion, and because of these discussions with govt".

Also during bargaining on October 21, 2016, Juliano told the Faculty Association that the University had not withdrawn its salary proposal but, instead, advanced the

position that the law of offer and acceptance indicated that offer had been rejected. A member of the Faculty Association's bargaining team then asked Juliano to confirm that the University maintained all of its other proposals despite their rejection, but "with money, you're saying, there's no salary offer on the table?" Juliano replied that was correct. The Faculty Association proposed that the parties engage a mediator and Juliano stated that he would seek instructions about that idea.

Following bargaining with the Faculty Association, Juliano called a senior government official to, in his words, "report in" on the session. In an email dated October 21, 2016 to members of the PET, Juliano advised that he indicated that "we need to settle on money instructions" as he could not commence mediation without them. Discussion regarding the potential of the government allowing the University "additional flexibility" was also mentioned by Juliano. He further indicated that he had proposed that the government permit the University to offer the 1% wage increase for one year that it had presented in its comprehensive settlement offer of September 13, 2016. This arrangement, Juliano suggested, would not require the University to go backwards on its offer or necessitate any explanation for having done so.

Approximately three hours later, Juliano sent another email to the PET regarding a further conversation with Irving, complaining that "they are so micro-managing things it is driving me crazy". In this regard, he noted that government was weighing in on whether the University should agree to mediation or not. Juliano wrote that he had tried to explain that there were really only two options: government could impose a strict mandate upon the University and "stand behind that you have"; or "allow us not to go backwards (for example offer year 1 of our previous deal) and then don't have to admit to any involvement".

Chernomas and Juliano exchanged emails on October 22 and 23, 2016 regarding mediation which culminated in the parties agreeing to continue to negotiate with the

assistance of a mediator from Ontario, Mr. Larry Steinberg ("Steinberg"). In agreeing to move to mediation with the Faculty Association's suggested mediator, Juliano advised Chernomas that the University was "doing this against the governments (sic) advice, and taking the risk of upsetting them". During cross-examination, he acknowledged that his message to the Faculty Association was that the University was not following the government's advice. The mediation was scheduled to commence on the morning of October 27, 2016, and to continue, if necessary on October 29 and 30, 2016.

On or about October 24, 2016, Juliano communicated with other senior University officials to attempt to craft "bullet points of exactly what we would need the government to say". Late in the afternoon on October 24, 2016, Juliano sent an email to Irving which, he testified, was an attempt to "obtain certainty" regarding his lingering questions about the mandate. He characterized the email as being "purposely inflammatory to provoke government to give me instructions in writing". In his email, Juliano raised the spectre of a bad faith bargaining complaint against the University due to the fact that "complying with the government's wishes would mean moving backwards from previous offers". He commented in the email that "the University feels that we cannot commit to doing something illegal, which would have serious consequences for our community, unless we have a credible defence and explanation" (emphasis added). Therefore, Juliano expressed that if the University had to comply with the new mandate, then "we are going to need a strong statement from government that this is a directive". Juliano concluded that if agreement with the government in this regard could not be reached quickly, then "the University feels that it cannot go backwards from its previous offers, as this would be illegal (ie bad faith bargaining) and have serious consequences for our community". Although he took this position with the government, Juliano had already told the Faculty Association that the University's salary proposal had been rejected and was no longer on the table.

Irving responded by email on October 25, 2016. He commented that he was troubled by the "shift in overall tone and the fairly raw positioning" that had been advanced by Juliano which he felt "contrasts quite sharply with our earlier communications". Disputing Juliano's worries about a potential bad faith bargaining complaint, Irving posited that the Province's "macro" concerns constituted a "significant change of circumstances" for the government and the University. He reiterated that the "only mandate currently approved for the University of Manitoba is a minimum one year contract extension" and that "any evolution is that mandate would require the approval of this body, in accordance with the policy and practices in place within the broader public sector for many years". There is no indication in the email that government intended upon publicly acknowledging that it was ordering the University to comply with the new mandate. Irving also offered that the government "recognizes -and supports- the University's independent determination to proceed to a non-binding, no report mediation process using an Ontario mediator" but added that the University was obliged to "seek approval of any proposed position on total compensation levels which might be advanced during the mediation process". Juliano claimed that he was "very happy" to have received Irving's reply because, in his view, it provided "the kind of certainty we needed".

Juliano conceded that Irving's email left the door open to discuss wages with the Faculty Association subject to the proviso that any increase would have to be approved. However, Juliano testified that he and the PET did not feel that was practical in the context of mediation. He further acknowledged that he ultimately told the Faculty Association that the University was only mandated to offer a one year collective agreement with a 0% wage increase.

Following receipt of Irving's October 25, 2016 email, Juliano, along with other representatives of the University and its outside legal counsel met with Irving and another senior government official. According to Juliano, there were no "revelations" at the meeting

beyond what was set out in Irving's email and that the discussions largely concerned communications.

The parties met to bargain again on October 26, 2016, at which time the Faculty Association provided a written proposal aimed at resolving outstanding issues including salaries, market adjustments, workload, and metrics. Despite his apparent satisfaction with Irving's email of the previous day, Juliano failed to make any reference to that document or its contents. He testified that the University did not disclose the communications at that time because he was "hopeful that the government would say something publicly". No such public statement, however, was ever issued by the government. Rather than divulge what Irving had related in his October 25, 2016 email and the subsequent meeting, Juliano instead made the following statement (as set out in the University's bargaining notes) to the Faculty Association during the bargaining session on October 26, 2016:

> .... we've been talking about the govt and their role. Things continue to be extremely difficult with them, we're still working with them, they know mediation starts tomorrow. It's been very difficult. I don't think you're going to give us a lot of credit, but we've been battling for our profs and their really mad at us. We gave them an ultimatum, can't go into mediation without direction. It's been a v diff (*sic*) few weeks.

In response, Chernomas submitted that the University had the right to bargain and was independent. He asked whether the government's complaints were about money rather than governance issues. Chernomas indicated that he assumed that governance issues remained "up to you and us". Juliano commented that "we're in a terrible place".

Late in the day on October 26, 2016, President Barnard sent a letter to Premier Brian Pallister. Juliano, amongst others, contributed to crafting the correspondence. He testified that one of the reasons for sending the letter was to show that President Barnard was "on the record defending the University of Manitoba community". The letter commences by expressing "grave concern about the University of

Manitoba's ability to negotiate a settlement with its faculty association (UMFA) in light of the Province's public sector compensation expectations, and the negative impact this could have on Manitoba". President Barnard warned that the "government's only recently articulated expectation of a salary "pause" for one year at 0% will seriously debilitate the University of Manitoba's almost completed (nine months into bargaining) negotiations with UMFA". He added that "abiding by the pause would require us to backtrack from our latest offer and would – without doubt – lead to a prolonged and divisive strike with devastating impacts on this community". Accordingly, President Barnard requested that the Premier intervene and reconsider "the decision to impose the salary pause on the University of Manitoba and allow us to continue to bargain in good faith". Juliano testified that, by sending the letter, the University was deliberately taking an inflammatory approach with government and wanted it to think about whether their actions would result in a strike. However, Juliano further testified that the University did not expect a response to the letter or that the position of the government with respect to the issue would change. According to Juliano, neither the Premier, nor anyone acting on his behalf, responded to President Barnard's letter.

Asked in direct-examination what consideration the University gave to not complying with the Provincial government's order/direction, Juliano responded that "we talked about it but it was never seriously considered because the consequences would be too severe" (emphasis added). He maintained that those potential consequences included a range of actions that could impact such matters as the University's finances and/or governance. The PET ultimately made a unanimous decision to comply with the government's directive and to withdraw its wage offer on October 25 or 26, 2016.

The Faculty Association was not informed of any specifics regarding the extensive communications that occurred between September 30, 2016 and October 26, 2016 involving the University and government representatives respecting matters related to collective bargaining. Unaware of the details of those conversations, the Faculty

Association prepared for a scheduled three-day mediation with the mediator from Ontario. On October 25, 2016, Hudson sent comprehensive mediation materials to the mediator, copied to Chernomas and Juliano. The documentation included a review of the Faculty Association's list of 7 priority issues for the mediation which included: performance metrics; collegial governance; security for Instructors and Librarians; management rights; salary; Letter of Understanding on complement; and length of the agreement. Hudson and Chernomas denied that the issues were listed in order of priority. The University still did not, upon receipt of the mediation materials, make any disclosure regarding its communications with the Provincial government.

G. Mediation and Joint Statement

Mediation commenced on the morning of October 27, 2016, with additional dates scheduled for October 29 and 30, 2016. With the strike deadline set for November 1, 2016, October 31, 2016 was set aside to provide for a day to reflect upon whether a strike was necessary. At the commencement of the mediation, Steinberg met with the Faculty Association's bargaining team for approximately three hours. Members of the bargaining team reviewed the priority issues with the mediator. This presentation to the mediator concluded around noon, at which time the Faculty Association's representatives went for lunch.

Juliano claimed that he and the University's representatives arrived at the mediation early in an attempt to meet with the mediator prior to him meeting with the Faculty Association. Juliano testified that he regretted that the Faculty Association met with mediator first because "we had big news for him". The University did not meet with the mediator until approximately noon on October 27, 2016. Only at that point did the University disclose to him "what happened with the government mandate". The mediator, Juliano acknowledged, recognized that the information needed to be shared with the Faculty Association immediately. As a result, the mediator summoned representatives of the Faculty Association from their lunch to a meeting with the University. At that time the

Faculty Association was told, for the first time, what Juliano described as "the details of what had been transpiring over the previous few weeks". Juliano testified that he told the Faculty Association's representatives, including Hudson and Chernomas, that the University had hinted at this for a "long time" and now the Provincial government had intervened and issued a mandate that directed that the University only agree to a one-year collective agreement with a 0% wage increase. Chernomas testified that Juliano explained that this was what the Provincial government told the University that it had to do and that the University was going to abide by that direction.

Chernomas described the moment that Juliano disclosed this information as one of "shock and awe". Similarly, Juliano testified that, upon receiving this disclosure, the Faculty Association's representatives had "long faces". Witnesses described Steinberg's reaction to the news as dismayed or frustrated. Apparently he remarked that he would not even have got on the airplane if he had known that salary was not open to negotiation.

Counsel for the Faculty Association arrived at the mediation thereafter and was provided with a redacted copy of President Barnard's letter to the Premier dated October 26, 2016. The University agreed that counsel could share the contents of the letter with representatives of his client and he proceeded to read it out to the Faculty Association's CAC. In cross-examination, Chernomas took issue with any suggestion that the University was "compelled" to follow the direction of the Provincial government. From his perspective, the University is an independent entity and it did not have to acquiesce to the government's direction. Despite being surprised by the University's disclosure, the Faculty Association's CAC considered the circumstances and decided to proceed with the mediation to deal with the so-called governance issues that remained unresolved. This decision was communicated to the University's representatives. The Faculty Association further noted that it was seeking legal advice with respect to the University's position that it could not bargain over wages. Hudson and Chernomas testified that the CAC

determined that if the University would not bargain with respect to wages, then there should be, as Chernomas testified, "more leeway on governance matters".

A further meeting between representatives of the Faculty Association (including its legal counsel), the University, and the mediator took place later on October 27, 2016. During that meeting, the Faculty Association indicated, amongst other things, that it could not let what had occurred remain undisclosed. Counsel for the Faculty Association suggested that a joint letter addressing the developments be drafted. Counsel further indicated that the Faculty Association was prepared to continue bargaining in relation to governance issues without prejudice to the right to file an Unfair Labour Practice application which named the government. The Faculty Association further indicated that governance issues were "the strike stuff" and, according to Hudson, signaled that if a strike occurred it would be because there was not sufficient movement on governance. He testified that given the context in which salary was no longer negotiable, that was the "new reality". Chernomas also indicated at the meeting that the Faculty Association blamed the Provincial government for the inability to bargain respecting wages, but would blame the University if a deal could not be reached on governance.

Juliano was pleased that the Faculty Association was prepared to continue with the mediation. He told the Faculty Association representatives that the Provincial government actually *wanted* a strike. In a similar vein, another University representative speculated that the Provincial government was trying to make an example of the Faculty Association. In cross-examination, Juliano admitted that he had conversations with Irving which led him to conclude that the Provincial government "would not be unhappy with a strike". Hudson testified that the Faculty Association inquired as to whether the University would show greater flexibility on non-financial issues and that he was given the impression that such flexibility could indeed be expected particularly given the 0% salary increase mandate. This evidence was disputed by Juliano who testified that the University made no such commitment.

Later that evening, counsel for the Faculty Association sent an email to Juliano to confirm that the representatives of the Faculty Association would attend the scheduled mediation dates of Saturday, October 29 and Sunday, October 30, "without prejudice to my client's ongoing right to bring an unfair labour practice application, whether or not the mediation results in a new collective agreement". Counsel further indicated his understanding that Juliano had earlier agreed to that condition. Juliano confirmed his agreement, "except only that we would maintain our position that our earlier compensation offer was rejected rather than withdrawn". Juliano, nevertheless, agreed with proceeding on the basis that counsel for the Faculty Association had suggested and indicated his belief that "this is the best way forward in a difficult situation for all involved".

The parties agreed to issue a joint letter to the University of Manitoba community. Representatives from both parties met on October 28, 2016 to prepare the statement. During that meeting, Hudson and the Faculty Association's Executive Director were shown a copy of Irving's email to Juliano dated October 25, 2016. The joint statement, published by the University in *UM Today News*, states that the parties agreed to communicate about "a dramatic recent development in our ongoing efforts to negotiate a new collective agreement". The parties went on to explain their individual perspectives.

In setting forth its perspective, the University commented that over "the past several days, the Province has made clear to the University that it has established fresh mandate parameters that seek cooperation in achieving a compensation 'pause' throughout the public sector" and that it, along with other public bodies, was "being asked to extend existing collective agreements for an additional year at zero per cent in order to stabilize public sector compensation levels". The University added that the "newly articulated provincial mandate…will have a profound impact on the final compensations 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." Juliano admitted, during cross-examination,

that the University's statement was inaccurate. The Provincial government was not merely "seeking cooperation", nor was the University merely being "asked" to agree to a one-year agreement at zero per cent. His explanation for these inaccuracies was that the University "tried to pick words that were less offensive".

The Faculty Association provided its perspective that the Provincial government had endangered a complex negotiation by illegitimately interfering in the constitutionally protected process of collective bargaining and that, as an independent entity, the University "must have the autonomy to engage in all aspects of negotiation". It noted that it was currently exploring legal options to address the circumstances, but that it continued to focus on negotiating a fair collective agreement for its members.

The joint statement attempted to reassure the University of Manitoba community that the parties were resolved to continue discussions despite this development and that the mediation process would proceed on the weekend in hopes of avoiding a strike before the November 1, 2016 deadline. In addition, the Faculty Association corresponded with its members to indicate that, on the first day of mediation, "a truly unexpected development occurred". It described the government's new mandate as "an egregious act of interference and intimidation" and that it was pursuing "all legal options for remedy", but was resolved to continue to "push your priorities on workload, performance standards, collegial governance, and job security at the table".

Mediation continued on October 29 and 30, 2016. On behalf of the Faculty Association, Chernomas indicated that the Faculty Association did not blame the University for the decision to offer a 0% increase. The parties proceeded to attempt to resolve the remaining issues. Despite working for 16 hours on October 29, 2016 and all day on October 30, 2016, an agreement was not concluded. Some progress was made during mediation on tenure and promotion matters; however, there remained a fundamental impasse on major issues such as governance, workload, and metrics.

At the end of the mediation on October 30, 2016, the Faculty Association made a final offer to the University, giving it until noon of the following day to respond. The Faculty Association's offer proposed a one-year collective agreement with a 0% wage increase. The offer addressed governance, metrics and workload. As Hudson acknowledged during cross-examination, had the University accepted this final offer, the strike would not have occurred. However, the University presented a counter offer the following day which was not accepted by the Faculty Association and the strike commenced on November 1, 2016 at 7:00 a.m. The University's request that the Faculty Association delay the strike was rejected.

H. The Strike and Conciliation

On October 31, 2016, the Faculty Association informed its membership that mediation had concluded and that its final offer had been rejected by the University. In accordance with the strike deadline which it previously set, the Faculty Association advised that it was calling a strike to commence the following morning. The strike lasted for approximately three weeks, with agreement being reached on November 20, 2016.

The parties exchanged proposals on November 1, 2016. Still unable to resolve their differences, the parties jointly decided to engage in conciliation. Mr. Dennis Harrison, of the provincial Conciliation and Mediation branch was appointed as conciliator to assist the parties. The Faculty Association stipulated at the hearing that when conciliation commenced on November 2, 2016, it conveyed to the conciliator that it would accept a one-year agreement with a 0% increase and that it wished to discuss other issues including those related to workload and metrics.

The parties continued to bargain and ultimately reached agreement on collective agreement provisions relating to various matters including governance, workload, tenure and promotion, metrics, and job security for instructors and librarians. Chernomas and

Hudson testified that, in their opinion, significant gains were achieved by the Faculty Association following the commencement of the strike. The Faculty Association requested that the University reimburse employees for wages lost owing to the strike; however, the University rejected that demand and it was thereafter withdrawn. Ultimately, the Faculty Association made an assessment that the improvements it achieved in bargaining were significant enough to put to the membership. The settlement reached on November 20, 2016 was put to a ratification vote the following day and was ratified by 90% of those who voted. Agreement was also reached on a return to work protocol.

The University's 2016-17 academic year was salvaged. Chernomas testified that the Faculty Association made a commitment to the University to have the courses taught so that students did not lose any course credits. Chernomas maintained that this resulted in members of the Faculty Association doing additional work without compensation. Juliano disagreed with that perspective. He commented that the University Senate controls the academic calendar and it decided how to adjust the schedule so that the same work was performed but at a later time. In cross-examination, he agreed that members of the bargaining unit ultimately completed their work in this regard but did not receive any additional pay. By Juliano's estimate, the University saved more than $3 million in salaries that it did not pay to striking employees over the course of the three-week strike. However, he took issue with the notion that the University had benefited from the strike.

Evidence was adduced regarding the cause of the strike. Chernomas suggested that if the University had offered a significant enough salary increase, then issues related to governance could have been deferred until the next round of collective bargaining. However, given the University's decision to comply with the Provincial government's edict relating to salaries, absent gains in relation to governance and/or other issues, the Faculty Association had nothing acceptable to take to its members. Juliano pointed out that, prior to the commencement of the strike, the Faculty Association made a final offer to the University which proposed a 0% increase for a one-year agreement.

The Faculty Association issued a number of public statements regarding why its members were on strike commencing with a strike handbill dated November 1, 2016 which states: "We're fighting for a greater say over ever-increasing workloads, appropriate use of metrics in evaluation, and job-security". Notes from the first day of conciliation indicate that Chernomas stated, in relation to workload, that: "Our members would turn down salary for this – no one is worked up about salary". It should be noted that Chernomas denied that the quote was accurate. Ultimately, the agreement between the parties was for a collective agreement for a term of one year with a 0% wage increase, which contained language to address various issues over which the parties were previously at an impasse including those relating to governance.

III. Submissions

A. Faculty Association

Following a comprehensive review of the applicable legislation and authorities, counsel for the Faculty Association launched a multi-pronged attack on the conduct of the University in relation to the 2016 round of collective bargaining. A brief summary of those complaints of the Faculty Association is as follows:

a) The University failed to provide appropriate or timely disclosure to the Faculty Association of its ongoing communications with the Provincial government and, as such, failed to make every reasonable effort to reach a collective agreement;

b) The University is an autonomous body, separate from the Provincial government and, as such, had a choice regarding whether or not to comply with a directive from the government respecting the University's offer on wages. The Faculty Association contends that the Provincial government's actions do not amount to a material change of circumstances and, accordingly, the University's decision to withdraw its wage offer was not justified and constitutes a breach of the duty to bargain in good faith. The Faculty Association further submitted that the fact that it made a counteroffer to the

University's September 13, 2016 offer is not a defense to the decision by the University to change its bargaining position. In this regard, counsel for the Faculty Association noted that the University maintained all of the other parts of its September 13, 2016 offer. Furthermore, and in any event, counsel referred to case law supporting the position that simple principles of contract law have no place within the realm of labour law and the statutory obligation to bargain in good faith;

c) By capitulating to the Provincial government's direction, the University's representatives at the bargaining table were not armed with sufficient authority to engage in collective bargaining. As a result, the real entity dictating bargaining with respect to wages and overall bargaining strategy was the Provincial government and not the University. As a result, the true decision-maker with sufficient authority to engage in meaningful bargaining was not at the bargaining table with the Faculty Association and, therefore, the University failed to bargain in good faith and make every reasonable effort to conclude a collective agreement; and

d) By removing one of the Faculty Association's top priorities – wages - from the bargaining table, and thereafter refusing to bargain on the issue, the University committed an unfair labour practice by taking a clearly untenable position to impasse. Coupled with the University's refusal to make meaningful concessions on governance issues during mediation, the University knew, or ought to have known, that its position could not have been accepted by the Faculty Association if the union was to maintain credibility with its members.

According to the Faculty Association, the evidence clearly established that prior to the Provincial government's interference in bargaining, the parties had engaged in numerous bargaining sessions, exchanged a number of proposals, agreed upon some collective agreement language, and were making steady progress towards reaching a settlement without recourse to strike or lockout. The University tabled a proposal on September 13, 2016 that included wage increases in each of the contemplated four years of the deal, totaling in excess of $9 million. However, following the government's

intervention, the University thereafter withdrew its offer and committed unfair labour practices.

The Faculty Association contends that the University's failure to bargain in good faith and make every reasonable attempt to conclude a collective agreement caused the strike that occurred. Counsel pointed out that the University effectively conceded this fact in correspondence in evidence at the hearing. For example, in Juliano's emails dated October 7 and October 24, 2016, he stated that "based upon conversations this week, I think there is a high likelihood of a strike, and perhaps a long one" and that any "backwards movement may lead to a lengthy strike". Indeed, President Barnard clearly expressed a similar view in his October 26, 2016 letter to Premier Pallister which indicated the University's view that abiding by the direction of the Provincial government would require it to "backtrack from our latest offer and would – without doubt – lead to a prolonged and divisive strike with devastating impacts on this community". The Faculty Association further submitted that although the strike ultimately resulted from its dissatisfaction with the lack of movement by the University on governance language during mediation, the amount of movement required "was a direct result of the University taking wages off the table".

As a result of the alleged breaches of the legislation by the University, the Faculty Association seeks a declaration that the University committed an unfair labour practice along with a host of additional remedies including: full compensation for each of its members who participated in the strike for lost wages and benefits; compensation payable to the Faculty Association for all costs associated with the strike; an order that the University pay all employees covered by the collective agreement an amount of salary equal to 1% of that employee's wages (less deductions) as of March 31, 2016; an order that the University be ordered to restore its monetary proposals as they existed on September 13, 2016; an order that the University pay to the Faculty Association and each of its members the amount of $2,000 in respect of the interference with their rights under

the *Act*; and an apology. The primary purpose of remedies in such a case is to compel the parties to meet and bargain in good faith and to make every reasonable effort to enter into a collective agreement. However, of particular significance in the present case is the secondary purpose of remedies which is to place the successful complainant in the position it would have been in had there been no violation of the statute.

B. University

Counsel for the University rejected each of the allegations advanced by the Faculty Association. In the course of so doing, the University thoroughly reviewed legal authorities which, it maintained, supported its positions. The University contends that the Faculty Association failed to discharge the onus to prove bad faith bargaining. Indeed, contrary to the Faculty Association's assertions, the University insists that the evidence established that it complied with the subjective requirement to bargain in good faith and, on the objective standard, made every reasonable attempt to conclude a collective agreement.

The University's responses to the Faculty Association's complaints may be briefly summarized as follows:

a) With respect to the allegation that it failed to provide appropriate or timely disclosure of discussions with Provincial government officials, the University responds that there is no obligation to make a voluntary disclosure unless and until a material change in circumstance has actually occurred and the employer has made a final or *de facto* decision regarding the change. It is the University's contention that there was insufficient clarity surrounding the government's direction with respect to the mandate until October 25, 2016 when Irving confirmed it, and its compulsory nature, in writing. In the interim, the University maintains that it made pointed comments to the Faculty Association regarding the threat of government intervention and that its representatives understood and accepted the risks, and failed to demand additional detail at the relevant time. In fact, the University insists that it addressed the developing mandate situation precisely as the Faculty Association would have wanted

it to do in any event; it sought clarity and fought back against the demands of the government officials. Accordingly, the University submitted that it would have made no practical difference if the information had been disclosed earlier and pointed out that the Faculty Association failed to lead any evidence regarding the consequences of the alleged failure to disclose the information;

b) The University challenged the underlying premise of the Faculty Association's complaint that the wage offer made on September 13, 2016 was withdrawn in violation of the *Act*. It maintains that the wage offer was part of a package deal that was not withdrawn but, instead, rejected by the Faculty Association by virtue of its counteroffer of October 3, 2016. There is no legal basis to suggest that a previously rejected offer continues as an enforceable obligation against the party who made the offer. Furthermore, the University contends that the new Provincial government mandate imposed upon it in October of 2016 constituted an order that prohibited any wage increase under warning of consequences if it failed to comply. It is the University's contention that this development constituted a dramatic and material change in circumstances that would have permitted it to retreat from its previous bargaining position by withdrawing its wage offer. Furthermore, the University dismissed as a red-herring the submission that, as an autonomous entity, it should have disobeyed the government. Merely because that course of action was theoretically possible does not mean that the University was "somehow legally obligated to disobey the order regardless of the severe financial and other consequences which could result";

c) The University also denied any suggestion that it was not the true decision-maker armed with sufficient authority to engage in collective bargaining by virtue of its decision to comply with the Provincial government's order respecting the mandate or otherwise. Counsel noted that the evidence established that, historically, governments establish mandates respecting compensation rates. In the present case, the University President and the PET determined that it had to comply with the government mandate and instructed Juliano accordingly. The fact that there were parameters placed around bargaining is not indicative of the University not having sufficient authority to bargain

in the circumstances and the decision to obey the government's direction respecting the mandate does not constitute an unfair labour practice; and

d) The University also rejected any suggestion that it advanced an untenable position to impasse in violation of the *Act*. It responded that it did not propose a 0% wage increase in order to undermine negotiations or to thwart achieving a collective agreement. In any event, the University maintains that the issues that caused the strike were related to governance language demanded by the Faculty Association. Furthermore, prior to the strike, the Faculty Association proposed a one-year agreement with a 0% increase and it reiterated that 0% was acceptable on the first day of conciliation.

Given its position that no violation of the *Act* was established, the University argued that the cause of the strike was a moot point. However, even if the Board felt that an unfair labour practice was committed in this case, it is the position of the University that the Faculty Association failed to establish that the University's alleged acts or omissions caused or contributed to the strike. Counsel for the University dismissed the suggestion that correspondence penned by Juliano and President Barnard constituted admissions that the University violated the *Act* and thereby caused the strike. Counsel pointed to Juliano's evidence that the impugned communications were deliberately provocative in order to cause the Provincial government to either stand behind the mandate or reconsider its application to the University. Furthermore, the University contends that the evidence clearly indicates that the Faculty Association's demands respecting governance and other related issues led to the strike and, following resolution of those matters during conciliation, settlement was reached and the strike ended.

The University denied that the Faculty Association was entitled to any of the remedies that it sought. Counsel emphasized the importance of the context in which this case occurred in that the parties ultimately concluded a collective agreement. Having regard to that fact, the University's position is that there is no labour relations purpose to be served by the Board imposing a remedy. The issues were well known to parties when

they settled the collective agreement and the Faculty Association, argues the University, now seeks to unwind that agreement and have the Board award the wage increases that it did not achieve in bargaining, having focused instead on the governance issues. Any decision by the Board which effectively changed the terms of the collective agreement would, in the circumstances, be repugnant to the bargaining process. Counsel also referred to the evidence that at the end of bargaining the Faculty Association requested that employees be compensated for the period of the strike. The University rejected that proposal and the parties nevertheless settled the agreement.

Counsel for the University briefly summarized the extent of its efforts during collective bargaining. He noted that numerous proposals were exchanged and, despite the Faculty Association's rejection of the University's package offer of September 13, 2016, it continued to bargain in good faith and attempt to reach an agreement. Thereafter, the University continued to bargain, agreed to participate in mediation with the Faculty Association's hand-picked mediator, participated in conciliation, and ultimately successfully worked through difficult governance issues and negotiated a collective agreement that was subsequently ratified. Having regard to the evidence and the applicable legal principles, the University submitted that it did not commit an unfair labour practice and no remedy ought to be granted.

C. Reply of the Faculty Association

Counsel accepted that the parties essentially agreed upon the core legal principles applicable in this case. However, the Faculty Association was particularly troubled by the University's position that there was no labour relations purpose to be served by the Board issuing remedies given that the parties successfully negotiated a collective agreement. That position, the Faculty Association submitted, ignores the fact that, following the University's disclosure on October 27, 2016 regarding the mandate, the Faculty Association agreed to continue bargaining "without prejudice" to its right to bring an unfair labour practice "whether or not the mediation results in a new collective agreement".

Juliano, on behalf of the University, expressly accepted that condition (subject to its offer and acceptance position) and agreed that it was "the best way forward in a difficult situation for all involved". The Faculty Association expressed its dismay that the University was now attempting to use that good faith attempt to prevent a strike and ultimately negotiate a collective agreement against it in this proceeding. The Faculty Association emphasized that the issue of remedies is far from moot and that it is incumbent upon the Board to send a clear message to the University that it will be held accountable for its actions committed in violation of the *Act*.

Counsel for the Faculty Association also rebutted the University's suggestion that it did not have an obligation to disclose the information about its communications with the Provincial government until a material change in circumstance occurred and the employer made a final or *de facto* decision regarding the change which, according to the University, could not have occurred prior to it receiving Irving's October 25, 2016 email. The Faculty Association argues that *de facto* decision was made on October 6, 2016, when Irving presided over a meeting at which the order respecting the mandate was made crystal clear. The Faculty Association submitted that the duty of unsolicited disclosure clearly applied from that point in time. Counsel further noted that Juliano provided no acceptable explanation for why the communications were not disclosed to the Faculty Association immediately.

The Faculty Association also commented upon the University's position that the new Provincial government mandate imposed upon it was a material change in circumstances that permitted it to alter its bargaining position by withdrawing a wage offer with a value of over $9 million. If that was true, counsel asked the Board to consider why the University failed to immediately disclose to the Faculty Association that the government had ordered it to comply with the new mandate on October 6, 2016. Counsel submitted that the government's order in that respect was either a material change in circumstances that required immediate disclosure to the Faculty Association, or it was not. If it was not a

material change in circumstances requiring immediate disclosure, then the University cannot rely upon that fact to justify the alteration of its bargaining position.

The Faculty Association also assailed the significance placed upon Irving's October 25, 2016 email by the University in support of its position that a material change in circumstances had occurred. At the hearing, the University claimed that this document was critical because it provided the first clear directive from the Provincial government in writing. However, counsel pointed to evidence that the Faculty Association requested a copy of that correspondence on November 1, 2016 (the first day of the strike). That request was rebuffed by Juliano in an email the following day which states: "the letter to which you refer is not in itself the change of circumstances" and further that the "change occurred through a series of meetings, telephone conversations, and written communications between October 6 and the start of mediation". The Faculty Association submitted that Irving's October 25, 2016 email is not nearly as clear with respect to the mandate as the meeting that took place on October 6, 2016. The only real significance of Irving's October 25, 2016 email is that it is the first time the government put anything in writing upon which the University could rely in defense of an unfair labour practice allegation.

The Faculty Association also challenged the University's position that it was the true decision-maker with respect to collective bargaining. In so doing, the Faculty Association pointed to the University's own documentation which indicated that the government was "dictating, not just the mandate, but our bargaining strategy". Counsel reiterated the position that the University capitulated to the Provincial government and thereby ceded its bargaining authority. In the circumstances, that decision constituted an unfair labour practice.

In reply to the University's position that the Faculty Association failed to call any evidence respecting what it would have done if timely disclosure of information had been made, counsel responded that such evidence would have been completely hypothetical

and its introduction would have been properly objected to on that basis. Furthermore, even if such evidence had been deemed admissible, it would have been of no weight. Counsel for the Faculty Association submitted that it is properly left to the Board, as an expert tribunal, to make necessary determinations regarding what effect appropriate and timely disclosure would have had in all of the circumstances.

The Faculty Association also took issue with the assertion that the University's September 13, 2016 offer was its "final and best offer". The evidence indicated that was not an accurate characterization. Moreover, counsel challenged the University's position that a strike was inevitable, stating that its position in that regard did not accord with history or common sense.

In conclusion, the Faculty Association reiterated that the University committed unfair labour practices and that the Board should order the wide-ranging remedies that it sought.

IV. Analysis and Decision

A. Legislative Provisions

Free collective bargaining is fundamental to the *Act* and labour relations in the Province. The statute's Preamble makes this clear, stating that: "it is in the public interest of the Province of Manitoba to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and unions as the freely designated representatives of employees". Collective bargaining is statutory policy designed to achieve labour relations peace. It has been acknowledged as a process in which labour, management and the public have a vital interest. Employees, in particular, have a critical stake in collective bargaining as it is the principal means by which they have a say in decisions respecting the terms and conditions of employment that affect them.

Once notice to bargain has been given in accordance with the *Act*, a statutory duty to bargain in good faith is imposed upon the employer and the bargaining agent. Section 63(1) of the *Act* establishes this duty as follows:

> **Effect of notice under section 61**
> 63(1) Where a party to a collective agreement has given notice under section 61 or subsection 83(3) to the other party to the collective agreement the parties shall, without delay, but in any case within 10 clear days after the notice was given or such further time as the parties may agree on, meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith and make every reasonable effort to conclude a renewal or revision of the collective agreement or a new collective agreement.

Failure to comply with this duty constitutes an unfair labour practice pursuant to section 26 of the *Act*. That provision reads as follows:

> **Not bargaining in good faith**
> 26 Every party to collective bargaining which fails to comply with any requirement of, as the case may be, section 62 or 63 in the circumstances described therein commits an unfair labour practice.

The party alleging a breach of the duty to bargain in good faith bears the onus of proof. Where the Board finds that a party has committed an unfair labour practice it may impose remedies set forth in section 31(4) of the *Act* as it deems reasonable and appropriate, notwithstanding the provisions of any collective agreement.

B. General Principles

The duty to bargain in good faith has been described as a "cornerstone" of labour relations statutes that "gives life and substance to the rights of employers and employees". It is a multi-dimensional duty, the general principles of which are well-established. In D.J. Corry, *Collective Bargaining and Agreement,* the authors summarized the obligations imposed by the duty to bargain in good faith at paragraph 8:1000 as follows:

(i) The duty to meet and make every reasonable effort to enter into a collective agreement;

(ii) The duty to fully recognize the union as the exclusive bargaining agent on behalf of the employees;

(iii) The duty to bargain and to engage in rational discussions with respect to all of the issues between the parties;

(iv) With respect to the content of bargaining, the duty to avoid bargaining to impasse those demands which are illegal or contrary to labour relations policy;

(v) The duty to refrain from using unfair bargaining tactics; and

(vi) The duty to fully and candidly disclose all relevant information and not to make misrepresentations.

As the Supreme Court of Canada noted in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369, the duty has both subjective and objective elements. That case concerned a long and bitter strike which resulted in the Canada Labour Relations Board concluding that the employer had failed to bargain in good faith. By way of remedy, the employer was ordered to tender the tentative agreement which was previously rejected with the exception of four issues about which it had changed its position. The Federal board gave the parties 30 days to settle those issues and, if they remained unresolved, then compulsory mediation was to be imposed. The jurisdiction of that Board to make the remedial order was at issue before the Supreme Court. Noting that all federal and provincial labour relations statutes contained provisions comparable to that under consideration in the case, for the majority, Mr. Justice Cory articulated the components of the duty to bargain in good faith as follows:

> 41 Every federal and provincial labour relations code contains a section comparable to s. 50 of the Canada Labour Code which requires the parties to meet and bargain in good faith. In order for collective bargaining to be a fair and effective process it is essential that both the employer and the union negotiate within the framework of the rules established by the relevant statutory labour code. In the context of the duty to bargain in good faith a commitment is required from each side to honestly strive to find a middle ground between their opposing interests. Both parties must approach the bargaining table with good intentions.
>
> 42 Section 50(a) of the Canada Labour Code has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective

> standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.

In the result, the Court recognized the wide and flexible remedial role of the Canada Labour Relations Board and upheld its decision.

Given the fact that the making of a reasonable effort to conclude a collective agreement is measured on an objective standard, a violation of the duty may be found even in instances in which a party's conduct in bargaining does not demonstrate bad faith on the subjective standard (see, for example, in this regard *University of Regina Faculty Association and Saskatchewan Indian Federated College,* [1995] S.L.R.B.D. No. 5 at page 9).

Despite the central importance of the duty to bargain in good faith to collective bargaining, it is relatively uncommon for labour relations boards to have to decide such cases. That is certainly the case in Manitoba where the Board has only had to issue decisions concerning the duty on a few occasions. That being said, one of the most notorious examples of failing to comply with the duty is discussed in this Board's decision in *Buhler Versatile Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (C.A.W. - Canada), Local 2224* , [2001] M.L.B.D. No. 9, (2001) 74 C.L.R.B.R. (2d) 297. In that case, the Board comprehensively reviewed the general principles that guided its approach to interpreting the duty as follows commencing at paragraph 51:

> **51** George W. Adams, Q.C., in his text, Canadian Labour Law, Second Edition, Chapter 10, Unfair Labour Practice Proceedings, [[paragraph]10,1400], in reviewing the duty to bargain in good faith, states at 10-92.1:
>
> **52** The purposes of collective bargaining legislation is to bring the parties to the bargaining table where they will present their proposals, articulate

supporting arguments and search for common ground which can serve as the basis for a collective agreement. The duty to bargain, no matter how phrased, has been elaborated over time by labour boards to prohibit certain specific conduct, i.e. misrepresentations, and at times to censure a party's entire bargaining stance where "having regard to all the circumstances", a labour board concludes that the real object of that party is to avoid a collective agreement. . . .

53 Adams also discusses the need for full and rationale discussion between the parties, where he references a phrase from DeVilbiss (Canada) Ltd., stated at page 10-106:

> In DeVilbiss (Canada) Ltd., it was held that "rational discussion is likely to minimize the number of problems the parties are unable to resolve without the use of economic weapons thereby focusing the parties' attention in the eleventh hour on the 'true' differences between them". With this policy in mind, labour boards have required the following: that certain bargaining data be disclosed; that misrepresentations not be employed; that the true decision makers participate in negotiations; that certain key decisions affecting a significant number of bargaining unit employees be disclosed; and that parties be prepared to justify particular stances which they may take.

He also comments on page 10-109, on the issue of unsolicited disclosures, stating:

> However, there is an evolving Canadian requirement of "unsolicited disclosure" which arises from the good faith purpose of the bargaining duty. This approach builds upon the misrepresentation cases by holding that is "tantamount to a misrepresentation" for an employer not to reveal during bargaining a decision it has already made which will have a significant impact on terms and conditions of employment, such as a plant closing, and which the union could not have anticipated.

54 In the case before us, we must determine if the Employer's actions contravened the statutory requirements in section 63(1) of the Act, where it directs the parties to, "bargain collectively in good faith and make every reasonable effort to conclude a renewal or revision of the Collective Agreement."

55 The Alberta Labour Relations Board, in Alberta Projectionists and Video Technicians Local 302 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada - and - Famous Players Inc. (1995), A.L.R.B. File No. GE-01760, May 8, 1995, (Howes, D.M), at page 11, states:

> The duty to bargain in good faith is a cornerstone of the Labour Relations Code. It "gives life and substance to the rights of employers and employees" contained in sections 19. . . .

56 That board went on to say, at page 12:

> The duty to bargain in good faith has many aspects; breach of one aspect does not imply a breach of all aspects. However, a breach of even one aspect may result in the Board finding a breach of s. 58. Decisions of this Board reveal the variety of obligations inherent in the duty to bargain in good faith. A summary of those obligations include the obligation on:
>
> * the employer to recognize the trade union as the bargaining agent;
> * the parties to meet
> * the parties to bargain
> * the parties to act with the intent of concluding, revising or renewing a collective agreement;
> * the parties to make every reasonable effort to enter into a collective agreement;
> * the parties to engage in full, rational, informed discussion about the issues;
> * the employer to disclose decisions that have been made affecting the bargaining unit;
> * a party, upon request , to provide the other party with information relevant to the issues involved in bargaining;
> * the parties to avoid deception in their representations to each other;
> * the parties to avoid surface bargaining.

The Board concluded that the employer failed to comply with the obligations set forth in section 63(1) of the *Act* and thereby committed an unfair labour practice. In so holding, the Board concluded, *inter alia*, that the employer failed to comply with the requirement of unsolicited disclosure and that the employer's conduct went beyond hard bargaining and violated the *Act*. As a result, the Board imposed comprehensive compensatory remedies

intended to "make whole" the employees negatively affected by the unfair labour practice and the strike that occurred.

C. Requirement of Unsolicited Disclosure

An important aspect of the duty to bargain in good faith and to make every reasonable effort to conclude a collective agreement is the requirement of unsolicited disclosure. As former Ontario Labour Relations Board Chairperson George Adams. Q.C. noted in *Consolidated Bathurst Packaging Ltd. v. I.W.A., Local 2-69*, [1983] O.L.R.B. Rep. 1411 commencing at paragraph 43, the duty to disclose arises both out of the obligation to recognize the bargaining agent and to foster rational and informed discussion between the parties during collective bargaining. Chairperson Adams emphasized that disclosure "encourages parties to focus on the real positions of both the employees and the employer".

The disclosure requirement is not limited to circumstances in which a party specifically requests information. A duty of unsolicited disclosure has developed in labour law over the course of the past 40 years and is now well-established in this and other Canadian jurisdictions. 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.

The Ontario Labour Relations Board developed much of the early Canadian jurisprudence respecting the obligation of unsolicited disclosure. For example, in *Consolidated Bathurst, supra*, at paragraph 53, Chairperson Adams indicated that the employer's decision respecting an "impending" plant closing was "so concrete and highly probable in early January and dealt with by the board of directors in such a perfunctory manner...that the company had a minimum obligation" to say during bargaining that unless circumstances changed, a recommendation to close the plant would be made within

weeks. The Ontario Board held that the employer's "silence at the bargaining table was tantamount to a misrepresentation within the meaning of the *de facto* decision doctrine".

In *Buhler, supra*, the Board reviewed the duty of disclosure in the context of the employer's failure to disclose during collective bargaining the termination of an important contract. At paragraphs 79 to 84, the Board thoroughly reviewed the law relating to the duty of disclosure. In that case, the Board concluded that the employer's failure to disclose to the union the significant decision that had been made with respect to the termination of the contract, which clearly affected the bargaining unit employees and collective bargaining, was the type of decision "that labour boards across Canada have stated must be disclosed to a union in a timely fashion". The Board determined that the employer's failure to comply with the duty of unsolicited disclosure constituted a breach of the duty to bargain established by section 63(1) of the *Act*. The Board noted, at paragraph 46, that had the employer disclosed the information, the union would "at least have been in a better position to seriously consider what options would have been open" at that point in time.

As noted above, the duty to make an unsolicited disclosure arises where an employer has made a decision or *de facto* decision that will have a significant impact on the employees in the unit. In *Rocky View (County) and IAFF, Local 4794, Re,* [2013] A.W.L.D. 5231, the Alberta Labour Relations Board considered at what point in time a plan to layoff firefighters became sufficiently concrete to conclude that a *de facto* decision had been made. Commencing at paragraph 42, Vice-Chairperson Schlesinger provided an extensive summary of the requirement to disclose information:

> **42** The Association's first argument raises the issue of whether the County breached its duty under section 60 by failing to disclose to the Association its plan to layoff all full-time firefighters. The duty to disclose in the bargaining context was summarized this way in *CUPE, Local No. 30* v. *City of Edmonton*, [1995] Alta. L.R.B.R. 102 at page 110 ("*CUPE*"):
>
> > The duty to bargain involves an obligation to meet, to bargain in good faith, and to make every reasonable effort to enter into a collective agreement. Part of the obligation to bargain in good faith is the requirement to disclose pertinent information so that both parties can

> intelligently appraise proposals. This blends with and promotes the goal of full and open discussion between the parties.
>
> A duty to disclose information typically arises in two cases. In the first, the union requests relevant information at the bargaining table, thereby creating an obligation on the employer to respond honestly. See: *U.N.A. v. A.H.A et al* [1994] Alta. L.R.B.R. 250. Here, Local 30 made no request to the City about the reorganization, so the obligation did not arise.
>
> The second case arises where the employer makes a *de facto* decision that will have a significant impact on the employees in the unit. Such a decision creates an affirmative duty on the employer to disclose that decision to the union in negotiations, even though the union has not asked about it. See: *UFCW Local 280-P v. Gainers Inc.* [1986] Alta. L.R.B.R. 529 at 550/551.

43 It is the second type of disclosure that is at issue here. As has been noted elsewhere, the duty "... goes beyond mere disclosure and requires there be full and frank discussion over the issues arising out of the disclosure": see *Retail Wholesale Canada Local 285, Division of National Automobile, Aerospace, Transportation and General Workers of Canada* v. *Brewers' Distributor Ltd.*, [2000] Alta. L.R.B.R. 298 at para. 55.

44 The rationale behind the duty was explained in *CEP, Local 255G* v. *Central Web Offset Ltd. et al.*, [2008] A.L.R.B.D. No. 52, [2008] Alta. L.R.B.R. 289 at para. 139 ("*Central Web*"):

> The rationale for this rule is that the Union is entitled to bargain on the basis of the enterprise as it will be in the immediately foreseeable future, not as it was before the management decision. To not disclose a management decision with a major impact on the bargaining unit is tantamount to a misrepresentation. And it is a misrepresentation that can deprive the Union of the ability to negotiate about the real issues in the workplace -- perhaps to address issues that might influence the decision to close, perhaps (and more likely) to bargain about the implications of the closure. In the worst case, a failure to make disclosure can result in a collective agreement that will immediately become irrelevant.

45 The duty of unsolicited disclosure only applies to decisions that have a significant impact on employees in the bargaining unit. There was no suggestion from the parties or the evidence that the decision to layoff of all the full-time firefighters was not significant to employees in the bargaining unit. The decision affected an entire classification of employee. It had the potential to affect others in the bargaining unit in terms of their work. To the extent there may be disagreement on the point, we find the decision to layoff the full-time firefighters

had a significant impact on employees in the unit and triggered an unsolicited duty to disclose.

With respect to the issue of when a decision or *de facto* decision may be said to have been made and the consequences that arise therefrom, Vice-Chairperson Schlesinger commented as follows commencing at paragraph 47:

> **47** As in many cases of this sort, the fundamental difficulty is determining when plans become sufficiently concrete that one can conclude a *de facto* decision has been made. It is clear from this Board's jurisprudence that a *de facto* decision is something more than: a serious possibility, an effective recommendation, or even a highly probable decision: see *CUPE*, *supra* at page 110. Instead, the decision must be sufficiently certain that one can say the decision has effectively been made. Each case has to be judged on its own facts. Thus, a sale of a business that is conditional on certain things can be sufficiently certain to demand disclosure; so too, can reorganization plans that are in place, but awaiting final approval: see: *Central Web*, *supra*, and *CUPE*, *supra*.
>
> **48** Once a *de facto* decision is made, an employer must disclose its plans to a union with sufficient detail to enable the union to have an understanding of the extent of the changes that are planned. After all, the whole raison d'être for the duty to disclose is to require the disclosure of "pertinent information so that both parties can intelligently appraise proposals": see quote from *CUPE*, *supra*.
>
> **49** But, the Board's jurisprudence also make the point that an employer need only go so far in satisfying its obligation to disclose. A union that ignores the disclosure once made or fails to take reasonable steps to allow the disclosure to take place will be at risk of having its complaint dismissed. See, for example: *Glass, Molders, Pottery, Plastics & Allied Workers International Union Local 371* v. *Barber Industries*, [1989] Alta. L.R.B.R. 130 at page 148, where the Board indicates that an employer need not provide the union with a "play-by-play commentary" of its decisions; and *HSAA et al* v. *Peace Regional Emergency Medical Services*, [1998] Alta. L.R.B.R. 460, where the employer informed the union of organizational changes that would impact employees, but the union took no steps to question or discuss the matter.

In the result, the Alberta Board determined that a *de facto* decision was made when "a firm course was set for the layoff of the full-time firefighters" which occurred one month prior to the employer making even minimal disclosure to the union. Only later did the employer provide "the type of information it was required to disclose". The Alberta Board therefore

concluded that the employer committed an unfair labour practice. At paragraph 65, it commented on the appropriate remedy to be fashioned in the circumstances, noting that "a more viable alternative is to award damages as compensation for the lost opportunity to bargain". Ultimately, the Board reserved jurisdiction on the issue of remedy. See also the Alberta Labour Relations Board's decision in *Calgary Board of Education Staff Assn. v. Calgary School District No. 19*, [2003] L.R.B.R. LD-061, where that Board dismissed the union's application on the basis that it was unable to conclude that a decision regarding staff reductions was "so certain that there was an obligation" on the Employer to make a disclosure.

The obligation of timely disclosure of information during bargaining was recently discussed again by the Alberta Labour Relations Board in *Sheperd's Care Foundation and AUPE (Re)* , [2016] Alta. L.R.B.R. 33. In that case, the union complained that the employer committed unfair labour practices by failing to disclose a decision it made to contract out services resulting in the layoff of numerous employees and by failing to give the union adequate time to respond to that decision in the context of collective bargaining. At paragraph 19, Vice-Chairperson Kanee noted that the "purpose of disclosure is to promote informed bargaining around significant decisions" which requires "more than mere disclosure". The Board noted that the failure to disclose a management decision with a major impact on the bargaining unit was tantamount to a misrepresentation that can deprive the union of the ability to negotiate about real issues in the workplace. In that case, the employer acknowledged that it had been contemplating the "major change" for several months but chose not to discuss it with the union or otherwise seek the union's input. At paragraph 28, the Alberta Board concluded that it is a violation of the duty to bargain for an employer to unilaterally implement its decision after notice to commence collective bargaining had been served "without a frank and full discussion with the union, simply because it perceives the discussion will be futile". Jurisdiction was reserved with respect to remedy.

The Faculty Association maintains that the University was under a duty to disclose its communications with the Provincial government regarding the mandate and its implications for the ongoing collective bargaining. It insists that a *de facto* decision requiring unsolicited disclosure was made by the University on October 6, 2016 when the Provincial government issued an order to the University respecting the mandate. The University contends that it was under no obligation to make any such disclosure until a material change in circumstances had actually occurred and the University made a final or *de facto* decision regarding the change. It is the position of the University that there was insufficient clarity regarding the government's direction until October 25, 2016 when the compulsory direction was put in writing, at which point the University made timely disclosure of this development to the Faculty Association. Counsel asserted that the University continued to challenge the government on its direction until such time as it concluded that resistance was futile. The University adds that its officials made earlier pointed comments to the Faculty Association and that it failed to follow up or ask for further information. According to the University, the issue is moot in any event as the University did exactly what the Faculty Association would have wanted it to do had the information been disclosed earlier.

Turning to the facts of the present case, during a bargaining session held on May 27, 2016, the University advised the Faculty Association that it intended to counter the Association's monetary proposal. It expressly stated that it did not intend to propose a 0% increase but that it wanted to take time to "seek clarity on our position" having regard to the new government's position, the stock market and whatever else informed its financial position. The parties agree that it is not uncommon for Provincial governments to issue mandates respecting compensation that apply to the University. On September 13, 2016, the University tabled a comprehensive settlement proposal that included a multi-million dollar wage increase including a general salary increase and some market adjustments. The University's reply to the Application pegged the costs for the first year of the proposal at nearly $5 million. The University publicized its offer heralding that it "would result in the

average UMFA member's salary being increased by 17.5% over four years". The University indicated that it viewed its proposal as an attractive package offer but that it expected further discussions would take place and that the positions advanced were not necessarily the University's final positions.

However, commencing on September 30, 2016, the University engaged in the first of numerous communications with Provincial government officials with respect to the imposition of a new government mandate on compensation. On that date, a government official indicated, amongst other things, that "it would not be good for the University's relations with the new government" if the University gave anything more than it already had on the table. There is no evidence that the University resisted this direction or otherwise asserted its independence. When bargaining recommenced on October 3, 2016, the University did not share any details of this discussion with the Faculty Association. At the hearing, Juliano acknowledged that he was sure that the Faculty Association "would have liked to know about it". But, even when the Faculty Association made a counter-proposal with respect to monetary issues, Juliano merely responded on behalf of the University that: "I'll take that back, but when we gave you our money we said this was pretty much all you'd get". He made no mention of the fact that the Provincial government had taken an interest in the ongoing negotiations and had warned the University that it would not be good for its relations with the new government to offer any more than it had already proposed.

The position of the Provincial government with respect to the mandate was made clear at a face-to-face meeting involving Juliano and Irving on October 6, 2016. Juliano said he had no idea of the "the bomb that was going to be dropped". At that meeting, the University was clearly told:

a) A new mandate was going to be imposed upon the University requiring a pause (meaning 0%) in any wage increases for one year;

b) That the government's direction respecting the mandate was an order and not a request and non-participation by the University in the mandate was not an option;
c) Any failure to cooperate with the new mandate would "lead to some financial consequences" for the University;
d) The government was concerned that a wage increase for members of the Faculty Association would set a pattern for broader public sector bargaining that could effectively magnify the costs to government; and
e) The discussions were confidential.

The University takes the position that there was lingering uncertainty regarding the position of government with respect to the mandate and its application to the University that was not sufficiently clarified until on or about October 25, 2016 when Irving wrote to Juliano. The University maintained that it resisted the government's mandate and continued to seek clarity from government officials. In the interim, the University contends that it made pointed comments to the Faculty Association regarding the threat of government intervention during ongoing bargaining. Juliano referred, in bargaining, to having private conversations with Provincial government officials and testified about "hinting" to the Faculty Association about its concerns with the government's comments. However, the University failed to disclose sufficient detail of its discussions with government so as to enable the Faculty Association to understand and respond to those challenges. Indeed, the University invited the Faculty Association to do its own "risk assessment", but failed to disclose sufficient details of what was occurring to allow a meaningful assessment of the risk to be undertaken.

Moreover, the Board is satisfied that a number of the various hints and cryptic comments made by the University to the Faculty Association during this time period obscured rather than shed light on the new government mandate and its impact on bargaining. For example, during bargaining on October 12, 2016, Juliano responded to a

suggestion that the Faculty Association was seeking "2% or less on scale" by stating that he did not know if the new government had "any tolerance for that thing" and that the government had said "other settlements at 2%" were unacceptable. But not later than October 6, 2016, Juliano absolutely knew that the government had no tolerance for wage increases of that magnitude. Similarly, during bargaining on October 21, 2016. Juliano indicated that "the University has not made a decision as to how it will respond to the government's viewpoint" and further that "the only thing I can say is that government has some pretty strong opinions about what has been happening in this round of bargaining". Of course, the University knew that the government had not merely expressed a viewpoint or strong opinions; we now know that government issued a clear and direct mandatory order to the University and noted that any failure to comply would lead to unspecified negative consequences. Even as late as bargaining on October 26, 2016, after the University received what it referred to as the decisive email from Irving, Juliano failed to disclose the information to the Faculty Association.

The Board also considered the University's position that it continued to battle the government on the issuance of the mandate and to seek clarity with respect to its terms. The University insists that the outcome of the discussions between it and the government was not so certain as to trigger the obligation to make an unsolicited disclosure until October 25, 2016 when Irving provided written confirmation of the mandate and its compulsory nature.

The Board does not agree with the University's submission. The new government mandate and its compulsory nature was very clearly outlined by Irving at the October 6, 2016 meeting. Although the University had ongoing discussions with government officials following that meeting, the focus of those discussions concerned messaging and communications. Despite the fact that subsequent to October 6, 2016 the University made inquiries regarding whether the government would consider somehow exempting it from the new mandate given the late stage of negotiations, the Board does not accept that the

University ever seriously considered exercising its independence and defying the government with respect to whatever mandate it ultimately imposed. Juliano confirmed this during cross-examination when he stated that University officials talked about not complying with the government's order but that it "was never seriously considered because the consequences would be too severe". Having regard to the evidence as a whole, the Board is satisfied that on, or shortly after, October 6, 2016, the University, as indicated by its words and actions, effectively succumbed to whatever directives the government elected to impose with respect to not only the mandate but any related government decision respecting confidentiality and communications surrounding the mandate. The University's challenges to government centered on how the government would publically communicate its order (principally to protect the University's legal position and the perceptions of its community), not the imposition of a mandate itself. Moreover, the *de facto* decision requiring disclosure did not, as argued, only crystalize following receipt of Irving's October 25, 2016 email. Indeed, Juliano, in response to an inquiry from counsel for the Faculty Association, specifically denied, in writing, that the October 25, 2016 correspondence from Irving constituted the change in circumstances and, instead, maintained that the change occurred through a series on meetings, telephone conversations and written communications starting on October 6, 2016.

The duty to bargain in good faith requires the timely disclosure of *de facto* decisions that will have a significant impact on the employees in the unit. In the present case, a senior Provincial government official made it clear to the University on October 6, 2016 that it was imposing a new compulsory mandate and that there would be consequences to the University for non-compliance. The imposition of a new mandate, and the University's decision to capitulate to the government order, was sufficiently certain as to constitute a *de facto* decision immediately following the government's communication on October 6, 2016. The decision concerned wages and, obviously, had a significant impact on employees in the unit. Accordingly, there was an obligation to disclose that critical information to the Faculty Association at that point in time. The University had many

opportunities to make appropriate disclosure during bargaining. Instead, the Faculty Association and its members were effectively left in the dark regarding a decision that had a significant impact on bargaining until the afternoon of the first day of mediation on October 27, 2016. Absent the information which related to a matter of such fundamental importance (wages), the Faculty Association and its members could not realistically assess their positions and priorities or formulate a meaningful response to the changed circumstances.

The duty of unsolicited disclosure requires there be full and frank discussion about issues arising out of the disclosure. Hints, vague comments, and cryptic messages of the kind the University made to the Faculty Association in this case do not satisfy the obligation to make unsolicited disclosure. The decision to provide hints rather than meaningful disclosure was clearly motivated, at least in part, by the University's agreement to keep its communications with the government confidential. The Board agrees with the submission of the Faculty Association that there is no evidence that the University gave any meaningful consideration to challenging the government's direction to keep the discussion confidential or that there was any thoughtful reflection on the impact of failing to disclose it having regard to the University's obligation to bargain in good faith. The University's vague and often misleading statements to the Faculty Association did not enable it, or its members, to have any reasonable understanding of the relevant circumstances or provide sufficient pertinent information to allow for an intelligent appraisal of the situation and the bargaining proposals. Furthermore, the direction from government officials not to share the information with the Faculty Association does not constitute a viable defense to the complaint nor otherwise exculpate the University in the circumstances. The Board also rejects the University's suggestion that the Faculty Association was somehow obliged to follow up and question the cryptic and vague hints that it offered up.

The Board is satisfied that the University's failure to disclose this information at bargaining was tantamount to a misrepresentation and constituted a breach of section

63(1) of the *Act* and an unfair labour practice pursuant to section 26. As a result of the failure of the University to make appropriate and timely disclosure, rational discussion with respect to all of the issues between the parties was compromised. In the circumstances, the University failed to provide full and candid disclosure and, as such, did not bargain in good faith and make every reasonable effort to conclude a collective agreement.

D. Changing bargaining position - Withdrawal of Compensation Offer

The Faculty Association complains that the University's decision to withdraw its wage offer was not justified and constituted a breach of the duty to bargain in good faith. The University responded that, in point of fact, it did not "withdraw" its September 13, 2016 offer. Rather, it says that the wage offer was part of a comprehensive package proposal, which did not permit the Faculty Association to accept the wage offer but reject the balance of the proposal. Noting that the Faculty Association rejected the September 13, 2016 package, the University contends that there is no basis to assert that it retreated from its bargaining proposal. Counsel for the University added that there is no legal basis to suggest that a previously rejected offer somehow continues as an obligation enforceable against the party who made the offer.

Factual context is critical here. The University commenced negotiations by making a "money only" offer on March 9, 2016 in which it proposed a 1.5% wage increase plus certain market adjustments of $1,500 for many academic ranks and additional increases to those in the Faculty of Dentistry and the Asper School of Business. Following an ultimately unsuccessful round of "expedited bargaining", the parties recommenced bargaining in May of 2016 at which time the Faculty Association proposed a one-year collective agreement that included a 2% wage increase plus comprehensive market adjustments and stipend increases. Juliano indicated that the University wished to take time to assess various factors including the new Provincial government's position prior to responding with a counteroffer to the Faculty Association's monetary proposals.

Ultimately, the University responded with the wage offer at issue in this case which was contained in the September 13, 2016 proposal which the University characterized as a "Comprehensive Settlement Proposal". In the Executive Summary attaching the proposal, Juliano indicated:

> The University of Manitoba and the University of Manitoba Faculty Association ("UMFA") have engaged in lengthy and productive discussions regarding many issues of concern to the institution and its faculty. In order to help bring the negotiation of a revised collective agreement to a conclusion, the University has prepared this comprehensive offer of settlement. It is hoped that this offer will be acceptable to the Association, or in the alternative, provide a useful tool to guide continuing discussions.

The Introduction to the proposal makes the following additional comments:

> **Comprehensive Settlement Offer**
>
> Throughout the lengthy bargaining process, the interdependencies of the various matters at issue have become clear. In particular, many UMFA proposals which could be characterized as "language" or "governance" issues in fact have the potential to result in substantially increased costs, or loss of management control over costs. Other proposals introduce uncertainty into the collective agreement, which could fuel the frequency of disputes, resulting in additional costs and potentially damaging important relationships.
>
> The University is therefore only prepared to commit to a negotiated settlement as a complete package. Although this comprehensive proposal contains a monetary offer, this offer is premised on (and contingent on) satisfactory resolution of all the issues, in a way that is consistent with the University's stated bargaining principles and achieves reasonable and certain costs throughout the term of the new collective agreement.

To this Juliano, at the bargaining table, added that it would be "wonderful if you just accepted it, but we expect some discussions". He made additional comments including that a change to one article, might affect how it felt about another article, and said that the University's positions were not necessarily its final positions. This was not characterized as a "take or leave it" offer or final offer.

Following the September 13, 2016 comprehensive settlement proposal, the parties continued to have discussions. During a bargaining session held on September 26, 2016,

Juliano indicated that the University would continue to work on revising proposals and negotiating with the Faculty Association. At that same meeting, the Faculty Association made a proposal regarding a number of provisions, but did not address wages or market adjustments. By September 29, 2016, the University had revised a number of its proposals which the Faculty Association viewed as improving upon the September 13, 2016 offer.

On October 3, 2016, collective bargaining continued at which time the Faculty Association provided a counter proposal respecting wages. That proposal was for a 2% general salary increase in addition to market adjustments. At that time, the Faculty Association indicated that the cost of this proposal (which it pegged at $7 million) was less than half of the cost of its original offer. Juliano's response at the time was telling. He did not indicate that the University's offer was off the table by virtue of his view of the common law principle of offer and acceptance. Instead he commented: "I'll take that back, but when we gave you our money we said this was pretty much all you'd get". Later, during bargaining that day, he again addressed the Faculty Association's financial proposal, asking "is there a logic to moving to 30% of your original number?". When bargaining continued on October 12, 2016, the University again did not indicate that its monetary offer was off the table having regard to the Faculty Association's counteroffer.

Indeed, it was not until a bargaining meeting on October 21, 2016 that this notion was first presented to the Faculty Association. On that date, Juliano told the Faculty Association that he wanted to "officially record that we are rejecting UMFA's last proposal on money". He expressed his view that the Faculty Association's monetary proposal was "beyond anything that we could justify in the current economic circumstances". The University further indicated that the parties needed to make more progress on "outstanding language issues" prior to getting back to a money discussion. Juliano also stated that the University's monetary offer was no longer on the table due to the law of offer and acceptance; however, it was maintaining all of its other proposals. Notwithstanding these comments to the Faculty Association, in communications on October 21, 24, and 26, 2016,

the University suggested to the Provincial government that it could not backtrack from its previous or latest offers. In its correspondence to the government, the University made no reference to its position that these offers had been countered and, as a result, rejected.

The Board has reviewed the cases submitted by the Employer in support of its position that it did not withdraw its September 13, 2016 wage offer. While a number of those cases, as shall be discussed below, express useful principles, they do not support the position that the Faculty Association's counteroffer somehow operated as a rejection of the University's monetary offer such that the University was thereafter permitted to fundamentally change its bargaining position with respect to wages. 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.

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. As noted in G. W. Adams, *Canadian Labour Law, supra*, at 10:1820, where "a dispute has been defined and an agreement almost reached, the tabling of new demands must be accompanied by compelling evidence" justifying them in order to avoid a finding of bad faith.

Having regard to the foregoing, the Board does not accept the position of the University that it did not retreat or move backwards in its bargaining position due to the Faculty Association's counteroffer respecting wages. The University's position in this regard, first announced to the Faculty Association on October 21, 2016, is best characterized as a contrived attempt to extricate itself from what it believed was a difficult position which it found itself in having been ordered by the Provincial government on October 6, 2016 to comply with a new mandate requiring a pause in wages.

That, however, does not end the matter. Not every instance of a party resiling from an offer or tabling new demands constitutes a breach of the duty to bargain in good faith. Indeed, there is no presumption that such conduct is bad faith. As was noted in *Fashion Craft Kitchens Inc. v. C.J.A., Local 3054*, [1980] 1 Can. L.R.B.R. 21 at paragraph 23, "the line between reneging that offends and reneging that does not offend the duty to bargain in good faith is not easy to draw and must be determined with regard to the circumstances of each case". Reneging on an offer or introducing a new demand "in furtherance of an unlawful intention to make no collective agreement, or has the predictable effect of destroying the framework for decision-making at the bargaining table", is contrary to the duty. However, not every reversal of position will constitute a breach of the *Act*.

In *R.C.I.U., Local 1979 v. Wilson Automotive (Bellville) Ltd.,* [1980] 3 Can. L.R.B.R. 476, a case upon which the University and the Faculty Association relied, the Ontario Labour Relations Board considered whether a company breached the duty to bargain in good faith by introducing a new ingredient into negotiations at the point in time that the union was prepared to settle on the company's terms. In that context, the Ontario Board commented on the concept of voluntarism and the ability of a party to change its position in bargaining as follows at paragraph 7:

> 7 We start with the long held view of this Board that "the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment." (See the DeVilbiss (Canada) Ltd.

case, [1976] OLRB Rep. March 49 at para. 13.) This Board recognizes the concept of voluntarism as relied upon by the respondent company. As a general proposition a party is free to take whatever position best satisfies its self interest providing it maintains the intention of concluding a collective agreement. The difficult cases arise where a party tables a position which it maintains is legitimately in its self interest but which the other side maintains is destructive of the process or designed to avoid a collective agreement and to undermine the trade union. In the Pine Ridge District Health Unit case, [1977] OLRB Rep. Feb. 65 the Board noted:

> Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, "Take it before I change my mind" reflects a widely accepted bargaining precept that has its proper application in collective bargaining...

(See also *Toronto Jewellery Manufacturers' Association* [1979] OLRB Rep. July 719).

However, the Board's views as expressed in the *Pine Ridge District Health Unit* case, *supra,* cannot be taken as a carte blanche to alter one's bargaining position at any time and for any reason. Clearly, an alteration of position designed to wreck the critical decision-making framework necessary for collective bargraining [sic] would be contrary to section 14 of the Act. (See the *Graphic Centre* (Ontario) *Inc.* case, [1976] OLRB Rep. May 221.) Similarly, the move to a position tailor-made for rejection would betray an intention not to conclude a collective agreement contrary to the duty imposed by section 14 of the Act. It follows, therefore, that while the parties may govern themselves by self-interest and may alter its bargaining positions in response to changes in relevant conditions, a party which alters its bargaining position may leave itself open to the allegation that it is bargaining in bad faith. It falls to the Board in these cases to examine the evidence in light of the labour relations dynamics and draw the appropriate inferences.

In the result, the Ontario Board concluded that the company failed to negotiate with the intention of concluding a collective agreement and, as a result, violated the duty to bargain

in good faith. The possibility of a party to bargaining changing its mind was similarly noted in *C.L.G.W. v. Westroc Industries Ltd.*, [1981] Can. L.R.B.R. 315 at paragraphs 25 and 26.

It is common-ground between the parties that labour relations boards have recognized that a party may retreat from a bargaining position if there is a material change in circumstance. The Board must scrutinize the reasons for the change in bargaining position in order to determine whether the change is justified having regard to the particular facts of the case. The parties referred to a number of cases in which boards have considered whether an employer was entitled to withdraw a wage offer or otherwise retreat from a bargaining position, including cases where it was argued that the said change was motivated by economic or public policy developments.

For example, both parties relied upon the Ontario Labour Relations Board's decision in *O.P.S.E.U. v. Municipal Property Assessment Corp.*, [2010] O.L.R.B. Rep. 425. That case concerned the decision of an employer to withdraw an offer of wage and benefit increases as a consequence of the introduction of the provincial budget and legislation respecting public sector compensation restraint applicable to non-union employees. Commencing at paragraph 10, the Ontario Board commented that a party is entitled to resile from a position as a result of a changed assessment of what constitutes its self-interest; however, the duty to bargain in good faith requires that any such changed assessment must be *bona fide* and, further, that even a *bona fide* decision may undermine the basis for negotiations and thereby violate the legislation. Rejecting the union's argument that the withdrawal of the wage proposal destroyed the framework for decision-making at the bargaining table, the Ontario Board commented at paragraphs 12 and 19 as follows:

> 12 This argument is devoid of the contextual analysis which has been the hallmark of the Board's jurisprudence with respect to the section. Withdrawal of agreed upon wage increases, let alone proposals such as in the case at hand, has, in certain circumstances, been found not to breach the section: *Hamilton Board of Education and City of Thunder Bay*....

> 19 In terms of whether any weight may be given to non-legislative statements, we note that in *Hamilton Board of Education* a public statement by the Premier that the Province was going to significantly reduce funding to public agencies was found by the Board to warrant reconsideration by the employer of its position with the result that the decision of the Board of Education to not ratify a memorandum of agreement concluded by its bargaining committee with the union was not a breach of what is now section 17.

The Ontario Board concluded that, while the provincial Budget and the public statement of expected fiscal restraint did not compel the employer to take its wage proposal off the table, it nevertheless constituted a material change in circumstances which the employer was entitled to take into account in recalibrating its negotiating position. In so holding, the Board commented that negotiations had not broken down and there was no suggestion that the employer was not prepared to discuss the possibility of increases to wages and benefits.

In the case of *O.P.E.I.U., Local 527 v. Hamilton (City) Board of Education*, [1993] O.L.R.B. Rep. 308, referred to in the above quotation, the Ontario Board reflected on the reality of collective bargaining in the broader public sector. That case concerned an allegation that the employer breached the duty to bargain in good faith when its elected trustees failed to approve a proposed settlement placed before them for ratification on the basis of "new economic realities which had not crystallized when the original deal was struck". At paragraphs 64 to 67 the Ontario Board concluded as follows:

> 64 This is not a case in which there was a sudden, unexplained change of heart, nor was the Board's decision to reopen bargaining just a matter of "politics" or shifting alliances among the Board's members. The situation really was different in February from what it had been before; and that new reality was underlined by the Premier's grim message of January 21, which confirmed and heightened concerns that were already emerging.
>
> 65 In our opinion, the circumstances faced by the Board on February 20 had shifted sufficiently and generated sufficient economic uncertainty, to warrant reconsideration of the Board's earlier collective bargaining stance, without breaching its statutory obligation to "bargain in good faith and make every reasonable effort to make a collective agreement". There was no failure to

> recognize or intent to undermine the union (as there was, for example, in Wilson Automotive). Nor was the Board's decision a pretence or subterfuge. It did not seize on the Premier's speech as a device to avoid a collective agreement with OPEIU. The change in circumstances was real and compelling.
>
> 66 In the broader public sector, the Provincial Government funding agency is always a "ghost at the bargaining table" which influences, to a greater or lesser degree, what subordinate bodies are willing or able to pay (see for example: St. Joseph's Hospital, 76 CLLC para. 16,026). But in this case, the "ghost" had rattled its chains and begun to speak. And the message was clear: the earlier warnings were warranted, the economic situation was serious, and the Province intended to impose severe financial restraints upon itself and its dependencies. Agencies receiving transfer payments were expected to do the same; and in light of the Board's existing financial woes, we find that it was entitled to rethink its financial commitments, including those associated with collective bargaining.
>
> 67 We do not say that the Board was entitled to REFUSE to bargain [emphasis added in upper case text]. On the contrary. It was obliged to bargain with the union, inter alia, about the new economic parameters, and inform itself about those matters so it could bargain meaningfully. (See: C.I.L. [1976] OLRB Rep. May 199). But it was also entitled to reconsider its previous bargaining position, and assess whether, given the change in funding, the teachers' bargaining pattern should be extended to the rest of its employees - including those represented by OPEIU.

Accordingly, the complaint was dismissed and the parties, who had suspended collective bargaining pending the Ontario Board's decision, were directed to go back to the bargaining table and bargain in good faith.

The University is established under provincial legislation. The Lieutenant Governor in Council appoints the majority of the members of the University's Board of Governors. In addition, the evidence indicates that the University is profoundly dependent upon the government financially. It is not contested that the University was ordered by the Provincial government, under warning of consequences, to comply with the new mandate requiring a pause (meaning 0%) in any wage increases for one year. The University complied with the government's order having determined that the consequences of not doing so would be too severe in light of its financial dependency upon government and the substantial

power and influence that the government could wield with respect to University governance.

Although the Faculty Association is correct in asserting that the University had a choice about whether or not to comply with the government's new mandate, the Board concurs with the University's position that merely because it was theoretically possible for the University to disobey the government's order, it was not, as a result, legally obliged to do so regardless of the potentially severe consequences that could result. Moreover, the fact that the Provincial government did not pass legislation compelling the University to comply or make a public statement that it was directing compliance with the new mandate, does not alter the Board's conclusion that the government's direct order respecting the mandate constituted a material change in circumstances which the employer was entitled to take into account in recalibrating its negotiating position and withdrawing its financial offer. The Board is, therefore, satisfied that, in the circumstances, the University's decision to resile from its offer does not offend section 63(1) of the *Act*.

E. Authority to Bargain

The Faculty Association contends that at, and after, the time that the University made the decision to withdraw its wage offer, it no longer maintained the authority to engage in meaningful bargaining. As a result, the Faculty Association submitted that the entity dictating bargaining was actually the Provincial government and not the University. In support of this position, the Faculty Association referred to Juliano's written communications to the PET and others in which he expressed frustration that government representatives were "second guessing and essentially dictating, not just the mandate, but our bargaining strategy" and engaging in "micromanaging". The University denied the allegation and maintained that its decision to comply with a government mandate does not suggest that it was not clothed with sufficient authority to bargain. Noting that governments have historically imposed mandates, the University maintained that the mere fact that there

were parameters placed around bargaining does not establish that the University ceded its authority to bargain.

The Board agrees with the proposition that an employer's bargaining representatives must be armed with sufficient information and authority that they can engage in meaningful bargaining (see *Saskatchewan (Re)*, [1993] S.L.R.B.D. No. 20 at pages 7 and 8). We do not, however, accept the Faculty Association's position that the University lacked appropriate authority to engage in meaningful collective bargaining in the present case.

In *Saskatchewan Health-Care Assn. (Re)*, [1993] S.L.R.B.D. No. 28, the Saskatchewan Labour Relations Board considered whether the employer failed to ensure that the requisite authority and direction were obtained from the Government of Saskatchewan, which the union asserted was the "real principal" in the negotiations. At page 6 of the decision, the Saskatchewan Board referred to the "delicate task of evaluating the bargaining process, to determine whether there is any employer conduct which endangers or threatens to subvert the process, while at the same time not intervening so heavy-handedly that the process ceases to reflect the strength, aspirations and historical relationship of the parties themselves". In addition, it commented on the close connection that exists between institutions that operate in the public sector and the government. In this regard, commencing at page 6, it stated:

> We have suggested earlier that there is a close connection between decisions made by the Government of Saskatchewan in the health care field and the collective bargaining which takes place between the Saskatchewan Health-Care Association and the unions representing employees in its member institutions. Those institutions and organizations which operate in the public sector depend for their existence, their prosperity and the definition of their objectives on decisions which are made by the Government according to the exigencies of democratic accountability and public priorities. In collective bargaining terms, this means that both the course of bargaining and the substantive content of the ultimate agreements are influenced by the choices which are made by the politicians who are responsible for the setting of the public policy agenda.

> In the case of bargaining between the Government and its own employees, this connection is of a fairly overt and direct nature. In the case of other public sector institutions, such as those which provide health care, the means by which this influence is exercised may be less direct. Nonetheless, the significance of governmental funding and policy decisions for collective bargaining in the health care sector is undeniable.

In the result, the Saskatchewan Board concluded that the employer obtained and relayed such information as was appropriate in its role as the party responsible for collective bargaining and, therefore, dismissed the application.

In every bargaining situation, external factors may influence or even dictate proposals and strategy. There is a longstanding practice of the Provincial government issuing mandates that impose varying levels of constraint or limitation upon the University in collective bargaining. Indeed, the Board heard evidence that this is not the first time that the Provincial government issued a mandate calling for a 0% wage increase. The complicating factor in the present case was that the government elected to order that the University adhere to a new mandate at a late stage in the negotiations, knowing that compliance with its order would necessitate the University resiling from its previously tabled offer. However, the University ultimately made the decision to comply with the mandate and instructed its lead negotiator, Juliano, accordingly. The University's negotiators made inquiries with government officials about the mandate and discussed the potential effects that it would have on bargaining. Just because the mandate resulted in strict parameters being established with respect to the University's monetary proposals does not, in the circumstances, mean that the true decision-maker was not at the bargaining table. The Board is satisfied that the University's negotiators had sufficient information and authority to engage in meaningful collective bargaining. Indeed, the parties continued to bargain and ultimately concluded a collective agreement. The failing of the University, as noted above, is that it did not disclose the decision regarding the new mandate in a timely fashion. It is that conduct which violated the *Act*, not the fact that its financial proposals were affected by the mandate that was adopted.

F. Pressing to Impasse an Unacceptable Offer

The Faculty Association also submitted that the University's decision to remove wages from the bargaining table constituted an unfair labour practice in that it pushed a clearly unacceptable offer to impasse. It further argued that the University exacerbated the problem by failing to offer anything of substance on governance and other issues during mediation. The University rejected that suggestion and submitted that it did not propose a 0% wage increase in order to undermine negotiations or to thwart achieving a collective agreement. Moreover, the University maintained that the issues over which the parties reached an impasse were all proposals demanded by the Faculty Association relating to governance. The University also pointed out that the Faculty Association proposed a one-year agreement with a 0% increase at the conclusion of mediation and that it reiterated that 0% was acceptable on the first day of conciliation.

The parties do not disagree over the legal principle that prohibits a party from pressing a clearly unacceptable position to impasse. It is, therefore, not necessary, in the Board's view, to review the authorities cited by the parties respecting that issue in any great detail. The key principle was concisely summarized by Cory J. in *Royal Oak, supra,* at paragraph 43 as follows:

> 43 Section 50(a)(ii) requires the parties to "make every reasonable effort to enter into a collective agreement". It follows that, putting forward a proposal, or taking a rigid stance which it should be known the other party could never accept must necessarily constitute a breach of that requirement. Since the concept of "reasonable effort" must be assessed objectively, the Board must by reference to the industry determine whether other employers have refused to incorporate a standard grievance arbitration clause into a collective agreement. If it is common knowledge that the absence of such a clause would be unacceptable to any union, then a party such as the appellant, in our case, cannot be said to be bargaining in good faith.

It is contrary to the obligations imposed by section 63(1) of the *Act* to construct unmanageable bargaining gaps that lead inevitably to impasse. For example, in *Buhler, supra*, this Board concluded, at paragraph 62, that the employer violated the *Act* when it

advanced proposals that "could not have been accepted by the Union and still have them maintain credibility with its members".

However, not every instance in which an impasse arises is evidence of a breach of the duty to bargain in good faith. As the Alberta Labour Relations Board noted in *North Central East Alberta School Authorities Assn. v. Alberta Teachers' Association*, [1988] Alta. L.R.B.R. 144, the fact that parties formulate priorities and tough bargaining ensues does not necessarily indicate that a breach of the legislation has occurred. At paragraph 32, the Board dismissed the unfair labour practice allegations and stated:

> 32. In this case the parties are engaged in hard bargaining and it resulted in an impasse on February 29, 1988. But that impasse is not, by itself, evidence of bad faith bargaining. In the absence of such evidence it is not up to this Board to interfere in the results of the parties' hard bargaining. Each of the parties had its own priorities as to what was to be achieved in this round of collective bargaining. Neither party was prepared to accept the priorities established by the other of them. They had no obligation to do so as long as they were prepared to meet and negotiate and to make reasonable efforts to enter into a collective agreement. This they did. NCESAA thought the cut in government funding in early 1987 justified its position of engaging in concession bargaining. ATA thought otherwise and wanted to catch up to the provincial average teacher's salary. Those disparate goals led to the tough bargaining. However, it is not for us to resolve the consequences of that tough bargaining. Rather the parties must seek that resolution through further bargaining and in view of the different circumstances now prevailing because of the strike.

A party to collective bargaining is free to take whatever position satisfies its self-interest and to engage in hard bargaining providing that it maintains an intention to conclude a collective agreement and does not table positions that are destructive of the collective bargaining process or designed to avoid a collective agreement and undermine the other party.

In the present case, the University withdrew its wage offer following the Provincial government's direction with respect to a new mandate. As noted above, the Board is satisfied that the decision to withdraw the offer was made owing to a material change in

circumstances. We are not persuaded that the University's decision in this regard was motivated by an unlawful intention to avoid making a collective agreement. Nor does the Board believe that the University's positions respecting wages and governance issues, assessed objectively, were untenable positions pushed to impasse in violation of the duties set forth in section 63(1) of the *Act*. As noted above, this is not the first time the government has issued a mandate to the University calling for 0% wage increases. The evidence clearly indicates that immediately following the University's disclosure of the new mandate at mediation, the parties, nevertheless, continued to make reasonable efforts to conclude a collective agreement. The Faculty Association accepted the 0% wage pause without prejudice to its ability to make an unfair labour practice application and doggedly pursued resolution on governance and others issues of importance to its members. Although the parties reached an impasse regarding those issues and a legal strike was commenced, there is no evidence that the parties were engaged in anything other than hard bargaining. Ultimately, that impasse was broken through the efforts of the parties to identify solutions that addressed the Faculty Association's concerns regarding governance and related matters. Accordingly, the Faculty Association's complaint that the University pressed a clearly unacceptable position to impasse is dismissed.

G. Cause of the Strike

The Faculty Association contends that the three-week long strike was caused by the University's failure to comply with the duties set forth in section 63(1) of the *Act*. The evidence upon which this claim is principally founded is the University's own communications. The Faculty Association pointed, in particular, to Juliano's comment to a senior government official on October 7, 2016 (the day after Irving clearly set forth the new mandate and its mandatory nature) that: "based upon conversations this week, I think there is a high likelihood of a strike, and perhaps a long one". In addition, the Faculty Association referred to Juliano's email to Irving dated October 24, 2016 in which he commented that "any backwards movement may lead to a lengthy strike" and President Barnard's letter dated October 26, 2016 which expressed a similar sentiment.

In response, the University attempted to explain that those comments were its efforts to pressure the Provincial government to provide written confirmation of the compulsory mandate and to deflect responsibility for any consequences of the mandate's imposition. Furthermore, the University pointed to the Faculty Association's own words and conduct which, it argued, contradicted its allegations.

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, Chernomas 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, Chernomas 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. Chernomas 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 Chernomas 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.

H. Remedies

The Faculty Association requested that the Board impose comprehensive remedies as a result of the alleged unfair labour practices. The University submitted that even if the Board concluded that it had committed an unfair labour practice, there was no labour relations purpose to be achieved by the Board awarding any remedy given the circumstances. The parties jointly requested that the Board determine whether or not an unfair labour practice had been committed and, if so, to order such remedies that the Board determined were appropriate, but to defer any decision respecting the quantum of any compensatory remedies.

The Board has determined that the University committed an unfair labour practice by failing to disclose a *de facto* decision concerning the new mandate made on October 6, 2016. It failed to disclose this decision, which had a significant impact on employees in the bargaining unit, until part-way through the first day of mediation on October 27, 2016, mere days prior to the strike deadline. The University's conduct was tantamount to misrepresentation.

A party that fails to bargain in good faith due to its failure to make required disclosures during collective bargaining effectively undermines the ability of the other party to engage in decision-making that is essential to collective bargaining. Such conduct interferes with the ability of the parties to focus on the real issues, improperly inhibits informed bargaining, and impedes rational discussion. In addition to not permitting timely discussion about the real issues, the failure to disclose decisions as required by the duty

to bargain in good faith negatively impacts the ability of the union to communicate important information about negotiations to its members, to manage their expectations, and to make the appropriate tactical and strategic adjustments to its positions.

It is, at least, equally important to consider the practical impacts of such prohibited conduct on the employees' rights under the *Act*. The rights of employees to evaluate collective bargaining positions and proposals, to participate in strike votes equipped with sufficient information concerning the real issues to make an informed decision, and to collectively engage in collective bargaining through their exclusive bargaining agent, were all imperilled by the University's conduct that constituted an unfair labour practice. Accordingly, the Board is satisfied that the University unlawfully interfered with the rights under the *Act* of the Union and the employees in the bargaining unit. It is significant, in the Board's view, that during the roughly three-week period that the University failed to disclose the decision regarding the mandate, collective bargaining continued and employees participated (from October 11 to 13, 2016) in a strike vote required prior to the commencement of any strike by virtue of section 93(1) of the *Act*. We also considered the fact that the Faculty Association prepared for and commenced mediation on October 27, 2016 without the University having made appropriate disclosure.

Labour boards have broad discretion and power to remedy unfair labour practices. The Board does not agree with the University that there is no labour relations purpose to be achieved by ordering remedies in the present case. The *Act* sets out the remedies that the Board may grant where it concludes that an unfair labour practice has been committed as follows in section 31(4):

> **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,
>
> (a) order a party which is an employer to reinstate in employment any employee whose employment has been terminated by reason of the unfair labour practice; or

> (b) order any party which is an employer to employ any person who has been refused employment by reason of the unfair labour practice; or
>
> (c) order any party which is a union to reinstate as a member of the union any person whose membership in the union has been terminated by reason of the unfair labour practice; or
>
> (d) order the party to pay to any person referred to in clause (3)(b) an amount in compensation for the diminution of income or other employment benefits or other loss suffered by the person; or
>
> (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.; or
>
> (f) where the unfair labour practice interfered with the rights of a union, employer or employers' organization under this Act, whether or not the union, employer or employers' organization has suffered any loss by reason of the unfair labour practice, order the party to pay to the union, employer or employers' organization an amount not exceeding $2,000.; or
>
> (g) order the party to cease and desist any activity or operation which constitutes the unfair labour practice; or
>
> (h) order the party to rectify any situation resulting from the unfair labour practice; or
>
> (i) order the party to do, or refrain from doing, anything that is equitable to be done or refrained from in order to remedy any consequence of the unfair labour practice; or
>
> (j) do two or more of the things set out in clauses (a) to (i).

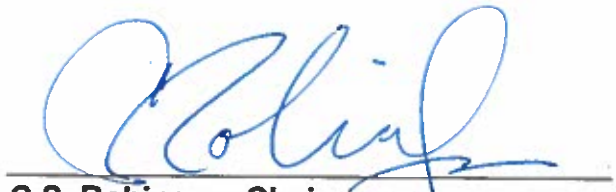
The Board is not prepared to grant the Faculty Association's request to issue remedies that would compensate it and employees in the bargaining unit for losses incurred due to the strike or to order that the University restore its monetary proposals as they existed on September 13, 2016.

However, the unfair labour practice committed by the University interfered with the rights under the *Act* of the Faculty Association and the employees in the bargaining unit. As a result, and having regard to the foregoing, the Board issues the following remedies:

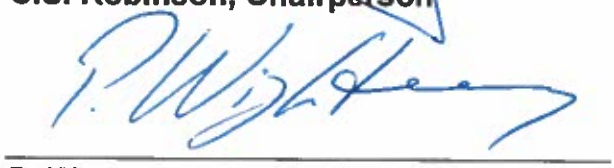
1) A Declaration that the University failed to comply with section 63(1) and committed an unfair labour practice contrary to section 26 of the *Act;*
2) An Order that the University, pursuant to clause (f) of section 31(4) of the *Act*, pay to the Faculty Association an amount not exceeding $2,000 for having interfered with its rights under the *Act*;
3) An Order that the University, pursuant to clause (e) of section 31(4) of the *Act*, pay to each employee who was in the bargaining unit when the unfair labour practice was committed an amount not exceeding $2,000 for having interfered with their rights under the *Act*; and
4) An Order that the University apologize, in writing, to the Faculty Association and all employees who were in the bargaining unit when the unfair labour practice was committed, for its conduct that the Board has determined was contrary to the *Act*.

The parties shall be given 30 days from the date of the Board's Order to agree upon the specific amounts that the University shall pay pursuant to points 2 and 3 above. If the parties are unable to agree on those amounts, the Board retains jurisdiction and shall receive submissions from the parties with respect to those remedies and determine the amounts to be paid by the University.

DATED at **WINNIPEG**, Manitoba, this 29th day of January, 2018, and signed on behalf of the Manitoba Labour Board by



C.S. Robinson, Chairperson



P. Wightman, Board Member

W. Comstock, Board Member

CSR/lo

Emailed to:

- Mr. G. Juliano, Associate Vice-President (Human Resources), University of Manitoba
- Mr. K. Dolinsky / Mr. R.C. Roy, Taylor McCaffrey LLP
- Dr. G. Fleming, Executive Director, University of Manitoba Faculty Association
- Mr. G. Smorang, Q.C., Myers Weinberg LLP

Appendix I

Authorities Filed by University of Manitoba Faculty Association

1. *Buhler Versatile Inc. (Re)* , [2001] M.L.B.D. No. 9 (QL)
2. *Royal Oak Mines Inc.*, [1996] 1 S.C.R. 369
3. D.J. Corry, *Collective Bargaining and Agreement*, 8:1000 - Obligations of the Union and Management
4. *University of Regina Faculty Association, Applicant, and Saskatchewan Indian Federated College* [1995] S.L.R.B.D. No. 5 (QL)
5. *Vale Inco Ltd.*, [2012] O.L.R.D. No. 668 (QL)
6. *R.C.I.U., Local 1979 v. Wilson Automotive (Bellville) Ltd.*, [1980] 3 Can.L.R.B.R. 476 (WL)
7. *O.P.S.E.U. v. Municipal Property Assessment Corp.* , [2010] O.L.R.B. Rep. 425 (WL)
8. *Saskatchewan (Re)*, [1993] S.L.R.B.D. No. 20 (QL)
9. *Saskatchewan Health-Care Assn. (Re)*, [1993] S.L.R.B.D. No. 28 (QL)
10. *U.S.W.A., Local 13704 v. Canadian Industries Ltd.*, [1976] 2 Can. L.R.B.R. 8, [1976] O.L.R.B. Rep. 199 (WL)
11. *Ontario Nurses ' Association v. The Board of Health of Haliburton, Kawartha, Pine Ridge District Health Unit and H.E. Good*, [1977] O.L.R.B. Rep. 65, [1977] 1 Can. L.R.B.R. 221 (WL)
12. *Sheperd's Care Foundation and AUPE (Re)* , [2016] Alta. L.R.B.R. 33 (WL)
13. G.W. Adams, *Canadian Labour Law*, Chapter 10 - Unfair Labour Practice Proceedings, 11 (iv) - Reinforcing Recognition of Bargaining Agent (excerpt)
14. *Glass, Molders, Pottery, Plastics & Allied Workers, Local 371 and Barber Industries (Re)*, [1989] Alta. L.R.B.R. 20, 3 C.L.R.B.R. (2d) 275 (WL)

15. D.J. Corry, *Corry Collective Bargaining and Agreement*, Chapter 8 - Duty to Bargain, 8:11000 – Remedies

16. G.W. Adams, *Canadian Labour Law*, Chapter 10 - Unfair labour Practice Proceedings, 13 - Remedies: Remedial Powers, (ii) - General Principles

17. *Barber industries v. Glass, Molders, Pottery, Plastics & Allied Workers International Union Local 372* (1981), 3 Can. L.R.B.R. (2d) 288 (QL)

18. D.J. Corry, *Corry Collective Bargaining and Agreement*, Chapter 8 - Duty to Bargain, 8:11200 – Compensation

19. *C.U.P.E., Local 3078 v. Wadena School Division No. 46*, [2004] Sask. L.R.B.R. 199

Authorities Filed by University of Manitoba

1. *CAW-Canada, Local 2224 v. Buhler Versatile Inc.*, [2001] M.L.B.D. No. 9.

2. *U.F.C.W., Local 832 v. Granny's Poultry Co-operative (Manitoba) Ltd. Hatchery Operations* (2011), 214 C.L.R.B.R. (2d) 242 (Manitoba Labour Board).

3. *Ottawa Citizen (The) v. Ottawa Newspaper Guild*, [1979] 2 Can. L.R.B.R. 251 (Ontario Labour Relations Board).

4. *Watkins Inc. and CAIMAW, Local 3, Re:*, [1983] M.L.B.D. No. 5 (Manitoba Labour Board).

5. *Consolidated Bathurst Packaging Ltd. v. I.W.A., Local 2-69*, [1983] O.L.R.B. Rep. 1411 (Ontario Labour Relations Board).

6. *Calgary Board of Education Staff Assn. v. Calgary School District No. 19*, [2003] L.R.B.R. LD-061 (Alberta Labour Relations Board).

7. *Rocky View (County) and IAFF, Local 4794, Re*, [2013] A.W.L.D. 5231 (Alberta Labour Relations Board).

8. *R.C.I.U., Local 1979 v. Wilson Automotive (Belleville) Ltd.*, [1980] 3 Can. L.R.B.R. 476 (Ontario Labour Relations Board).

9. *Fashion Craft Kitchens Inc. v. C.J.A., Local 3054*, [1980] 1 Can. L.R.B.R. 21 (Ontario Labour Relations Board).

10. *C.L.G.W. v. Westroc Industries Ltd.*, [1981] Can. L.R.B.R. 315 (Ontario Labour Relations Board).

11. *U.F.C.W., Local 401 v. Gateway Casinos G.P. Inc.*, [2007] Alta. L.R.B.R. 112 (Alberta Labour Relations Board).

12. *Finning (Canada) v. I.A.M. & A.W., Local 99*, [2005] Alta. L.R.B.R. 356 (Alberta Labour Relations Board).

13. *C.U.P.E., Local 87 v. Thunder Bay (City)*, [1995] O.L.R.B. Rep. 1355 (Ontario Labour Relations Board).

14. *NAV Canada v. CAW-Canada, Local 2245* (2004), 76 C.L.A.S. 96 (Canada Arbitration).

15. *North Central East Alberta School Authorities Assn. v. Alberta Teachers' Association*, [1988] Alta. LR.B.R. 144 (Alberta Labour Relations Board).

16. *Diageo Canada Inc. and UFCW, Local 832, Re* (2016), 128 C.L.A.S. 75 (Manitoba Arbitration).

17. *Saskatchewan Assn. of Health Organizations v. SEIU (West)*, 2014 C.L.L.C. 220-035 (Saskatchewan Labour Relations Board).

18. *O.P.S.E.U. v. Municipal Property Assessment Corp.*, [2010] O.L.R.B. Rep. 425 (Ontario Labour Relations Board).

19. *O.P.E.I.U., Local 527 v. Hamilton (City) Board of Education*, [1993] O.L.R.B. Rep. 308 (Ontario Labour Relations Board).

20. G.W. Adams, Q.C., "Canada Labour Law", 2nd Ed., Cdn. Lab. L 10.13(ii), section 10.2320 (Westlaw).

21. *O.P.S.E.U. v. Art Gallery of Ontario*, [2011] O.L.R.B. Rep. 274 (Ontario Labour Relations Board).

22. *R. (M.) v. CAW-Canada, Local 144*, 2011 CarswellMan 672 (Manitoba Labour Board).

23. *Campbell River (District) v. C.U.P.E., Local 623*, 2002 CarswellBC 3857 (British Columbia Labour Relations Board).

24. *Power Workers Union v. Ontario Hydro*, [1994] O.L.R.B. Rep. 765 (Ontario Labour Relations Board).

25. *Direct Energy Marketing Ltd. v. CEP, Local 975*, 2014 CarswellOnt 14375 (Ontario Labour Relations Board).

26. *Teamsters, Local 938 v. Stock Transportation Ltd.*, [2006] O.L.R.D. No. 2350 (Ontario Labour Relations Board).

27. *Limen Group Ltd. v. BACU*, 2013 CarswellOnt 16459 (Ontario Labour Relations Board).