File No. AI22-30-09768

IN THE COURT OF APPEAL

BETWEEN:

MANITOBA FEDERATION OF LABOUR (IN ITS OWN RIGHT AND ON BEHALF OF THE PARTNERSHIP TO DEFEND PUBLIC SERVICES), THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION, THE MANITOBA NURSES' UNION, THE MANITOBA TEACHERS' SOCIETY, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCALS 2034, 2085, AND 435, MANITOBA ASSOCIATION OF HEALTH CARE PROFESSIONALS, UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 832, UNIVERSITY OF MANITOBA FACULTY ASSOCIATION, CANADIAN UNION OF PUBLIC EMPLOYEES NATIONAL, ASSOCIATION OF EMPLOYEES SUPPORTING EDUCATION SERVICES, GENERAL TEAMSTERS LOCAL UNION 979, OPERATING ENGINEERS OF MANITOBA LOCAL 987, THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, PUBLIC SERVICE ALLIANCE OF CANADA, UNIFOR, LEGAL AID LAWYERS ASSOCIATION, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 7975, 7106, 9074, and 8223, WINNIPEG ASSOCIATION OF PUBLIC 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) Respondents,

- and -

THE GOVERNMENT OF MANITOBA,

(Defendant) Appellant.

FACTUM OF THE RESPONDENTS

MYERS LLP
Barristers and Solicitors
724 – 240 Graham Avenue, Winnipeg, Manitoba, R3C 0J7

GARTH SMORANG Q.C. / KRISTEN WORBANSKI
Phone No. (204) 926-1501 / Facsimile: (204) 956-0625
Email: gsmorang@myersfirm.com / kworbanski@myersfirm.com

File No. AI22-30-09768

IN THE COURT OF APPEAL
WINNIPEG CENTRE

BETWEEN:

MANITOBA FEDERATION OF LABOUR (IN ITS OWN RIGHT AND ON BEHALF OF THE PARTNERSHIP TO DEFEND PUBLIC SERVICES), THE MANITOBA GOVERNMENT AND GENERAL EMPLOYEES' UNION, THE MANITOBA NURSES' UNION, THE MANITOBA TEACHERS' SOCIETY, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCALS 2034, 2085, AND 435, MANITOBA ASSOCIATION OF HEALTH CARE PROFESSIONALS, UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 832, UNIVERSITY OF MANITOBA FACULTY ASSOCIATION, CANADIAN UNION OF PUBLIC EMPLOYEES NATIONAL, ASSOCIATION OF EMPLOYEES SUPPORTING EDUCATION SERVICES, GENERAL TEAMSTERS LOCAL UNION 979, OPERATING ENGINEERS OF MANITOBA LOCAL 987, THE PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA, PUBLIC SERVICE ALLIANCE OF CANADA, UNIFOR, LEGAL AID LAWYERS ASSOCIATION, UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCALS 7975, 7106, 9074, and 8223, WINNIPEG ASSOCIATION OF PUBLIC 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) Respondents,

- and –

THE GOVERNMENT OF MANITOBA,

(Defendant) Appellant.

FACTUM OF THE RESPONDENTS

Index

I. INTRODUCTION

1. In 2016, the newly elected Manitoba Government had a plan: save money by restraining public sector wage increases and use the savings to fund election promises of tax reduction. The collective bargaining at the University of Manitoba ("UM") was a barrier to that plan. The publicly announced 17.5% wage increase offered by UM to the University of Manitoba Faculty Association ("UMFA") in September 2016 was "embarrassing for the government" (their words).[1] The Government told UM, both verbally and in print, that its wage offer would set a bad precedent, such that even a 1% increase could effectively result in a $100 million cost to Government across the broader public sector (their words, their calculation).[2]

2. The Government set out to remove that risk by issuing a secret directive to UM to take its salary offer off the table at the eleventh hour and replace it with 0% for one year. Government warned UM that failure to cooperate would lead to financial consequences for the University and could be dangerous for it.[3]

3. UM complied. Approximately 1475 UM faculty members, and their union, suffered significant financial losses ($15,000 each, on average), and the trial judge, and this Court, have both found that the Government's actions, characterized by the

[1] Manitoba Labour Board, Case No. 215/16/LRA ("MLB Decision"), p 17, Appeal Book V2, III, p 134
[2] Book of Agreed Facts, paras 90-91, Appeal Book V1, IV, p 306; Agreed Book of Documents – Schedule 5, Binder A, Exhibit 2, Appeal Book, V2, V, p 379.
[3] MLB Decision, pp 18-19, Appeal Book V2, III, pp 135-136

trial judge as "egregious," constituted a breach of their s.2(d) *Charter* rights.[4]

4. The Government's plan worked. Presumably, the money it would have expended on public sector wages but for its directive to UM was saved, at the expense of UMFA members' *Charter* rights. But now, the Government does not want to pay for the damage it caused.

5. The trial judge correctly articulated the four-step legal framework for s. 24(1) *Charter* damages, applied it to the facts respecting the Government's violation of s. 2(d) of the *Charter*, and concluded that a *Charter* damages award in the amount of $19,432,277.45 served the functions of compensation, vindication, and deterrence.

6. Given the highly discretionary nature of the remedy and the lack of any palpable and overriding factual or legal error made by the trial judge, this Court should afford deference and decline to substitute any different *Charter* damages.

II. STATEMENT OF FACTS

7. UMFA has been the certified bargaining agent for academic staff at UM since 1951. Its members had only gone on strike twice in the 65 years prior to 2016.[5]

8. UMFA and UM commenced collective bargaining in spring 2016, prior to the change in government. After taking office in May, the new Government did not provide UM with a bargaining mandate or otherwise involve itself in their bargaining

[4] Reasons of the trial judge, April 22, 2022 ("Damages Decision"), para 55, Appeal Book, V3, XI, p 878
[5] Affidavit of Greg Flemming, paras 3, 7, Appeal Book V1, III, pp 76-77

process prior to the end of September 2016.

9. Salary increases were a top priority in bargaining for both UMFA and UM.[6] UMFA members' wages were the lowest of 12 other comparable Canadian universities, and this was of significant concern to both UM and UMFA.[7] UM publicly announced on its website that it was in a healthy financial position and had adjusted faculty budgets to help pay for its top priorities, including salaries.[8]

10. On September 13, 2016, following more than 20 bargaining sessions, UM presented a wage offer of four years at 1% / 2% / 2% / 2%, plus significant market adjustments to salaries, which would increase the average salary of UMFA members by 17.5% by the end of the four-year term (the "Offer"). The Manitoba Labour Board ("MLB") described the Offer in its decision as one where UM felt it had gone as far as possible with respect to monetary compensation and may not have gone as far as possible on governance issues.[9] UMFA did not accept the Offer, regarding it as a good start on salary, but considered that language on the union's other issues needed further improvement.[10]

11. On September 16, 2016, Manitoba, through Cabinet, approved the formation

---

[6] Over 70% of UMFA members identified salary as their number one priority. Other priority issues included metrics, performance indicators, collegial governance and workload: Agreed Book of Documents – Schedule A, Binder 5, Exhibit 2, Appeal Book V2, V, p 317

[7] MLB Decision, p 11, Appeal Book V2, III, p 128; Agreed Book of Documents – Schedule A, Binder 5, Exhibit 2, Appeal Book, V2, V, pp 337-338.

[8] Agreed Book of Documents – Schedule A, Binder 5, Exhibit 2, Appeal Book V2, V, pp 331-334

[9] MLB Decision, p 14, Appeal Book V1, III, p 131

[10] Transcript of Oral Proceedings, November 19, 2016, T43, line 12

of the Public Sector Compensation Committee ("PSCC").[11] On September 21, 2016, the PSCC met and approved extending public sector collective agreements for a minimum one-year period with a 0% wage pause.[12]

12. On September 30, 2016, unbeknownst to UMFA, Rick Stevenson, Assistant Deputy Minister, Labour Relations, on behalf of the PSCC, contacted Greg Juliano, UM's lead bargainer, by telephone and advised him that UM's Offer was "embarrassing" for the Government, given that news regarding UM's wage offer to UMFA broke at the exact time as the Government was announcing the need for restraint in public sector wage settlements, and had led to some very hard questions for the minister. He also advised that it was highly likely that the Government would be moving on public sector wage control.[13] Consequently, the first active interference in UM bargaining occurred.

13. This telephone call was the first of approximately 30 secretive communications between the Government[14] and UM during October 2016, the

[11] Book of Agreed Facts, paras 17-19, Appeal Book V1, IV, p 301. The PSCC was chaired by the Minister of Finance and its meetings were almost always attended by the Premier.
[12] Book of Agreed Facts, para 22, Appeal Book V1, IV, p 302
[13] MLB Decision, p 16, Appeal Book V1, III, p 133. Note that para 10 of the Appellant's Factum incorrectly states that Government first learned of the Offer on September 30, 2016. This is not what the trial judge said (Reasons of the trial judge, June 11, 2020 ("Trial Decision"), para 38, Appeal Book, V2, VII, p 541) or what the evidence was before the MLB.
[14] Directly involved in communicating with UM officials were **Michael Richards** (Deputy Minister charged with overseeing the development of the *PSSA*), **Gerry Irving** (Sec. to the Public Sector Compensation Committee), **Rick Stevenson** (ADM – Labour Relations), **Cameron Friesen** (Minister of Finance), and **Lynn Zapshala-Kelln** (Sec. to the Treasury Board). None testified at trial.

contents of which were all kept secret from UMFA at Government's insistence.[15]

14. By October 6, 2016, the mandatory directive from Government was that UM return to the bargaining table with a message to UMFA that the previous Offer was withdrawn, replace the Offer with a one-year 0% wage offer, and not disclose Government's involvement. The Government further explained to UM that a 1% increase for UMFA would set a bad precedent for other public sector bargaining, such that a 1% increase could effectively result in a $100 million cost to the Government across the broad public sector.[16] The directive was a mandatory order and non-participation was not an option. The Government made it known that it would be dangerous for UM to fail to comply with its directive and there would be "financial consequences" for UM in the event of non-compliance.[17]

15. UM strongly resisted the Government's interference. In particular, UM expressed concern about withdrawing its offer, given that negotiations had progressed so far, and doing something "illegal" at Government's behest that would have serious negative consequences for the University community.[18] UM also tried to convince Government to publicly broadcast that it was mandating the removal of

---

[15] Decision makers regarding the directives issued to UM included **Premier Pallister** and Cabinet Ministers **Friesen, Goertzen, Fletcher, Cullen, Stefanson, and Schuler** (all voting members of the Public Sector Compensation Committee of Cabinet). None testified at trial.
[16] Book of Agreed Facts, paras 90-91, Appeal Book V1, IV, p 306. This was also made clear to the University President in a PowerPoint presentation made at a meeting on October 17, 2016, hosted by the Minister of Finance: Book of Agreed Facts, para 94, Appeal Book V1, IV, p 307; Agreed Book of Documents – Schedule 5, Binder A, Exhibit 2, Appeal Book, V2, V, p 379.
[17] Book of Agreed Facts, paras 90-92, Appeal Book V1, IV, p 306
[18] Agreed Book of Documents – Schedule 5, Binder A, Exhibit 2, Appeal Book, V2, V, p 397

UM's offer from the bargaining table, but Government refused.[19]

16. Mr. Juliano reported to UM that the Government was "second guessing and essentially dictating, not just the mandate, but the University's bargaining strategy" and that Government was "so micromanaging things it's driving me crazy."[20]

17. Nevertheless, UM never seriously considered not complying with the Government's directive because the consequences would be too severe in light of its financial dependency upon Government and the substantial power and influence that the Government could wield with respect to university governance.[21]

18. In the meantime, bargaining continued between UM and UMFA without disclosure of the existence of the Government's mandate.

19. At a bargaining meeting on October 3, 2016, UMFA substantially reduced its salary proposal to less than half of its original position, from increases amounting to $15.2 million (a 13.5% salary increase in one year) to $7 million.[22]

20. Between October 11 and 13, 2016, still completely unaware of the Government's directive imposed on UM, UMFA conducted a strike vote, which resulted in an 86% vote to authorize strike action and set a strike deadline of November 1, 2016. Dr. Mark Hudson, UMFA's president in 2016, testified that a

[19] Agreed Book of Documents – Schedule 5, Binder A, Exhibit 2, Appeal Book, V2, V, p 397 Binder 5- T17 and T 20
[20] MLB Decision, pp 23, 25, Appeal Book V1, III, pp 140, 142
[21] MLB Decision, pp 71-72, Appeal Book V1, III, p 188-189
[22] Transcript of Oral Proceedings, November 19, 2016, T43-44

strike vote was a fairly standard part of the bargaining process, negotiations were positively progressing with the parties coming closer to an agreement, and UMFA was of the view that there would be a resolution rather than a strike.[23]

21. Dr. Hudson testified that there was "some degree of satisfaction" with the monetary aspect of the Offer, such that "the priority then starts to shift toward other sticking points within bargaining where we see that…there is not adequate movement".[24] He stated the "sticking points" were collegial governance and metrics.

22. Five days before the strike deadline, on October 26, 2016, UM President Barnard wrote to Premier Pallister (with copies to the Minister of Finance and the Minister of Education and Training) imploring the Government to reconsider its imposition of a salary pause that would "seriously debilitate the University of Manitoba's almost completed (nine months into bargaining) negotiations with UMFA."[25] The letter further stated that "abiding by the pause would require us to backtrack from our latest offer and would – without doubt – lead to a prolonged and divisive strike with devastating impacts on this community." The President received no response. Nor did the Government take public ownership of the mandate.

23. The following day, October 27, 2016, at the mediation held to attempt to avoid a strike, UM finally disclosed to UMFA the direction from Government and that its

[23] Transcript of Oral Proceedings, November 19, 2016, p T48, lines 14-16
[24] Transcript of Oral Proceedings, November 19, 2016, p T48, lines 35-40, p T49, lines 1-4
[25] Agreed Book of Documents – Schedule 5, Binder A, Exhibit 2, Appeal Book, V2, V, p 404-405

revised proposal was a one-year contact with 0% compensation. UM showed UMFA members the President's letter to the Premier. UMFA bargainers were shocked and frustrated.[26] The mediator advised both parties that he would not have flown to Winnipeg from Toronto if he had known that salary was not open to negotiation.[27]

24. UMFA decided to proceed with the mediation in order to achieve some type of resolution, on the understanding that its participation was without prejudice to its right to file an Unfair Labour Practice application ("ULP") at the MLB.[28]

25. In terms of the comments made later that day by UMFA representatives at a meeting with UM representatives that the governance issues were "the strike stuff", Dr. Hudson testified those comments were made for the following reasons[29]:

- UMFA believed that UM could not move from 0% salary;
- given that UMFA had resolved to try and move forward with mediation, it needed to shift attention to the most important remaining priorities; and
- unless there was really, really remarkable movement on those remaining priorities, settlement was a very distant prospect.

26. On October 28, 2016, UM And UMFA publicly issued a joint statement[30]:

    - UM stated: *"We find ourselves in the unusual circumstance of having a newly articulated provincial mandate regarding public sector*

[26] Transcript of Oral Proceedings, November 19, 2016, p T51, line 26
[27] MLB Decision, p 31, Appeal Book V1, III, p 148
[28] Agreed Book of Documents – Schedule 5, Binder A, Exhibit 2, Appeal Book, V2, V, p 408
[29] Transcript of Oral Proceedings, November 19, 2016, p T56, lines 26-41, p T57, lines 1-11
[30] Agreed Book of Documents – Schedule 5, Binder A, Exhibit 2, Appeal Book, V2, V, pp 409-410

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."

- UMFA stated: *"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…*

27. When UMFA became aware of the UM President's October 26 letter to the Premier, Dr. Hudson indicated that its contents 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."[31]

28. During mediation, Mr. Juliano informed UMFA that the Government actually *wanted* a strike.[32]

29. On October 30, 2016, at the end of the mediation, UMFA made a final offer for a one-year collective agreement with a 0% wage increase, which addressed governance, metrics, and workload. UM did not accept this offer.[33]

30. Mediation failed and a three-week strike occurred. On November 20, 2016, at the conclusion of the strike, a one-year collective agreement was entered into with

[31] Transcript of Oral Proceedings, November 19, 2016, p T55, lines 13-15
[32] Transcript of Oral Proceedings, November 19, 2016, p T57, lines 13-15; MLB Decision, p 32, Appeal Book V1, III, p 150
[33] MLB Decision, p 35, Appeal Book V1, III, p 152

no salary or other monetary increases. Dr. Hudson described the resolution of the strike action as achieving a "minimum threshold".[34]

31. The 2016 round of bargaining and the ensuing strike caused significant damage to the relationship between UMFA and UM, and between UMFA and its own members.[35] Members' trust was particularly undermined as their number one priority – salary increases – was not addressed.[36]

32. UMFA submitted a ULP against UM. The MLB found that UM had committed a ULP by failing to defy Government's warning and disclose Government's October 6, 2016 directive in a timely manner to UMFA, contrary to its duty to bargain in good faith.[37] The MLB ordered UM to pay $2,000 to each UMFA member[38], and to the union, on account of interference with their rights under *The Labour Relations Act* (totalling $2.5 million), and to apologize.[39]

33. At trial, the judge concluded that the Government substantially interfered in the 2016 contract negotiations between UM and UMFA, thereby violating s. 2(d).[40] This Court upheld the trial judge's conclusion on the first stage appeal, including

---

[34] Transcript of Oral Proceedings, November 19, 2016, p T89, lines 17-21
[35] Transcript of Oral Proceedings, November 19, 2016, pp T64-66; Trial Decision, para 429, Appeal Book, V2, VII, pp 763-764; Reasons of the Court of Appeal, paras 155, Appeal Book V3, IX, p 825
[36] Damages Decision, para 18, Appeal Book, V3, XI, p 843
[37] MLB Decision, p 61, Appeal Book V1, III, p 178
[38] The maximum amount pursuant to s. 31(4) of *The Labour Relations Act*, C.C.S.M. c. L10.
[39] The MLB ordered that the parties be given 30 days to agree upon the specific amounts that UM would pay (MLB Decision, p 83, Appeal Book V1, III, p 200), and UM agreed to the maximum payment of $2,000 to UMFA and each UMFA member.
[40] Trial Decision, para 429, Appeal Book, V2, VII, pp 763-764

with respect to the Government conduct constituting the *Charter* breach[41]:

> [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.
>
> …
>
> [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.

34. In the trial's remedy stage, the trial judge awarded UMFA *Charter* damages in the amount of $19,432,277.45. It is from this decision that the Appellant appeals.

III. LIST OF ISSUES

A. Jurisdiction and Standard of Review on this Appeal

35. The Respondents agree with the Appellant's position in respect of jurisdiction.

36. The Respondents also agree that a remedy under s. 24(1) of the *Charter* is discretionary. Indeed, the SCC has observed that "[i]t is difficult to imagine…a wider and less fettered discretion".[42]

---

[41] Reasons of the Court of Appeal, paras 148, 155-156, Appeal Book V3, IX, pp 823, 825

[42] *Vancouver (City) v. Ward*, 2010 SCC 27 ("*Ward*"), para 17 [**Appellant's Book of Authorities ("ABOA") TAB 3**]

37. An appellate court must show considerable deference to a trial judge's choice of remedy under s. 24(1) of the *Charter* and may only interfere where a trial judge misdirects themself in law, commits a reviewable error of fact, or renders a decision that is "so clearly wrong as to amount to an injustice."[43] Deference is also owed to the trial judge's assessment of quantum.[44]

38. This Court has described the discretionary standard of review as follows[45]:

> The standard for intervention in a discretionary decision is very high. It is not enough that the appellate judges think the trial (or motions) judge simply reached a wrong result; there rarely is, in truly discretionary matters, a "right" or "wrong" result. It is not enough that the appellate judges would have decided differently; they are to respect, and not replicate, the unique role of trial judges. Assuming there have been no reversible errors on fact or law, the appellate judges are not to usurp the trial judge's role in discretionary matters, barring a decision so "clearly wrong" as to yield a truly unjust result.

B. Issues and Position of the Respondents

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

39. The trial judge did not misapprehend the nature of the Government's s. 2(d) breach entitling UMFA to a remedy. This Court has already upheld the trial judge's findings respecting the nature of Government's *Charter*-infringing conduct and the

---

[43] *Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33, para 26 [**ABOA TAB 1**]; citing, *inter alia, Doucet—Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, para 87;
[44] *Ward*, para 17 [**ABOA TAB 3**]; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13 ("*Conseil*"), paras 180-181 [**Respondent's Book of Authorities ("RBOA") TAB 1**]
[45] *Perth Services Ltd v Quinton et al*, 2009 MBCA 81, para 28 [**RBOA TAB 2**]

impact of that conduct on the bargaining process. This detrimental impact, which included the loss of a collective agreement with wage compensation akin to the Offer and the strike, was not only caused by the Government's directive to UM being kept secret for three weeks, but also the timing and content of the directive, as compared to the UM wage offer that was already made to UMFA; i.e. all aspects of the breach.

40. The Appellant conflates the analysis under s. 2(d), which protects a good faith process of collective bargaining and not a particular bargaining model or substantive outcome, with the *Charter* damages analysis, which recognizes that a breach of s. 2(d) causing losses must be remedied.

Issue 2: Did the trial judge err in awarding *Charter* damages by assuming that the Government's mandate caused UMFA to strike and to lose a four-year agreement that was similar to a proposal previously rejected?

41. This issue is appropriately framed as follows: did the trial judge err in awarding *Charter* damages by finding that the Government's *Charter*-infringing conduct – which involved more than the mere imposition of a mandate – caused UMFA to strike and to lose an agreement with wages similar to the Offer?

42. The trial judge's findings that the Government's conduct caused, or materially contributed to, the strike and the loss of a contract with wage increases akin to the Offer were amply available to her on the evidence adduced at trial. The Appellant has not established a palpable and overriding error.

Issue 3: What is an appropriate and just award of damages under s. 24(1) for

the s. 2(d) *Charter* breach?

43. The trial judge's award of *Charter* damages is appropriate and just. An award of the nature proposed by the Appellants would not be a meaningful remedy. Alternatively, if the trial judge erred then the issue of damages should be remitted.

IV. ARGUMENT

(1) Section 24(1) *Charter* Damages Framework

44. The *Charter* guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach. A court which has found the violation of a *Charter* right has a duty to provide an effective remedy.[46] Section 24(1) of the *Charter* broadly empowers a court to grant "such remedy as the court considers appropriate and just in the circumstances. Trial judges accordingly have extremely wide discretion in determining the appropriate and just remedy under s. 24(1),[47] which remedy may include an award of *Charter* damages.[48]

45. The Respondents agree that the Appellants have set out the applicable four-step framework for assessing whether damages are an appropriate and just remedy.[49]

(2) The Trial Judge did not err in Awarding Damages Based on the Totality of the Government's *Charter*-Infringing Conduct, which was not Restricted to the Secretive Manner it Imposed the Directive on UM

---

[46] Damages Decision, para 29, Appeal Book, V3, XI, p 849, para 29; citing *R. v. Ferguson*, 2008 SCC 6, para 34
[47] *Ward*, para 17 [**ABOA TAB 3**]; Damages Decision, para 42, Appeal Book, V3, XI, p 861, para 29; citing *Francis v. Ontario*, 2020 ONSC 1644, para 540
[48] *Ward*, para 4 [**ABOA TAB 3**]
[49] Appellant's Factum, para 27; *Ward*, para 4 [**ABOA TAB 3**]; *Conseil*, para 167 [**RBOA TAB 1**]

(i) Government did not Impose a Constitutional Mandate

46. The trial judge clearly and repeatedly identified the Government conduct that constituted the s. 2(d) *Charter* breach for which damages were awarded, with direct reference to the description of the breach by this Court:[50]

> …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…

47. In contrast, the Appellant mischaracterizes and minimizes the *Charter* breach by asserting that, as a government has the notional right to issue a mandate, it was only the "secretive manner" in which Government imposed the mandate that constituted substantial interference and warrants compensation.[51] The Appellant relies on its own misstatement of the s. 2(d) breach to improperly minimize the disruption it caused to the bargaining process to the three weeks of non-disclosure.

---

[50] Damages Decision, para 44, Appeal Book, V3, XI, p 864 (see also: paras 29, 58)
[51] Appellant's Factum, para 32

48. In the first appeal, the Appellant made the same argument that the trial judge erred by finding that the imposition of a new mandate constituted a violation of s. 2(d).[52] This Court rejected that argument and upheld the trial judge's conclusions regarding the multi-faceted nature of Government's *Charter*-infringing conduct and the impact of that conduct on the bargaining process. It is the totality of Manitoba's conduct that brought about substantial interference in the collective bargaining between UM and UMFA, thereby infringing s. 2(d) of the *Charter*.

49. The *Meredith* and *Syndicat canadien* cases cited by the Appellant do not support its position.[53] The Appellant relied upon the same authorities in the first appeal and this Court distinguished the degree and intensity of interference in the UM and UMFA bargaining process from the wage roll backs found to be permissible in those cases.[54] In addition to relying on the distinguishing elements highlighted by this Court, the trial judge also noted that, while the courts in these cases accepted that enacted and proclaimed legislation could roll back previously agreed wage increases in some circumstances, the 2016 UM and UMFA bargaining occurred before the Government passed wage restraint legislation in 2017.[55] Government was not acting pursuant to any legislative authority in stipulating its mandate and non-

---

[52] Reasons of the Court of Appeal, paras 143, 147, Appeal Book V3, IX, pp 821-822
[53] *Meredith v. Canada,* 2015 SCC 2 [**ABOA TAB 4**]; *Canada (Procureur general) c. Syndicat canadien,* 2016 QCCA 163, leave to appeal denied (August 25, 2016, SCC File No. 36914) [**ABOA TAB 5**]
[54] Reasons of the Court of Appeal, paras 147-148, Appeal Book V3, IX, pp 822-823
[55] Damages Decision, para 44, Appeal Book, V3, XI, p 865

disclosure. Further, unlike the roll backs in these cases, the Government's late mandate was not consistent with the "going rate" reached in other similar negotiated agreements, in that it was not in accordance with what was freely bargained for that same year with the other two largest universities in the province.[56]

50. The trial judge recognized that "Manitoba has a right to play a role in public sector bargaining", but qualified that "it must do so honestly, openly, and fairly", which did not occur in the circumstances of the 2016 UMFA bargaining.[57] Rather, the trial judge held: "What occurred was a substantial and surreptitious insertion by Manitoba into the ongoing, nine-month good faith collective bargaining process."

51. The Appellant parses the mere imposition of a mandate, which they describe as "entirely constitutional", from the specific factual circumstances and context in which the Government imposed its unconstitutional directive on UM, which include the timing and content of the mandate, in addition to its secrecy. This decontextualization is completely contrary to the accepted approach to determining whether government conduct amounts to substantial interference, and thereby a breach of s. 2(d) of the *Charter*, as per *Health Services*.[58] Simply put, there was no

---

[56] Reasons of the Court of Appeal, para 143, Appeal Book V3, IX, p 821; The evidence was that recently bargained (as recent as August 2016) collective agreements for faculty at the Universities of Winnipeg and Brandon had achieved wage increases between 1.5% and 2.5% for 2016, 2017 and 2018: Affidavit of Greg Flemming, Appeal Book V1, III, paras 10-12, pp 78-79.

[57] Damages Decision, paras 54, 58, Appeal Book, V3, XI, pp 878, 880

[58] *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia,* 2007 SCC 27, para 92 [**ABOA TAB 7**]

"constitutional mandate" as asserted by the Appellants.[59] Government surreptitiously stepped into the shoes of the employer to dictate bargaining late in the process on very different terms than those recently offered by UM. The trial judge was live to the distinction between the imposition of mandates generally and Manitoba's *Charter* violation in this case. Indeed, she observed that "it would not have been an unusual occurrence for a bargaining mandate to be invoked by a provincial government."[60] As both the trial judge and this Court have held, however, Manitoba did not merely invoke a bargaining mandate.

52. The Appellant asks this Court to carve out the hypothetical imposition of a constitutional mandate from the full context of the Government's *Charter*-infringing conduct, engage in counter-factual speculation as to what would have occurred had Government acted in compliance with the *Charter*, and assess damages on that basis. This is a wrong-headed exercise. The trial judge properly determined the harms flowing from the totality of the Government's *Charter*-violating conduct, from which the notional imposition of a legitimate mandate cannot be disentangled.

53. The Appellant concedes that the MLB was not addressing s. 2(d) of the *Charter* in deciding the ULP, but nevertheless relies on the MLB's finding that UM did not breach its statutory duty to bargain in good faith by withdrawing the Offer

[59] Appellant's Factum, para 36
[60] Damages Decision, para 7, Appeal Book, V3, XI, p 835

to accord with the Government's directive to somehow support their argument that imposing the directive was not unlawful. The MLB's ruling does not in any way vindicate the Government's conduct. The basis for the MLB's decision was that the Government's direct order to UM to comply with the mandate, under warning of severe financial and governance consequences, constituted a material change in circumstances for UM, which justified it revising its position at the bargaining table.[61] It is Government's conduct in issuing this order to UM, thereby upending what had been a meaningful and productive bargaining process, that constituted the *Charter* breach and is the basis for damages.

(ii) The Appellant Conflates the Content of s. 2(d) of the *Charter* with the Losses Flowing from the Breach of the *Charter* Right

54. The Appellant's emphasis on s. 2(d) of the *Charter* protecting process rather than outcomes is an attempt to conflate the content of the right with the identification of specific harms flowing from a breach of the right. The procedural nature of s. 2(d) rights is no legal impediment to the trial judge finding on the facts before her that the parties would likely have settled a collective agreement with wages similar to the Offer but for Government's unconstitutional conduct.

55. In *BCTF*, Donald J. upheld the trial judge's decision that legislation that deleted certain terms from the collective agreement between the teachers' union and

[61] MLB Decision, pp 71-72, Appeal Book V1, III, pp 188-189

their employer regarding working conditions, and also temporarily prohibited bargaining with respect to these matters, violated s. 2(d) of the *Charter*.[62] He found that striking down the legislation, on its own, did not provide the union with an effective remedy and additionally ordered, pursuant to s. 24(1), that the deleted terms be reinstated in the collective agreement immediately, thereby restoring the union's members to the position they would have been in but for the *Charter*-infringing legislation. Donald J. determined that restoration of the terms was necessary to prevent "plac[ing] the teachers at an unfair disadvantage due to egregious and unconstitutional government conduct.[63] Applying the Appellant's logic, this remedy was not available to the BC Court of Appeal at law because it imposed a substantive outcome (collective agreement terms) that is not constitutionally protected by s. 2(d).

56. This Court held the trial judge "was very much aware and knew that section 2(d) was 'to protect the good faith process of collective bargaining and not a particular bargaining model or outcome' (at para 210) and 'to preserve the processes of good faith bargaining' (at para 348)."[64] She clearly explained that the basis for her damages award was the significant impact to the good faith bargaining process:

> …I conclude that Manitoba's actions should result in a *Charter* damage remedy <u>as a consequence of the significant process irregularities that transpired which served to create and promote the events that took place</u>. The remedial provisions of s. 24(1) provides for those process guarantees pursuant

[62] *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184 ("*BCTF*") [**RBOA TAB 3**]. The SCC substantially upheld Donald J's reasons on appeal: 2016 SCC 49 [**RBOA TAB 4**].
[63] *BCTF*, paras 396-399 [**RBOA TAB 3**]
[64] Reasons of the Court of Appeal, para 151, Appeal Book V3, IX, p 823

> 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.[65]

57. The Appellants rely strongly upon *Saskatchewan Federation of Labour*, in which the plaintiff/applicant unions argued that if the *Charter*-infringing essential services legislation eliminating the right to strike had not been enacted and implemented, then unionized public sector employees would generally have had more bargaining power, which would have invariably resulted in more financially beneficial collective agreements, the loss of which employees should be compensated for in damages. Ball J. noted that none of the unions' claims identified any personal losses of employees that the unions sought to recover by way of compensation. He characterized the damages sought for minimizing the unions' bargaining power as "speculative at best and incapable of quantification for compensatory purposes." Understandably, Ball J. was not prepared to assume, in the absence of any evidentiary foundation, that employees suffered monetary losses.[66]

58. In contrast, the compensatory damages awarded to UMFA were directly grounded in the trial judge's factual findings regarding specific losses caused by the Government's *Charter*-infringing conduct, based on the evidence put before her, not a generic assumption that a larger wage settlement will inevitably flow from an

---

[65] Damages Decision, para 54, Appeal Book, V3, XI, p 878

[66] *Saskatchewan Federation of Labour v. Saskatchewan*, 2016 SKQB 365 ("*SFL*"), paras 45-51 [**ABOA TAB 9**]

increase in bargaining power. The trial judge highlighted that most cases dealing with *Charter* damage awards, including *SFL*, did not address circumstances where a quantifiable compensatory loss was sought and articulated, as is the case here.[67]

59. The trial judge did not award damages on the basis that s. 2(d) guaranteed UMFA a particular financial outcome.[68] The trial judge concluded that UMFA established on the evidence that it was more likely than not that the parties would have settled a collective agreement containing wage increases along the lines of the Offer, if not for Manitoba's *Charter*-infringing conduct.

60. Further, while Ball J. was correct in stating that there is no assurance that either side will ever recoup the financial costs imposed upon them by a strike, he was not commenting upon a situation in which a party is found to be responsible for causing a strike by virtue of its unlawful conduct.

61. Consistent with this Court's findings respecting the scope of the Government's *Charter*-infringing conduct, the trial judge awarded *Charter* damages for the impact that conduct had on the bargaining process, which went beyond non-pecuniary harms to the bargaining relationship and included quantifiable financial losses. Government was not entitled to impose the mandate that it did in the manner that it did. The trial judge and this Court have found that Government's conduct in

---

[67] Damages Decision, para 44, Appeal Book, V3, XI, pp 871-873

[68] Damages Decision, para 44, Appeal Book, V3, XI, p 864. The trial judge confirmed: "Section s. 2(d) protects the good faith process of collective bargaining and not a particular bargaining model or outcome."

issuing the mandate, including its timing, content, and manner of imposition, violated s. 2(d) of the *Charter*. The trial judge is entitled to exercise her wide discretion to award *Charter* damages as an appropriate and just remedy for the financial losses flowing from Government's *Charter*-infringing conduct.

(3) The Trial Judge did not Err in Concluding that the Government's *Charter*-Infringing Conduct Caused UMFA to Lose a Collective Agreement Similar to the Offer and to Strike

(i) Government's Conduct Caused the Loss of a Four-Year Agreement Similar to the Offer

62. The trial judge's conclusion that UM and UMFA would have settled a collective agreement with a 17.5% salary increase over a four-year period, subject to contingencies, is directly grounded in the evidence respecting the parties' 2016 bargaining prior to Government's substantial interference.

63. In her decision on the merits, the trial judge held that the 2016 bargaining "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",[69] which finding was affirmed by this Court.[70] In determining that *Charter* damages were warranted in respect of the loss of a four-year agreement with wage compensation similar to the Offer, the trial judge carefully reviewed the bargaining

[69] Trial Decision, para 429, Appeal Book, V2, VII, pp 763-764
[70] Reasons of the Court of Appeal, paras 155-156 Appeal Book V3, IX, p 825

history, and noted that salary was UMFA members' top priority, "[p]rogress towards a resolution of the wage issue was being accomplished" by the parties,[71] UM considered the Offer fair and reasonable, UMFA "had shown a degree of satisfaction" with the compensation proposed in the Offer, and UMFA accordingly thereafter shifted to address the other and "lesser" priorities of its membership.[72] The trial judge also referred to UMFA's communications to UM in October 2016, prior to disclosure of the mandate, that governance and metrics were the outstanding significant issues and concluded it was reasonable to infer that the 17.5% Offer was therefore substantially acceptable as a wage increase.[73]

64. Tort law damages principles are instructive in awarding *Charter* damages, particularly in respect of the objective of compensation.[74] In tort, losses that require a projection into the future must be established by the plaintiff as a reasonable possibility and it is the duty of the court to assess such sum for future loss as may be determined from a reasonable appraisal of all the evidence.[75] The evidence comprehensively reviewed by the trial judge demonstrates that this standard was well exceeded with respect to the loss of a wage settlement comparable to the Offer.

65. The Appellant relies on the fact that UMFA's proposals had been for a one-

---

[71] Damages Decision, para 47, Appeal Book, V3, XI, pp 873-874
[72] Damages Decision, para 50, Appeal Book, V3, XI, p 876
[73] Damages Decision, para 51, Appeal Book, V3, XI, pp 876-877
[74] *Ward*, paras 22, 48, 50-51 [**ABOA TAB 3**]
[75] *Conklin v. Smith et al.*, 1978 CanLII 181 (SCC), [1978] 2 SCR 1107 [**RBOA TAB 5**]

year agreement and UMFA had rejected the four-year Offer. There was no evidence, however, that a one-year term was a bargaining priority or goal for UMFA. Nor was there evidence that the parties have historically settled one-year contracts.[76] Government itself obviously thought there was a real likelihood of a four-year contract being reached as per UM's Offer, as the Offer; in particular, the danger of it setting a precedent, was the impetus for Government's interference in the parties' bargaining in the first place.[77] Further, it is important not to assign unwarranted significance to UMFA's purported rejection of the Offer by way of counter proposal. The MLB soundly rejected UM's argument that when the Government imposed the wage directive on UM on October 6, 2016, UM did not, at that time, have a wage offer on the table, given that, after its Offer was made on September 13, 2016, UMFA did not accept it and advanced a counteroffer, on the basis that this argument misrepresents the obligations imposed by the duty to bargain in good faith.[78]

66. The Appellant also relies on UMFA's final offer on October 30, 2016, prior to going on strike, for a one-year collective agreement at 0%, and the fact that UMFA ultimately settled for a one-year agreement with a 0% wage pause. The trial judge found, consistent with the evidence, that UMFA's actions and position subsequent

[76] Book of Agreed Facts, para 63 [Not in Appeal Book].
[77] Book of Agreed Facts, paras 90-91, Appeal Book V1, IV, p 306; Book of Agreed Facts, para 94, Appeal Book V1, IV, p 307; Agreed Book of Documents – Schedule 5, Binder A, Exhibit 2, Appeal Book, V2, V, p 379
[78] MLB Decision, pp 66-67, Appeal Book V1, III, p 183-184

to the October 27, 2016 disclosure of the mandate and Government's involvement in bargaining "was reactive to Manitoba's *Charter*-infringing actions and the new reality imposed"; namely, that wages were off the table and UMFA needed to shift its attention to other priorities that remained open to negotiation.[79] The trial judge described the Appellant's suggestion that UMFA should have remained on strike for 60 days in order to trigger statutory access to interest arbitration if a one-year 0% contract was truly unsatisfactory as "untoward", given the relevant consideration of the costs to affected third parties, including the student body whose academic year was salvaged by UMFA ending the strike when it did.[80] The Appellant is not entitled to complain of what is effectively a failure to mitigate damages, when their own actions have made doing so more difficult.[81] UMFA did not act unreasonably.

67. The trial judge's finding that the Government's *Charter*-infringing conduct caused the loss of a collective agreement with wage increases comparable to the Offer was grounded in the evidence and is not a palpable and overriding error. It is entirely appropriate and just for UMFA to be compensated, to some extent, for this identifiable loss.[82]

---

[79] Damages Decision, para 51, Appeal Book, V3, XI, pp 876-877
[80] Damages Decision, para 51, Appeal Book, V3, XI, pp 876-877
[81] *2438667 Manitoba Ltd. v Husky oil Ltd*, 2007 MBCA 77, paras 57-62 [**RBOA, TAB 6**]
[82] The trial judge correctly noted that, in addition to being reduced for contingencies, the *Charter* damages awarded constitute a one-time payment to UMFA members, do not alter collective agreement salary rates, and accordingly do not indemnify for their ongoing losses: Damages Decision, para 44, Appeal Book, V3, XI, p 866.

(ii) Government's Conduct Caused the Strike

68. The trial judge did not err in awarding damages to compensate in part for costs and wage losses associated with the strike. Her determination that the Government's *Charter*-infringing conduct was a cause of the strike was supported by the substantial body of evidence that pointed to the likelihood of the parties settling a freely negotiated agreement prior to the strike deadline had the Government not interfered.

69. The parties had agreed to a mediation process, brought in a professional mediator from Ontario, and were scheduled, over three days, to hammer out the remaining barriers to agreement. Proposals had been modified and compromises had already been made. Reaching agreement without job action was the historic pattern between the parties over decades, with only two strikes in UMFA history. The effect of the Government directive was well-characterized by the mediator, who indicated that had he known about it earlier, he would not even have flown to Winnipeg.

70. The trial judge relied upon the views of the parties themselves as to the cause of the strike. She cited the unchallenged evidence of Dr. Hudson that UMFA expected a contract settlement would be achieved prior to the strike deadline. She also noted the UM President's unanswered letter to the Premier, which described Government's interference as seriously debilitating UM's almost completed negotiations with UMFA and stated that it "would –without doubt –lead to a prolonged and divisive strike with devastating impacts on this community". She

referred to Mr. Juliano's communication to Government that there was a high likelihood of a strike if the mandate was imposed. Finally, she noted the evidence indicated that the Government "would not be unhappy with a strike."[83]

71. The trial judge additionally cited the expert evidence of Dr. Hebdon in support of her conclusion that Government interference caused the strike. Dr. Hebdon testified that the imposition of a pre-determined pay level removes leverage from the collective bargaining process. This observation is consistent with UM's rejection of UMFA's final offer for a one-year agreement at 0%. The trial judge found that Manitoba's actions crippled the joint ability of UM and UMFA to resolve their contractual dispute. The parties were precluded from bridging the gap in their positions on non-monetary issues by negotiating compensation.[84]

72. No Government official or civil servant testified at trial to explain or justify the Government's conduct connected with the 2016 interference in UM/UMFA bargaining. Nor did the Government's expert opine at all on UM/UMFA bargaining. The only evidence before the trial judge was adduced by the Respondents/Plaintiffs.

73. The trial judge found that the new reality imposed on UMFA by virtue of the Government's *Charter*-infringing actions caused it to pivot its priorities to governance and other non-compensatory issues, as these were the only matters that

[83] Damages Decision, paras 24, 48 Appeal Book, V3, XI, pp 846, 875
[84] Damages Decision, para 24, Appeal Book, V3, XI, p 846

remained available to negotiate.[85] As held by the trial judge, UMFA's actions and position in bargaining subsequent to the October 27 disclosure were founded on Manitoba's imposition of a late mandate, the non-disclosure of that mandate, and the fact the mandate had significantly changed from what had previously been proposed.

74. The trial judge made no palpable and overriding error in finding that Government's *Charter*-infringing conduct was a cause of the strike, and it was appropriate and just to award damages for financial losses associated with the strike.

(4) The Quantum of the Trial Judge's Award is Appropriate

75. There is no basis for this Court to interfere with the trial judge's discretionary determination as to the appropriate and just quantum of *Charter* damages, which decision is properly afforded deference.

76. The quantum of damages proposed by the Appellant does not represent a meaningful remedy in the circumstances as it entirely fails to account for the pecuniary losses suffered UMFA members as a result of Manitoba's *Charter*-infringing conduct. Nor does it reflect the seriousness of the "egregious" breach.[86]

77. The MLB's remedial award against UM pursuant to the LRA is not a substitute for, nor duplicative of, a *Charter* damages remedy pursuant to s. 24(1). As noted by the trial judge, Government was not a party to the ULP and, accordingly,

---

[85] Damages Decision, para 48, Appeal Book, V3, XI, p 875
[86] Damages Decision, para 55, Appeal Book, V3, XI, p 878

no award could be made by the MLB with respect to Government's conduct. The MLB was solely interested in the University's reaction to the directive, not the directive itself. The trial judge also found that there were two distinct breaches of duty: a duty upon the Government not to substantially interfere in a process of good faith bargaining by secretly directing UM to withdraw its Offer for a significantly different wage mandate late in the process, and a duty upon UM to disclose its decision to abide by the Government directive to UMFA at its earliest opportunity so as to give UMFA and its members an opportunity to appropriately react. The consequences of these two violations are simply not the same.[87]

78. As held by the trial judge, the MLB award did not compensate UMFA members for the loss of a collective agreement with wage increases similar to the Offer or for the costs of the strike. The MLB award did not serve the function of vindication, as the breach of UMFA members' s. 2(d) *Charter* rights was not before the MLB. Nor could the MLB award serve the function of deterrence, as it was issued against UM, not the Government. As the MLB award did not serve any of the functions of *Charter* damages, there can be no duplication of relief.[88]

79. The *BCTF* and *Brazeau* cases cited by the Appellant are not a relevant guide to assessing the quantum of *Charter* damages in the present case, as they did not

[87] Damages Decision, para 44, Appeal Book, V3, XI, pp 868, 870
[88] Damages Decision, para 44, Appeal Book, V3, XI, pp 870-871

involve quantifiable losses. In *Conseil*, the SCC restored the *Charter* damages awarded to compensate for the calculable losses identified by the trial judge.[89]

80. If this Court finds that the trial judge made an error such that her *Charter* damages award should be set aside, the issue of damages should properly be remitted to her to be determined with the benefit of this Court's decision. This was the relief ordered by the Ontario Court of Appeal in *Brazeau*, wherein the Court affirmed the trial judge's finding on liability (which has already been affirmed in the present case) but held that he made serious errors of law in awarding *Charter* damages. The Court set aside the aggregate *Charter* damages award and remitted the issue of damages to the trial judge to be determined on proper principles.[90]

81. The determination of an appropriate and just award of *Charter* damages is highly discretionary and turns on the particular evidence before the trial judge. This Court should not usurp the trial judge's role in this regard. The trial judge invoked all three functions of *Charter* damages in issuing her award. If this Court finds that UMFA is not entitled to compensation in respect of a particular loss, it is for the trial judge to reconsider and rationalize an appropriate and just award in light of the weight she sees fit to assign to each of the three functions of damages.

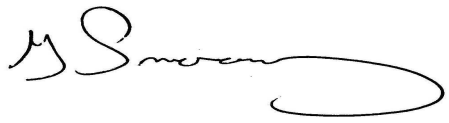
V. CONCLUSION

82. The Respondents ask this Honourable Court to dismiss the appeal, with costs.

---

[89] *Conseil*, paras 180-181 [**RBOA TAB 1**]
[90] *Brazeau et al. v. Canada (A.G.)*, 2020 ONCA 184, para 113 [**ABOA TAB 2**].

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Garth Smorang, Q.C.
Counsel for the Respondents

Estimated Time for Oral Argument: 1.5 hours