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

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

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

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

MCKELVEY J.

I. INTRODUCTION

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

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

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

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

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

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

II. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Binder 5, Schedule A, Tab 20)

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

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

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

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

(Binder 5, Schedule A, Tab 24)

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

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

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

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

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

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

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

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

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

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

(Binder 5, Schedule A, Tab 27)

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

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

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

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

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

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

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

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

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

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

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

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

III. POSITION OF UMFA

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

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

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

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

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

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

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

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

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

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

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

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

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

[29] UMFA relies on a number of cases:

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

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

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

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

     Ward explains:

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

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

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

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

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

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

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

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

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

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

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

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

IV. POSITION OF MANITOBA

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

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

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

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

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

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

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

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

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

1. It is lawful to change a mandate.

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

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

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

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

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

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

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

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

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