V. ANALYSIS

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

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

This was affirmed by the Court of Appeal:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[61] Dr. Flemming has outlined the costs and losses associated with UMFA's three week strike in the amount of 7,009,230.97 dollars. There are items of loss outlined that UMFA paid to or on behalf of the membership. The membership pays monthly union dues to UMFA based on the Rand formula, as well as contributions into a national Canadian Association of University Teachers Defence Fund. UMFA's funding is based entirely on membership dues. Consequently, when monies are paid out, as occurred here, there is a reduced availability to fund other union-based endeavours or purposes. The members were afforded strike pay and benefits coverage in the amount of 2,754,300.80 dollars. Not all members were in receipt of strike payments from UMFA. Additionally, the costs associated with operating a strike headquarters were 74,781.02 dollars. These components of UMFA's claim totals 2,829,081.82 dollars.

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

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

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

VI. CONCLUSION

[64] Manitoba's conduct significantly disrupted the balance between UM and UMFA along with their relationship, as well as causing significant discord between UMFA and its membership. There was a serious and substantial undermining and interference with what had been a meaningful and productive process of collective bargaining. Accordingly, ***Charter*** damages are awarded in the amount of $19,432,277.45 dollars accompanied by interest at the relevant Court of Queen's Bench interest rates. There is to be no payout by Manitoba of these amounts until the appeal period has expired. Costs may be spoken to if they cannot be agreed upon.

J.