

**IN THE COURT OF APPEAL**

**BETWEEN:**

**MANITOBA FEDERATION OF LABOUR (IN ITS OWN RIGHT AND ON BEHALF OF THE PARTNERSHIP TO DEFEND PUBLIC SERVICES), THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION, THE MANITOBA NURSES' UNION, THE MANITOBA TEACHERS' SOCIETY, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCALS 2034, 2085 AND 435, MANITOBA ASSOCIATION OF HEALTH CARE PROFESSIONALS, UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 832, UNIVERSITY OF MANITOBA FACULTY ASSOCIATION, CANADIAN UNION OF PUBLIC EMPLOYEES NATIONAL, ASSOCIATION OF EMPLOYEES SUPPORTING EDUCATION SERVICES, GENERAL TEAMSTERS LOCAL UNION 979, OPERATING ENGINEERS OF MANITOBA LOCAL 987, THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, PUBLIC SERVICE ALLIANCE OF CANADA, UNIFOR, LEGAL AID LAWYERS, ASSOCIATION, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 7975, 7106, 9074 AND 8223, WINNIPEG ASSOCIATION OF PUBLIC SERVICES OFFICERS IFPTE LOCAL 162, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA LOCAL UNION 254, BRANDON UNIVERSITY FACULTY ASSOCIATION THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOVING PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE UNITED STATES, ITS TERRITORIES AND CANADA, LOCAL 63, THE UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL UNION NO. 1515, PHYSICIAN AND CLINICAL ASSISTANTS OF MANITOBA INC. and UNIVERSITY OF WINNIPEG FACULTY ASSOCIATION,**

**(Plaintiffs) Respondents,**

**- and -**

**THE GOVERNMENT OF MANITOBA,**

**(Defendant) Appellant.**

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**FACTUM OF THE APPELLANT**

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## PART I - INTRODUCTION

1. This appeal asks the Court to determine what damages can legally flow from the government's breach of s. 2(d) of the *Charter* during the 2016 contract negotiations between the University of Manitoba ("University") and the University of Manitoba Faculty Association ("UMFA"). The trial judge awarded UMFA a total of \$19,432,277.45 in s. 24(1) *Charter* damages, plus interest and costs.

2. The Appellant submits that the trial judge erred in law by misapprehending the s. 2(d) breach that warranted a remedy. In essence, the trial judge awarded damages to compensate UMFA for the imposition of a new bargaining mandate for a one-year 0% wage pause, late in the process. She assumed that but for that mandate, UMFA would not have incurred the costs of a strike and would have signed a four-year collective agreement. UMFA was not entitled to a remedy for the financial effects of a mandate, which this Court held was entirely constitutional. Rather, UMFA was entitled to a remedy for the fact that government imposed the mandate late in the bargaining process and directed the University to keep its involvement secret, which constituted a s. 2(d) breach. The trial judge ought to have compensated UMFA for the substantial disruption to the bargaining process and damage to the parties' relationship caused by the secretive manner in which government imposed the mandate. Though the trial judge did note that s. 2(d) protects process and not outcomes, her damages award strayed

beyond protecting the procedural rights in s. 2(d). Instead, the award compensated UMFA as though s. 2(d) guarantees a particular financial outcome.

3. Further, the trial judge made two significant reviewable errors of fact. There was no evidentiary basis to conclude that the mandate caused UMFA to lose a four-year contract similar to the offer UMFA previously rejected. UMFA itself repeatedly sought a one-year collective agreement. Nor was there evidence to support the trial judge's finding that the mandate caused the strike. With full knowledge of government's mandate, UMFA decided to strike over governance issues, not wages. Indeed, UMFA's final wage proposal was for a one-year deal with a 0% wage pause.

4. The Appellant asks this Court to substitute an appropriate s. 24(1) damage award that compensates UMFA for the *Charter*-infringing conduct, while recognizing government's right to impose a mandate during the bargaining process.

## **PART II - STATEMENT OF FACTS**

5. The University and UMFA were engaged in contract negotiations in 2016.<sup>1</sup> UMFA provided the University with notice to bargain in early January of 2016, as their collective agreement was set to expire on March 31, 2016.<sup>2</sup>

6. On March 9, 2016 the University made a time-limited offer for a one-year contract. The offer was a “money-only” offer of 1.5% for one year, plus \$1,500.00 in market adjustments for some positions and other compensation increases. UMFA rejected the offer. Although “it looked favourably upon a one-year collective agreement”, UMFA rejected the offer because the compensation was inadequate and the offer failed to address governance and other “very urgent” non-monetary issues that were of significant concern to UMFA.<sup>3</sup>

7. A new government was sworn into office on May 3, 2016.

8. On May 25, 2016, UMFA 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 also addressed a number of non-monetary issues important to UMFA and its membership.<sup>4</sup>

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<sup>1</sup> See generally Reasons of the Court of Appeal, 2021 MBCA 85 at paras. 134-140, Appeal Book V. I pp. 818-820.

<sup>2</sup> Manitoba Labour Board, case no. 215/16/LRA (“Manitoba Labour Board reasons”), Appeal Book V. I p. 125.

<sup>3</sup> Manitoba Labour Board reasons, Appeal Book V. I pp. 125-127; Transcript of oral proceedings, November 19, 2016, T33 lines 35-58.

<sup>4</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 128.

9. The parties continued to meet to bargain over the summer of 2016, and the next offer was tabled by the University on September 13, 2016. The University offered a four-year contract at 1%, 2%, 2% and 2% plus market adjustments mainly aimed at lower ranks. The University claimed that with the market adjustments, the average UMFA member's salary would end up being increased by 17.5% by the end of the four-year term.<sup>5</sup>

10. UMFA did not accept the September 13, 2016 offer. Though it viewed the monetary offer as a good start,<sup>6</sup> UMFA advised that the two critical issues raised by its members were the ability to do their jobs in light of budget cuts and decanal authority.<sup>7</sup> On September 30<sup>th</sup>, UMFA emphasized that workload had become “issue number 1” and “metrics” was also a major issue.<sup>8</sup> The government of Manitoba first learned of the University's offer on September 30, 2016.<sup>9</sup>

11. On October 3, 2016, UMFA tabled a new offer of 2% for a one-year agreement, with lower market adjustments.<sup>10</sup> This was a substantial reduction from UMFA's original compensation offer by approximately one-half.<sup>11</sup> The University

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<sup>5</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 131.

<sup>6</sup> Transcript of oral proceedings, November 19, 2019 at T43, line 12.

<sup>7</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 132.

<sup>8</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 133.

<sup>9</sup> Reasons of the Court of Appeal at para. 135, Appeal Book V. III p. 818.

<sup>10</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 134.

<sup>11</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 136; Transcript of oral proceedings, November 19, 2019 at T44, lines 14-15.

said it was unlikely to increase its previous offer.<sup>12</sup>

12. The government informed the University on October 6, 2016 that it was issuing a bargaining mandate for a 0% wage pause for one year.<sup>13</sup> Previously there had been no government mandate, even though government typically sets mandates for bargaining with UMFA.<sup>14</sup> At that time, the government directed the University not to disclose to UMFA that the government was responsible for the new mandate.<sup>15</sup>

13. Unaware of these discussions between the government and the University, UMFA held a strike vote on October 11 and 13, 2016. Of the members who voted, 86% voted in favour of a strike if a deal was not made by the November 1, 2016 deadline. UMFA had chosen November 1, 2016 as a strike deadline because it gave UMFA “maximum pressure” vis-à-vis the University.<sup>16</sup>

14. By this time, each party had rejected the other’s latest offer.<sup>17</sup> At the bargaining session of October 21, 2016, the University advised UMFA that it was “not at liberty to tell you about the situation with the government at the present time”. In response, UMFA made it clear that the “big issues” like collegial

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<sup>12</sup> Manitoba Labour Board reasons, Appeal Book V. I pp. 134-135.

<sup>13</sup> Manitoba Labour Board reasons, Appeal Book V. I pp. 135.

<sup>14</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 132 (Mr. Juliano had asked if government would be setting a mandate); Transcript of oral proceedings, November 19, 2019 at T94, lines 27-29.

<sup>15</sup> Book of Agreed Facts, para. 92, Appeal Book, V. I, p. 306-307.

<sup>16</sup> Transcript of oral proceedings, November 19, 2019 at T46 lines 13-24.

governance and metrics were the matters that “will cause a strike”.<sup>18</sup>

15. On October 27, 2016, the University negotiators informed UMFA of the government’s mandate, at the commencement of a mediation session. The University said that they could only agree to a one-year collective agreement with a 0% wage pause.<sup>19</sup>

16. Despite learning of the mandate, UMFA decided to proceed with the mediation to deal with the governance issues that remained unresolved. UMFA’s view was that if the University would not bargain on wages at the mediation, then there should be “more leeway on governance matters”,<sup>20</sup> which had been viewed as “very urgent” from the outset of bargaining.<sup>21</sup>

17. Before and after the University disclosed the mandate, UMFA had maintained that metrics and governance issues were the critical issues that could lead to a strike and that if those issues could be resolved, “everything else goes away”.<sup>22</sup> At the October 27<sup>th</sup> mediation session, UMFA’s representative stated that governance issues were “the strike stuff” and if a strike were to occur it would be because there

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<sup>17</sup> October 21, 2016 bargaining notes, Appeal Book V. II pp. 391-392.

<sup>18</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 141.

<sup>19</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 148.

<sup>20</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 148-149.

<sup>21</sup> Transcript of oral proceedings, November 19, 2016, T33 line 36

<sup>22</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 195; Transcript of oral proceedings, November 19, 2016, T33 line 36.

was insufficient movement on governance.<sup>23</sup>

18. On October 30, 2016 UMFA tabled a final offer of 0% for one year, with improvements to the important non-monetary issues. Had the University accepted UMFA's offer, there would have been no strike; however, the University made a counter-offer which was rejected. UMFA went on strike on November 1, 2016.<sup>24</sup>

19. During the strike, the parties continued to bargain and engaged in a conciliation process. On the first day of the conciliation process on November 2<sup>nd</sup>, UMFA reiterated that a 0% wage freeze was acceptable and they wanted to discuss other issues including workload and metrics.<sup>25</sup> UMFA advised that workload issues were critical and "our members would turn down salary for this - no one is worked up about salary."<sup>26</sup> Bargaining continued over UMFA's demands regarding governance and related issues.

20. On November 20, 2016 the parties agreed to a one-year collective agreement with no wage increase. It was ratified by 90% of UMFA's members who voted.<sup>27</sup>

21. Subsequently, UMFA filed an unfair labour practice against the University before the Manitoba Labour Board. The Labour Board ruled that the University

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<sup>23</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 148-149, 194-196.

<sup>24</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 152, 196.

<sup>25</sup> Manitoba Labour Board reasons, Appeal Book V. I, p. 152, 192.

<sup>26</sup> Manitoba Labour Board reasons, Appeal Book V. I, p. 196.

<sup>27</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 196.

did not breach its duty to bargain in good faith under *The Labour Relations Act* when it chose to bargain in accordance with the new mandate issued by government. The Board held that the University had committed an unfair labour practice by failing to inform UMFA of the new mandate at the first opportunity.

22. In this proceeding, UMFA sought a declaration that the government had violated its members' rights to freedom of association during the 2016 contract negotiations. It also sought a declaration that *The Public Services Sustainability Act (PSSA)* violated s. 2(d). The trial judge granted both declarations. This Court overturned the trial judge's finding that the *PSSA* violated the *Charter*, however, it affirmed her decision that the government's conduct breached s. 2(d) by introducing a significantly different mandate late in the process and instructing the University not to disclose that government had directed the mandate.<sup>28</sup>

23. The matter returned to the Court of Queen's Bench to address UMFA's remedy. The trial judge awarded UMFA a total of \$19,432,277.45 in *Charter* damages. She compensated UMFA for having lost a collective agreement with a 17.5% wage increase over four years, worth \$20 million. She reduced that award to \$15 million "to account for the possibility of a contract resolution at less than 17.5% because of enhancements in non-compensatory areas, as well as other contingencies." The trial judge also awarded \$2,829,081.82 for strike pay and

benefits paid to UMFA members, and \$1,603,195.63 for loss of salary while on strike.<sup>29</sup>

### **PART III – POINTS IN ISSUE AND STANDARD OF REVIEW**

24. There are three issues in this appeal:

- i. Did the trial judge err in awarding s. 24(1) *Charter* damages caused by the government’s mandate *per se*, rather than for the manner it had been imposed, thereby misapprehending the nature of the s. 2(d) breach that warranted compensation?

The Appellant submits the trial judge erred in law by awarding *Charter* damages to compensate UMFA on the basis that the government’s mandate caused UMFA to strike and prevented the parties from settling a four-year collective agreement. Setting a mandate, even assuming it had those effects (which is denied), was entirely constitutional. The conduct that violated s. 2(d) was setting a significantly different mandate late in the bargaining process and directing the University to keep government’s role secret. The trial judge ought to have compensated UMFA for the substantial disruption to the bargaining process and damage to the parties’ relationship caused by UMFA being unaware of the government’s mandate for three weeks. Instead, she provided UMFA with a substantive outcome which s. 2(d) did not protect.

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<sup>28</sup> Reasons of the Court of Appeal at para. 148, Appeal Book V III p. 823

<sup>29</sup> Reasons of the trial judge, April 22, 2022 (“Damages Decision”) at paras. 59-64, Appeal Book V. III p. 881-883.

- ii. Did the trial Judge err in awarding *Charter* damages by assuming that the government's mandate caused UMFA to strike and to lose a four-year agreement that was similar to a proposal previously rejected?

The Appellant submits that there was no basis in the evidence to conclude that the government caused UMFA to strike by imposing a wage mandate. Further, it was entirely speculative to find that, but for the mandate, the University and UMFA would have concluded a four-year contract. The evidence is to the contrary. This amounts to a palpable and overriding error.

- iii. What is an appropriate and just award of damages under s. 24(1) for the s. 2(d) *Charter* breach?

UMFA is entitled to an appropriate award of non-pecuniary *Charter* damages for the significant disruption of the bargaining process and the harm to the relationship caused by keeping UMFA in the dark about government's mandate for three weeks. An appropriate award would be in the range of \$500 to \$1,000 per UMFA member.

25. A remedy under s. 24(1) is discretionary. As such, an appellate court may only interfere with a s. 24(1) remedy if the trial judge errs in law or principle, commits a reviewable error of fact or renders an unjust decision.<sup>30</sup>

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<sup>30</sup> *Manitoba (Director of Child and Family Services) v. HH and CG*, 2017 MBCA 33 at para. 26 [**Appellant's Book of Authorities ("ABOA") TAB 1**]. For an example in the context of *Charter* damages see: *Brazeau et al. v. Canada (A.G.)*, 2020 ONCA 184 at paras. 102-113 [**ABOA TAB 2**].

26. The Court of Appeal has jurisdiction to determine this appeal by virtue of s. 25.1 of *The Court of Appeal Act*, C.C.S.M. c. C240.

## **PART IV - ARGUMENT**

### **1) Section 24(1) *Charter* damages**

27. At the outset, it is useful to briefly review the principles for awarding *Charter* damages. In *Ward*, the Supreme Court established a four-step test to determine whether damages are an appropriate and just remedy:<sup>31</sup>

- i) Has a *Charter* right been breached?
- ii) Would damages fulfill one or more of the related functions of compensation, vindication of the right and deterrence of future breaches?
- iii) Has the state demonstrated countervailing factors that defeat the functional considerations supporting a damage award and render a damage award inappropriate or unjust?
- iv) What is the appropriate quantum of damages?

28. The objective of compensation is to restore the claimant to the position they would have been in but for the breach. A claimant may be compensated for pecuniary and non-pecuniary losses. Absent exceptional circumstances, non-pecuniary losses are generally fixed at a fairly modest conventional rate.<sup>32</sup> Where the objectives are vindication and deterrence, damages should be proportionate to

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<sup>31</sup> *Vancouver (City) v. Ward*, 2010 SCC 27 [ABOA TAB 3].

the seriousness of the breach.<sup>33</sup>

29. *Charter* damage awards must be fair to the claimant and the state. Large awards divert public funds, may serve little functional purpose in terms of the claimant's needs, and may be inappropriate or unjust from the public perspective. Therefore, courts have been cautious to avoid unduly high damage awards. Nonetheless the award must meaningfully serve the functions of damages.<sup>34</sup>

30. In this case, while the trial judge took account of all three functions of *Charter* damages, it is apparent that she focused primarily on compensating UMFA for pecuniary losses she says were caused by government's conduct to put the claimant in the same position as if rights had not been infringed.<sup>35</sup>

31. The Appellant does not dispute that damages were an appropriate remedy in this case. However, the trial judge erred by compensating UMFA for pecuniary losses which she found were due to the imposition of the 0% wage mandate. The trial judge awarded damages on the basis that but for the mandate, UMFA would have entered a four-year agreement and would not have gone on strike. Imposing the wage mandate was entirely constitutional. The trial judge ought to have provided UMFA with an appropriate non-pecuniary award for the secretive manner

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<sup>32</sup> *Vancouver (City) v. Ward*, at para. 48-50 [ABOA TAB 3].

<sup>33</sup> *Vancouver (City) v. Ward*, at para. 51-52 [ABOA TAB 3].

<sup>34</sup> *Vancouver (City) v. Ward*, para. 53-54 [ABOA TAB 3].

<sup>35</sup> Damages Decision, paras. 43, 56, 58-62, Appeal Book V. III, p. 861-862, 879-883.

in which the government imposed the mandate, which caused disruption to the bargaining process for three weeks and the harm to the relationship. Further, there is no basis for the trial judge's finding that but for the s. 2(d) breach, UMFA would not have gone on strike or lost a hypothetical four-year agreement.

**2) The trial judge erred in awarding compensation for the imposition of a mandate**

*A. The government had a right to impose a mandate*

32. An “appropriate and just” remedy can only be determined with reference to the conduct that was held to constitute a breach of freedom of association. This Court’s previous decision held that the impugned conduct was the government imposing a mandate late in the process that was significantly different from what the University had offered three weeks prior and instructing the University not to tell UMFA that the new mandate came at the government’s direction.<sup>36</sup> It was the secretive manner in which government imposed the mandate that substantially disrupted the balance between the University and UMFA and harmed the bargaining relationship, undermining what had been a meaningful process.<sup>37</sup> That was the s. 2(d) breach.

33. This Court accepted that if governments can roll back wage offers or even overturn settled collective agreements through legislation without necessarily

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<sup>36</sup> Reasons of the Court of Appeal at para, 147-148, Appeal Book V. III p. 822-823.

violating the *Charter*, then governments can impose a new mandate late in the bargaining process, provided there is open disclosure. This was the logical implication of cases like *Meredith*<sup>38</sup> and *Syndicat canadien*.<sup>39</sup> In *Meredith*, the RCMP wage increases previously announced by Treasury Board were rolled back significantly by 1.82%, 2% and 0.5% in 2008, 2009 and 2010 respectively, late in the bargaining process. In *Syndicat canadien*, wages in a settled collective agreement were rolled back by approximately 1% yet no *Charter* breach was found. Based on these cases, this Court concluded that legislation that removes wages as a topic from the bargaining table for a limited period of time is constitutional because it does not fundamentally alter the collective bargaining process or preclude good faith bargaining from occurring on other important workplace conditions and on non-monetary matters.<sup>40</sup> Indeed, unlike legislation, a mandate is merely a bargaining position, which does not legally bind the parties.<sup>41</sup>

34. Recognizing government's right to issue a new bargaining mandate, as long as it does so transparently, is critical to determining the appropriate remedy. The trial judge made a legal error by purporting to compensate UMFA for the financial consequences of the new mandate itself (constitutional conduct) rather than for the

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<sup>37</sup> Reasons of the Court of Appeal at para. 155, Appeal Book V. III p. 825.

<sup>38</sup> *Meredith v. Canada*, 2015 SCC 2 [ABOA TAB 4].

<sup>39</sup> *Canada (Procureur general) c. Syndicat canadien*, 2016 QCCA 163 at para. 5[27] ("*Syndicat canadien*"), leave to appeal denied (August 25, 2016, SCC Case No. 36914). [ABOA TAB 5].

<sup>40</sup> Reasons of the Court of Appeal at paras. 70-71, 124, Appeal Book V. III p. 796, 815.

<sup>41</sup> See Agreed Facts at para. 13, Appeal Book V. I p. 300.

breach of s. 2(d), which was the manner in which government imposed the mandate.

35. In her reasons, the trial judge properly noted that the purpose of compensatory *Charter* damages was to put a claimant in the same position as if their rights had not been infringed.<sup>42</sup> The problem is the trial judge compensated UMFA for the financial effects of the changed mandate rather than the adverse impacts on the process flowing from the manner in which the mandate was imposed. In other words, she compensated UMFA for the removal of the University's previous bargaining position and the resulting financial losses. This is underscored by the following comment:

Manitoba's mandate, imposed on UM, served to substantially impact the capacity of union members to come together, react to, and pursue their collective goals related to wages. Without question, UM was moved backwards in its bargaining position by Manitoba as regards monetary compensation. UMFA was left with no choice but to follow through on strike action as non-compensatory issues became increasingly important when it was left with the reality that a zero per cent wage mandate had been imposed.<sup>43</sup>

The trial judge also remarked that the "mandate also reflected a very different wage position from that offered three weeks earlier and, consequently, significantly impacted the good faith bargaining process. This created a substantial interference in the ongoing bargaining and altered the dynamics of the

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<sup>42</sup> Damages Decision at para. 56, Appeal Book V. III p. 879.

<sup>43</sup> Damages Decision at para. 49, Appeal Book V. III p. 875.

negotiations”. She found that Manitoba was fully aware “as to the mandate’s expected adverse consequences, accompanied by the reconsideration requests”.<sup>44</sup>

36. In awarding damages on the basis of the mandate itself, the trial judge compensated the claimant for the financial effects of constitutional conduct. Had the government been fully open and transparent from out outset, the University would still have necessarily altered its bargaining position from a four-year proposal due to the mandate. It was a legal error for the trial judge to compensate the claimant not on the basis of the s. 2(d) breach, but for financial consequences arising from a constitutional mandate.

37. Although not addressing s. 2(d) of the *Charter*, the Manitoba Labour Board also ruled there was nothing illegal about removing the four-year wage proposal. The University did not breach its duty to bargain in good faith by withdrawing its financial offer to accord with the government’s mandate. Rather, the unfair labour practice was limited to the lack of open communication. The University was entitled to take the mandate into account “in recalibrating its negotiating position and withdrawing its financial offer”.<sup>45</sup>

38. The trial judge therefore erred in law in awarding compensation for the loss of a hypothetical four-year contract similar to what the University has proposed in

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<sup>44</sup> Damages Decision at para. 44, Appeal Book V. III p. 865.

<sup>45</sup> Manitoba Labour Board Reasons, p. 72, Appeal Book V. I p. 189

September, which she found would have been reached but for government's mandate. While imposing the mandate might have changed the outcome of the bargaining, that was not a *Charter* breach.

39. In determining an appropriate damage award, it is important to recall that s. 2(d) of the *Charter* is a procedural right. Freedom of association protects a fair and meaningful bargaining process but does not extend constitutional protection to a particular outcome (e.g. terms of a collective agreement). In *Saskatchewan Federation of Labour v. Saskatchewan*,<sup>46</sup> Abella J. described a meaningful process as including the rights of employees to join together to pursue workplace goals, the right to make collective representations to the employer and to have those representations considered in good faith, plus the right to strike or pursue binding arbitration.

40. As stated by the Supreme Court of Canada in *Health Services*, s. 2(d) “does not guarantee a certain substantive or economic outcome” for employees engaged in a collective bargaining process.<sup>47</sup> In *Fraser*, the Court reiterated the “*Charter* may protect collective bargaining and not the fruits of that process.”<sup>48</sup> This Court also held that the trial judge “should have been concerned with the process of

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<sup>46</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at paras. 1, 24 and 29. [ABOA TAB 6].

<sup>47</sup> *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27 at para. 91 [ABOA TAB 7].

<sup>48</sup> *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at para. 84 and also paras. 33, 42, 45 [ABOA TAB 8].

bargaining, not the outcomes”.<sup>49</sup>

41. Ball J. properly recognized this important distinction in *Saskatchewan Federation of Labour v. Saskatchewan*.<sup>50</sup> The unions sought s. 24(1) damages following the Supreme Court of Canada’s decision that struck down Saskatchewan’s law dealing with essential service employees because it eliminated the right to strike in breach of s. 2(d). The unions argued that but for the s. 2(d) breach, the employees would have had more bargaining power and would have obtained more financially beneficial collective agreements. The unions sought an award of damages to compensate employees for what they lost. Ball J. rejected the claim for damages because it wrongly assumed that a strike or threat of a strike will ensure that employee demands at the bargaining table are met. That assumption is inconsistent with the *Charter* and the Supreme Court jurisprudence, which made it clear that:

... what is protected by ss. 2(d) of the *Charter* is associational activity, not a particular process or result. Applying that principle to this case, if ss. 24(1) damages were to be awarded to compensate employees for monetary losses assumed to have been caused by the enactment and implementation of the *PSESA*, it would be using the remedial provisions of ss.24(1) to provide substantive guarantees that are not provided by ss. 2(d) of the *Charter*.<sup>51</sup>

42. Notably, the decision to strike is itself an exercise of a s. 2(d) *Charter* right.

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<sup>49</sup> Reasons of the Court of Appeal, para. 23, 60, 95, 97, 151, Appeal Book V. III p. 781, 793, 805, 806, 823.

<sup>50</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2016 SKQB 365 at paras. 45-48 [ABOA TAB 9].

<sup>51</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2016 SKQB 365 at para. 48 [ABOA TAB 9].

However, as Justice Ball correctly remarked, when employees choose to withdraw their services, there is no assurance either side will ever recoup the financial costs of the strike or achieve the end result sought. In the case at bar, UMFA was unwilling to go on strike over monetary issues and yet now turns to the court for compensation for lost wages.

43. The trial judge's damage award provides an amount representing the salary increase that UMFA members would have obtained if the University's September 13, 2016 offer had been accepted (less contingencies). Awarding s. 24(1) damages to compensate employees for monetary losses assumed to have been caused by the implementation of a mandate (i.e. by presuming a four-year agreement would have been reached) far overshoots the mark. Despite the trial judge acknowledging in her reasons that s. 2(d) does not protect outcomes, the trial judge's award effectively turned the procedural protection of s. 2(d) into a guaranteed substantive outcome.

44. Likewise, the trial judge compensated UMFA for the pecuniary losses associated with the strike because she found that the wage mandate had caused the strike. She cited Dr. Barnard and Dr. Hudson's belief that the "strike was a consequence of Manitoba's mandate".<sup>52</sup> This falls into the same legal error. Even if imposing the mandate late in the day caused the strike (which is denied), it is not

a compensable breach because the government was entitled to issue that mandate.

45. For three weeks, UMFA was left in the dark about government's direction to the University regarding the significant change in mandate. This interfered with full and frank discussion between the parties. UMFA could not realistically assess its position and priorities or formulate a meaningful response to the changed circumstances.<sup>53</sup> As this Court noted, the balance between the employer and union was substantially disrupted and the relationship was significantly damaged. Manitoba submits that the trial judge ought to have awarded appropriate *Charter* damages to compensate for these non-pecuniary harms and to serve the functions of vindication and deterrence. Instead, the trial judge awarded UMFA damages for the financial losses flowing from a constitutional mandate.

**3) The trial judge erred in finding that the mandate caused UMFA to strike and to lose a speculative four-year collective agreement**

46. Apart from mistakenly providing a s. 24(1) damages remedy for the imposition of the mandate alone, the Appellant submits there was no evidentiary basis to support the trial judge's conclusion that the government's mandate (a) caused UMFA to lose the benefit of a four-year collective agreement, let alone one similar in nature to the September 13, 2016 offer that UMFA had rejected, or (b) caused UMFA to strike. Therefore, it was not appropriate or just to award

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<sup>52</sup> Damages Decision at para. 44, 49, Appeal Book V. III p. 864, 875.

<sup>53</sup> See Manitoba Labour Board Reasons, Appeal Book V. I p. 179.

damages for a speculative four-year contract and for the costs and wage losses associated with the strike.

***A. The mandate did not cause UMFA to lose a four-year agreement***

47. The trial judge acknowledged it was speculative whether the University and UMFA would have agreed to a 17.5% salary increase over a four-year period.<sup>54</sup> Nonetheless, she proceeded to award *Charter* damages as though a four-year collective agreement would have been concluded. She remarked that UMFA had a “level of satisfaction” with an increase in and around 17.5% over four years and that the total loss to membership without interest would be about \$20.6 million.<sup>55</sup> To allow for the possibility that the parties might have reached a four-year contract providing less than 17.5% because of enhancements in non-compensatory areas as well as “other contingencies”, the trial judge awarded UMFA members \$15 million, recognizing that figure was “somewhat arbitrary”.<sup>56</sup>

48. With respect, it was entirely speculative and arbitrary to conclude that UMFA and the University would ever have reached a four-year contract. It is not supported by the bargaining history.<sup>57</sup> The trial judge reached this conclusion despite the fact that all of UMFA’s proposals were for a one-year term and UMFA had turned down the only four-year proposal offered by the University.

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<sup>54</sup> Damages decision at para. 59, Appeal Book, V. III p. 881.

49. The University began the bargaining process with an offer for a one-year term on March 9, 2016. On May 25<sup>th</sup>, UMFA countered with a proposal for a one-year contract with a 2% increase plus market adjustments. UMFA then turned down the only four-year proposal offered by the University on September 13<sup>th</sup>. Instead, even before becoming aware of the mandate, on October 3<sup>rd</sup> UMFA proposed a new one-year offer of 2% plus lower market adjustments, which was less than half of its original bargaining position.<sup>58</sup> Finally, after learning of the mandate and just before going on strike, UMFA made a final offer on October 30, 2016, again for a one-year agreement, this time with a 0% wage pause plus enhancements on governance and other non-monetary matters.

50. The University rejected UMFA's final one-year offer, and a strike ensued on November 1<sup>st</sup>. Ultimately, UMFA settled for a one-year deal, with a 0% wage pause and satisfactory improvements to governance and other non-monetary issues. The one-year term and the wage component were consistent with UMFA's October 30<sup>th</sup> offer and with its statements that it was not going on strike over wages.<sup>59</sup> If that one-year wage agreement were truly unsatisfactory, UMFA could have tried to hold out on strike longer and might even have decided to proceed to arbitration after striking for 60 days. It did not.

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<sup>55</sup> Damages decision at para. 59-60, Appeal Book, V. III p. 881.

<sup>56</sup> Damages decision at para. 60, Appeal Book, V. III p. 881-882.

<sup>57</sup> Manitoba Labour Board Reasons, Appeal Book V. I p. 125-128, 131, 136, 152, 196.

51. Awarding \$15 million in damages for a presumed four-year collective agreement ignores the bargaining history, and UMFA's actual response. The finding that the government's mandate caused such loss was a palpable and overriding error.

52. It would not be appropriate and just for Manitoba taxpayers to compensate UMFA members for their union's decisions to turn down a four-year agreement, propose a one-year contract and then settle a strike for a one-year deal, which was ratified by 90% of the members who voted.

***B. The mandate did not cause the strike***

53. The Appellant further submits that the trial judge erred in awarding damages for costs and wage losses associated with the strike. The evidence cannot support the trial judge's finding that the late wage mandate combined with the direction not to disclose government's involvement caused the strike. UMFA did not strike over wages at all. As noted, it ultimately accepted a one-year deal with a wage pause.

54. The trial judge suggested that governance and metrics issues became critical to UMFA because that was all that remained when wages were removed from the bargaining table.<sup>60</sup> In fact, the evidence before the trial judge showed that non-monetary issues such as workload and governance were always seen as being very

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<sup>58</sup> Damages Decision at para. 47, Appeal Book V. III p. 874.

<sup>59</sup> Manitoba Labour Board Reasons, p. 37, Appeal Book V. I p. 154.

important by UMFA in the 2016 bargaining sessions, even prior to the imposition of the mandate.<sup>61</sup> Before the mandate was disclosed on October 27, 2016, UMFA had maintained that metrics and governance were the critical issues that could lead to a strike.<sup>62</sup> On October 12, 2016, UMFA told the University that these were the big issues outstanding and if they could be resolved “everything else goes away”. During a bargaining session on October 21, 2016, UMFA reiterated that the “big issues” like collegial governance and metrics were the matters that will cause a strike.<sup>63</sup> The mandate concerned the financial offer and had nothing to do with governance or other matters that were the “strike stuff”. After the mandate was disclosed, during mediation, UMFA continued to emphasize that governance issues were “the strike stuff” and if that a strike were to occur, it would be because there was insufficient movement on governance issues.<sup>64</sup>

55. In light of this evidence, it was an error for the trial judge to suggest that UMFA was “left with no choice but to follow through on strike action” given the reality of the wage mandate (para. 49). The wage proposal was not the reason for the strike. This is borne out by UMFA’s final offer of October 30, 2016, just before the strike, of 0% for one year, with improvements to the significant non-monetary

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<sup>60</sup> Damages decision at para. 51, Appeal Book, V. III p. 876.

<sup>61</sup> Transcript of oral proceedings, November 19, 2016, T33 line 36.

<sup>62</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 148-149, 152, 192, 194-196; Transcript of oral proceedings, November 19, 2016, T33 line 36.

<sup>63</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 141, 195; Transcript of oral proceedings, November 19, 2016, T33 line 36.

<sup>64</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 196.

issues. Significantly, had the University accepted UMFA's final offer, which aligned with the wage mandate, there would have been no strike at all. However, the University did not agree to UMFA's non-monetary demands. That is what led to the strike.<sup>65</sup>

56. Even after the strike commenced, on the first day of the conciliation process on November 2<sup>nd</sup>, UMFA reiterated that a 0% wage pause was acceptable and they wanted to discuss other issues including workload and metrics.<sup>66</sup> UMFA advised that workload issues were critical and "our members would turn down salary for this - no one is worked up about salary."<sup>67</sup> Thus, while wages were one of the top priorities for members, UMFA was prepared to give up wages in the hope of achieving other non-monetary gains. On November 20, 2016, UMFA and the University ultimately agreed to a one-year collective agreement with a wage pause. The agreement was ratified by 90% of UMFA's members who voted.<sup>68</sup>

57. On these facts, it is hardly surprising that the Labour Board concluded that the failure to disclose the wage mandate did not cause the strike because the impasse between the parties clearly concerned UMFA's demands over governance and related issues.<sup>69</sup> It was a palpable and overriding error for the trial judge to find

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<sup>65</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 152, 196.

<sup>66</sup> Manitoba Labour Board reasons, Appeal Book V. I, p. 152, 192.

<sup>67</sup> Manitoba Labour Board reasons, Appeal Book V. I, p. 196.

<sup>68</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 196.

<sup>69</sup> Manitoba Labour Board reasons, Appeal Book V. I p. 196-197.

otherwise. Thus, it was not appropriate and just to compensate UMFA members for the costs and wage losses associated with the strike.

**4) What is an appropriate and just damage award for the *Charter* breach?**

58. The Appellant does not dispute that damages are suitable as a remedy for the *Charter* breach. Given the trial judge's legal and factual errors, this Court is free to substitute its discretion as to the appropriate amount.

59. It is not appropriate for this Court to award pecuniary damages for an agreement the parties might have reached. To do so would require baseless speculation. It might be that exactly the same one-year contract would have been achieved had the mandate been disclosed openly. Moreover, awarding s. 24(1) damages based on a presumed agreement would run afoul of the problem identified by Justice Ball in *Saskatchewan Federal of Labour*. It would provide a guaranteed financial outcome when s. 2(d) only protects a process.

60. This Court affirmed the trial judge's finding that the government's breach of s. 2(d) significantly disrupted the balance between the University and UMFA and also significantly damaged their relationship, undermining what had been a meaningful and productive process.<sup>70</sup> The bargaining process was undermined because UMFA lacked important information that could have helped the union

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<sup>70</sup> Reasons of the Court of Appeal, para. 155, Appeal Book V. III p. 825.

assess its positions and priorities, and formulate a meaningful response to the changed circumstances. The lack of complete transparency also harmed the bargaining relationship. On the other hand, the damage was not irreparable. The government's role in setting the mandate became clear on October 27, 2016 when the University told UMFA of the need for a one-year wage pause.

61. The Appellant submits it would be just and appropriate to award non-pecuniary damages aimed at compensating UMFA's members for the harm caused to the relationship and the disruption to the good faith bargaining process. Such an award would also vindicate their s. 2(d) *Charter* rights and serve as a deterrent. At the same time, a non-pecuniary damage award would not overshoot the mark by attempting to compensate UMFA's members for a speculative financial outcome, which was never guaranteed by the freedom of association in any event.

62. As the Supreme Court noted in *Ward*, while non-pecuniary damages are harder to measure, compensation is generally fixed at a fairly modest conventional rate. The seriousness of the breach is a principal guide when considering the objectives of vindication and deterrence. On the other hand, s. 24(1) damages must be fair to both sides. Large awards divert public funds, may serve little functional purpose and may be unjust from the public perspective.<sup>71</sup>

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<sup>71</sup> *Vancouver (City) v. Ward*, at para. 50-53. [ABOA TAB 3].

63. This Court should also bear in mind that the Labour Board's ruling already resulted in a payment of \$2.5 million to UMFA (\$2,000.00 to each member) from the University for its unfair labour practice in failing to disclose its decision to follow the government's mandate in a timely and transparent manner. The trial judge found that a s. 24(1) damage award would not duplicate the Labour Board award because it was only made against the University, but did not address Manitoba's conduct. She also held the Labour Board did not compensate members for the loss of income or benefits or the strike. However, as submitted, UMFA is not entitled to compensation for these financial losses.<sup>72</sup>

64. The Appellant accepts that a *Charter* damages award against the government to address its role in undermining the process and the bargaining relationship would not completely duplicate the Labour Board's award. Nonetheless, as *Ward* instructs, double compensation should be avoided.<sup>73</sup> Therefore, the Labour Board's previous award is a relevant consideration because UMFA members have already received some compensation for the unfairness of the bargaining process.

65. The jurisprudence provides little guidance on the quantum of *Charter* damages in a similar case. In *British Columbia Teachers' Federation*, the trial judge awarded \$2 million (\$66 per teacher) for an extended 14-month legislated prohibition on collective bargaining over working conditions. However, the

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<sup>72</sup> Damages Decision at para. 20, 44, Appeal Book V. III p. 843-844, 868-870.

damage award for the s. 2(d) breach was set aside on appeal.<sup>74</sup> In *Brazeau et al.*,<sup>75</sup> the Ontario Court of Appeal discussed the appropriate *Charter* damages award in the context of the *Reddock* class action for breach of s. 7 and s. 12 of the *Charter* in relation to administrative segregation practices in federal institutions. The Court affirmed that a global award of \$20 million would serve the three functions of s. 24 damages. The compensatory portion of that amount was \$9 million, calculated based on \$500.00 for each inmate who spent longer than 15 days in segregation.

66. Given the trial judge's legal and factual errors, it is open to this Court to substitute an appropriate remedy. The Appellant submits that a modest and conventional award in the range of \$500.00 to \$1,000.00 per UMFA member (or up to approximately \$1.25 million in total), on top of the Labour Board remedy, would be appropriate and just in the circumstances. It would adequately serve the functions of compensation, vindication and deterrence.

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<sup>73</sup> *Vancouver (City) v. Ward*, at paras. 35-36 [ABOA TAB 3]

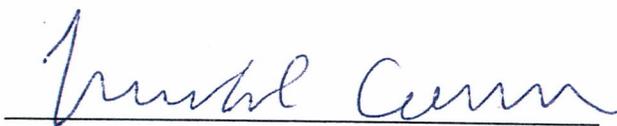
<sup>74</sup> *British Columbia Teachers' Federation v. British Columbia*, 2014 BCSC 121 at paras. 608-637, damages set aside 2015 BCCA 184 at paras. 391-393, per Donald J.A., whose decision was upheld 2016 SCC 49 [ABOA TAB 10]

<sup>75</sup> *Brazeau et al. v. Canada (A.G.)*, 2020 ONCA 184 at paras. 102-104 [ABOA TAB 2].

**PART V - RELIEF CLAIMED**

67. The Appellant respectfully requests that this Honourable Court allow the appeal with costs, and substitute an appropriate and just award of *Charter* damages.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Michael Conner, Counsel for  
The Attorney General of Manitoba

DATED this 4<sup>th</sup> day of July, 2022.

**Estimated Time for Oral Argument: 1 hour**

**PART VI - LIST OF AUTHORITIES**

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