Citation: Manitoba Federation of Labour et al v The Government of Manitoba,
2023 MBCA 65
Date: 20230713
Docket: AI22-30-09768

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Diana M. Cameron
Madam Justice Janice L. leMaistre

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,	)	***M. A. Conner*** *and* ***M. A. Bodner*** *for the Appellant*
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,	)	***G. H. Smorang, K.C.*** *and* ***K. M. Worbanski*** *for the Respondents*
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,	)	*Appeal heard:* ***January 11, 2023***
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,	)	*Judgment delivered:* ***July 13, 2023***

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	)

On appeal from 2022 MBQB 32

CAMERON JA

Background and Issues

[1] This appeal concerns an award of damages pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) against the Province of Manitoba (Manitoba) for having breached the University of

Manitoba Faculty Association's (UMFA) section 2(d) *Charter* right to associate by substantially interfering in the 2016 contract negotiations between the University of Manitoba (the U of M) and UMFA.

[2] The trial in this matter was bifurcated. In the first part of the trial, the trial judge found that *The Public Services Sustainability Act*, CCSM c P272, as repealed by *The Public Services Sustainability Repeal Act*, SM 2022, c 9 s 1 (the *PSSA*), passed in 2017, infringed section 2(d) of the *Charter* and could not be justified pursuant to section 1 of the *Charter* (see *Manitoba Federation of Labour et al v The Government of Manitoba*, 2020 MBQB 92 at para 434) (*MFL 2020*). The *PSSA* applied broadly across the public service to both unionized and non-unionized employees and set wage caps of 0%, 0%, 0.75% and 1% over a four-year period (see *MFL 2020* at para 9).

[3] In addition, on a slightly different but related issue, the trial judge held that Manitoba's conduct during the 2016 contract negotiations between the U of M and UMFA (the 2016 negotiations) violated section 2(d) of the *Charter* (see *MFL 2020* at para 257).

[4] In *Manitoba Federation of Labour et al v The Government of Manitoba*, 2021 MBCA 85 (*MFL 2021*), this Court allowed Manitoba's appeal of the trial judge's ruling regarding the constitutionality of the *PSSA*, holding that it did not infringe section 2(d). Despite this, the Court dismissed Manitoba's appeal regarding the trial judge's finding that its conduct during the 2016 negotiations violated section 2(d) of the *Charter*.

[5] The second part of the trial involved the determination of damages as a section 24(1) *Charter* remedy (the remedy hearing) (see *Manitoba*

Federation of Labour et al v The Government of Manitoba, 2022 MBQB 32). The trial judge ordered $15 million as compensation, vindication and deterrent damages for the harm caused by Manitoba in interfering with the 2016 negotiations between the U of M and UMFA. In addition, after having found that Manitoba's conduct caused UMFA to strike, she ordered damages of $2,829,081.82 for strike pay and benefits paid to UMFA members and $1,603,195.63 for loss of salary while on strike. Her total award amounted to $19,432,277.45. It is from that order that Manitoba now appeals.

[6] Briefly, Manitoba alleges that the trial judge made errors of law and of fact in reaching her conclusion. For the reasons that follow, I disagree and would dismiss the appeal.

Facts

[7] The facts regarding Manitoba's involvement in the 2016 negotiations were set out in *MFL 2021*. For ease of reference and consistency, they are reproduced below (at paras 134-40):

> The current government was sworn into office on May 3, 2016. The U of M and UMFA were engaged in contract negotiations in the summer and fall of 2016. On September 13, 2016, after 20 bargaining sessions, the U of M offered UMFA a comprehensive offer which included a 7% wage increase over four years (1%, 2%, 2% and 2%). When market adjustments were added, this wage increase would have represented a 17.5% wage offer over the four-year period.
>
> That offer, while not accepted by UMFA, was still on the table when Manitoba heard about it for the first time on September 30, 2016. It was concerned that the September 13 wage offer would create a bad precedent for future bargaining regarding public sector wages across the province. As a result, on October 6, 2016, it directed the U of M to bargain for a one-year agreement with a

0% wage freeze for UMFA. It also ordered the U of M not to disclose to UMFA that it was the one that gave this new mandate. Prior to this mandate, the U of M had not been given any government direction with respect to these negotiations.

The U of M strongly disagreed with this new mandate, given how far the parties had progressed in the bargaining process and given the September 13 wage offer to UMFA. Despite its disapproval, the U of M felt it had no option but to abide by the mandate after being told that there would be "financial consequences" were it not to do so.

On October 26, 2016, the President of the U of M, Dr. David Barnard (Dr. Barnard), wrote to the Premier of Manitoba requesting him to reconsider "the decision to impose the salary pause on the (U of M) and allow (it) to continue to bargain in good faith." He also stated that the new mandate would "seriously debilitate the (U of M's) almost completed (nine months into bargaining) negotiations with UMFA".

The following day, on October 27, 2016, at the commencement of a mediation session, the U of M informed UMFA of the mandate it had received from Manitoba. Unsurprisingly, UMFA reacted negatively and, on November 1, 2016, its members commenced a legal strike.

During the course of the strike, the parties continued to bargain and engage in a conciliation process. On November 20, 2016, the parties agreed to a one-year collective agreement with a 0% wage increase. UMFA did make some gains, including workload protections, a collegial process for the determination of tenure and promotion criteria, and some improvement to performance metrics.

Afterwards, UMFA filed with the Manitoba Labour Board (the Labour Board) an unfair labour practice against the U of M for not disclosing the one-year 0% wage freeze mandate during a three-week period (October 6-27, 2016). The Labour Board ruled that the U of M's failure to make appropriate and timely disclosure "was tantamount to a misrepresentation and constituted a breach of section 63(1) of (*The Labour Relations Act*, CCSM c L10) and an unfair labour practice pursuant to section 26." The Labour Board held that the U of M "failed to provide full and candid

> disclosure and, as such, did not bargain in good faith and make every reasonable effort to conclude a collective agreement."

[8] UMFA then commenced these proceedings against Manitoba, claiming that its conduct and interference in the 2016 negotiations had violated section 2(d) of the *Charter*. At the oral hearing of this appeal, the parties advised that the decision of the Manitoba Labour Board (the Labour Board) had been put before the trial judge as if the evidence contained in its decision was before her. Both parties agreed that the trial judge was not bound by the legal findings of the Labour Board.

Reasons of the Trial Judge

[9] At the remedy hearing, UMFA sought damages to compensate its members for their monetary losses incurred because of Manitoba's "substantial interference and disruption in the collective bargaining process as demonstrated by the reduction of a 17.5 per cent wage increase to 1.75 per cent over four years" [1] (at para 21).

[10] As well, because the Labour Board was not prepared to find that the U of M's failure to disclose the mandate had caused the strike, it did not order compensation by the U of M for monetary losses incurred by UMFA and its membership as a result of the strike action. Thus, UMFA requested section 24(1) *Charter* damages for the direct costs of the strike including strike pay, health benefits, strike fund, wages lost for those on strike and

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[1] The 1.75% increase mentioned by the trial judge was based on the fact that, after UMFA completed the one-year agreement with a 0% wage increase, it later completed a further three-year agreement with the U of M which provided wage increases of 0%, 0.75% and 1% for the years 2017 to 2020.

UMFA's costs, such as setting up an office outside of the U of M's campus (see para 21).

[11] In total, UMFA sought $28,811,626 in damages (see para 31).

[12] In determining damages, the trial judge applied *Vancouver (City) v Ward*, 2010 SCC 27, the leading Supreme Court of Canada decision on section 24(1) *Charter* damages. She noted that a damage award can advance the general objectives of the *Charter* by compensating for any personal loss, vindicating the right infringed by emphasizing its importance and deterring any future breaches (see para 44).

[13] The trial judge found that the mandate resulted in a significantly different wage position being adopted late in the bargaining process which created a section 2(d) *Charter* breach and that the directed non-disclosure was a further significant breach (see para 44). In doing so, she relied on *MFL 2021* at para 148, which stated that there were two facets to Manitoba's impugned conduct: (1) the imposition of the mandate late in the bargaining process that was significantly different than what was earlier offered; and (2) the instruction to the U of M not to disclose that the mandate was at the direction of Manitoba. As I later explain, the interpretation of paras 147-48 of *MLF 2021* is at the core of Manitoba's appeal that the trial judge erred in her assessment of the nature of the infringement of section 2(d) that was found by this Court.

[14] In determining that damages should be ordered, the trial judge found that "Manitoba's imposition of the initial and late mandate . . . resulted in [the U of M] altering its bargaining position from a 17.5 per cent wage increase

offer over a four year period to what proved to be a 1.75 per cent increase" (at para 44).

[15] Based on the above, amongst other findings, she concluded that an award of *Charter* damages would, in part, cover the losses incurred by UMFA members and UMFA, assist in the vindication of the *Charter* breach and serve to deter future similar conduct (*ibid*).

[16] In considering quantum, she acknowledged that there was a speculative element as to whether the U of M and UMFA would have agreed to a 17.5% salary increase over the four-year period. Despite this, relying on UMFA's conduct and Dr. Mark Hudson's testimony (the president of UMFA at the time), she found that there was a level of satisfaction with that wage offer. In the end, in order to account for the possibility of a contract resolution at less than 17.5% (which would have resulted in the membership loss being $20,691,902 without interest), she reduced the amount to $15 million (see paras 59-60) (the award for loss of collective agreement). She noted that her order would constitute a one-time payment that would not alter the current salary rates (see para 44).

[17] Next, the trial judge determined that Manitoba's conduct caused the strike. Manitoba argued that the offer made by UMFA on October 30, 2016 (after it had been advised of the mandate), which put forward a 0% increase and the November 20, 2016 final settlement for a one-year increase at 0%, broke the chain of causation. However, despite this argument being similar to the position accepted by the Labour Board, she noted that she was not bound by the findings of the Labour Board, nor did they render the issue of causation before her *res judicata* (see paras 46-52). In her view, the chain of

causation was not broken by these two events which she found to be reactions to the new reality faced by UMFA as a result of Manitoba's *Charter*-infringing actions (see para 48).

[18] Having found that Manitoba's conduct caused the strike, she awarded $2,754,300.80 for strike pay, $74,781.02 for the costs of operating a strike headquarters and $1,603,195.63 for loss of salary while on strike.

[19] The total of all damages awarded amounted to $19,432,277.45.

Issues and Standard of Review

[20] Section 24(1) of the *Charter* provides:

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

[21] A decision made pursuant to section 24(1) is discretionary and entitled to deference on appellate review. It can only be interfered with "where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is 'so clearly wrong as to amount to an injustice'" (*R v Babos*, 2014 SCC 16 at para 48). See also *Manitoba (Director of Child and Family Services) v HH and CG*, 2017 MBCA 33, for a review of the jurisprudence concerning the standard of review for section 24(1) *Charter* remedies.

[22] Manitoba argues that the trial judge erred in misapprehending the nature of the section 2(d) *Charter* breach, thereby causing her to err in her

assessment of the section 24(1) damages. Next, it argues that she made factual errors when she found that (a) the mandate caused UMFA to lose a four-year contract similar to the September 13, 2016 offer, and (b) the mandate caused UMFA to strike. Manitoba's final issue is premised, for the most part, on the assumption that the above errors were made and deals with quantum of damages and the concept of double recovery.

[23] Manitoba submits that the first issue involves a question of law to be considered on the standard of correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at para 8). I agree. In my view, the question requires this Court to define the scope of the section 2(d) *Charter* breach upheld by this Court in *MLF 2021*. That is a question of law.

[24] Regarding the errors of fact alleged by Manitoba, the standard of review is palpable and overriding error (see *Housen* at para 10).

The Law Regarding *Charter* Damages

[25] There are few cases dealing with damages related to wage restraint by a government.[2] Thus, it is important to review the evolution of the law regarding the award of damages as a section 24(1) *Charter* remedy.

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[2] In *Ontario English Catholic Teachers Assoc v His Majesty*, 2022 ONSC 6658, Ontario's *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, SO 2019, c 12, was held to breach section 2(d) of the *Charter* and was not justified pursuant to section 1. A declaration of invalidity was granted, but other remedies were deferred to a future hearing. In *Nova Scotia Teachers Union v Nova Scotia (Attorney General)*, 2022 NSSC 168, Nova Scotia's *Teachers' Professional Agreement and Classroom Improvements (2017) Act*, SNS 2017, c 1, was declared invalid for being an unjustifiable breach of section 2(d). In *OPSEU v Ontario*, 2016 ONSC 2197, Ontario's *Putting Students First Act, 2012*, SO 2012, c 11 (since repealed) was found to be an unjustifiable breach of section 2(d), but there is no reported decision on remedy. Finally, in *Canadian Union of Postal Workers v Canada (Attorney General)*, 2016 ONSC 418, which dealt with back-to-work legislation for postal workers that included a wage restraint component, the statute was declared invalid, but no section 24(1) remedies were awarded. As stated by the Court, "There was no conduct on the part of government officials in this case that would warrant an award of *Charter* damages" (at para 244).

[26] In *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, the Supreme Court of Canada explained the manner in which courts should approach the determination of remedy pursuant to section 24(1). The majority wrote (at para 25):

> . . . A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.
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> [emphasis in original]

[27] The majority also stated that a party challenging a *Charter* remedy must show that the order is not "appropriate and just in the circumstances" (at para 50). It explained, "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" (at para 55) and that "[t]he trial judge is not required to identify the single best remedy, even if that were possible" (at para 86). Finally, the majority emphasized that reviewing courts "must show considerable deference to trial judges' choice of remedy" (at para 87).

[28] The leading case on *Charter* damages is *Ward*. In that case, McLachlin CJ, writing for a unanimous Court, agreed that damages may be awarded as a remedy pursuant to section 24(1). She stated (at para 4):

> I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy,

> having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[29] She explained that constitutional damages are distinct from private law damages in that an action for public law damages—including constitutional damages—lies against the state and not against individual actors (see para 22). However, she also indicated that the "private law measure of damages for similar wrongs will often be a useful guide" (at para 54).

[30] In terms of when *Charter* damages are an appropriate remedy, she explained (at para 25):

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

[31] She also noted that, where the function of compensation is engaged, the claimant should be put in the same position as if their *Charter* rights had not been infringed (see paras 27, 48), vindication focusses on the harm, not only to the claimants, but to society as a whole (see para 28) and the societal

purpose of deterrence is to regulate government behaviour in order to secure state *Charter* compliance in the future (see para 29).

[32] The onus is on the state to establish any countervailing factors, such as the existence of alternative remedies (such as private law remedies or other *Charter* remedies) and concerns for good governance (see paras 33-35). While the existence of a potential claim in tort does not bar section 24(1) damages, such a remedy will be barred if the result would be double compensation (see para 36).

[33] In *Henry v British Columbia (Attorney General)*, 2015 SCC 24, at issue was a claim for *Charter* damages for wrongful conviction in the context of non-disclosure. In that context, the majority of the Court held that, as a result of the wrongful non-disclosure, a claimant would have to show that they suffered a legally cognizable harm (see para 95). The majority stated that, "Regardless of the nature of the harm suffered, a claimant would have to prove, on a balance of probabilities, that 'but for' the wrongful non-disclosure he or she would not have suffered that harm" (at para 97). It noted that this test restricted liability to cases where an "intentional failure to disclose was actually the cause of the harm to the accused" (*ibid*).

[34] Generally speaking, absent state conduct under a law which is "clearly wrong, in bad faith or an abuse of power" (*Ward* at para 39), an action for *Charter* damages cannot be combined with a declaration of invalidity under section 52 of the *Constitution Act, 1982* (see also *Guimond v Quebec (Attorney General)*, [1996] 3 SCR 347 at para 19; and *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 at para 81).

[35] Recently, in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13, the Court considered *Charter* damages in a case involving good faith policy decisions made by government, as opposed to the enactment of legislation. In that case, the trial judge awarded $6 million in damages as a remedy for the infringement of section 23 of the *Charter* resulting from the inadequate funding of school transportation for French-language students in British Columbia. The Court of Appeal reversed the trial judge's decision regarding damages, finding that the trial judge had not recognized and applied the government's immunity from being ordered to pay (see para 49).

[36] The majority of the Supreme Court decided that the government did not enjoy immunity from damage awards arising from *Charter*-infringing policies. It stated (at para 169):

> The Province argues that *Ward* extended the scope of the government immunity to include decisions made by a government in accordance with its policies. This Court noted at para. 40 of that case that "the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion." Considered in its context, the concept of policy making relates to government policies that are based on laws. The Province's argument in this regard must fail. Only one situation in which the limited immunity applies was recognized in *Ward*, that of government decisions made under laws that were duly enacted but were subsequently declared to be invalid.

[37] The majority then held that awarding damages in relation to a government decision made in accordance with its own policy was "unlikely to have a chilling effect on government actions and thereby undermine their

effectiveness" (at para 170) and that it, in fact, helps to ensure government actions respect fundamental rights (see para 171).

[38] The majority explained (at paras 172-73):

> An overly broad application of the limited government immunity could in fact have undesirable effects. It would permit a government to avoid liability for damages simply by showing that its unlawful actions are authorized by its policies.
>
> This concern is accentuated by the fact that government policies do not usually result from a public process and that the "government policy" concept has not been defined. Does it concern any form of directives or guidelines issued by the government? If so, the immunity the Court is being asked to recognize would be very broad. In contrast, a law is an easily identifiable instrument. It is the product of a vote taken by a legislative body. The preparation of a law is a transparent public process that is central to the democratic process. It is therefore appropriate to give the government, in respect of a well-defined instrument such as a law, an immunity that it is nonetheless inadvisable to give it for undefined instruments with unclear limits, such as government policies. The latter approach would reduce the chances of obtaining access to justice and an appropriate and just remedy for individuals whose rights have been infringed. The effect of expanding the scope of the government immunity like this is that bringing an action for damages in response to a *Charter* infringement would become illusory.

[39] Ultimately, the majority upheld (and increased) the damages awarded by the trial judge (see paras 180-81, 185-86).

Positions of the Parties

[40] Manitoba argues that the trial judge misapprehended the nature of the section 2(d) *Charter* breach. It submits that, in *MFL 2021*, this Court held

that governments can constitutionally impose a new mandate late in the bargaining process, provided there is open disclosure. It maintains that it was only the secretive manner in which the government imposed the mandate that harmed the relationship between the U of M and UMFA and that caused the breach.

[41] Manitoba further argues that, while the trial judge took into account all three functions of *Charter* damages (i.e., compensation, vindication and deterrence), her primary focus was on compensation. It maintains that she made a legal error by compensating UMFA for the financial consequences of the mandate itself, which Manitoba submits was constitutional. Thus, Manitoba submits that the trial judge should have ordered damages for the harm caused by the manner in which the mandate was imposed and not the consequences of it.

[42] Manitoba also alleges that the trial judge made factual errors. First, it argues that there was no evidentiary basis for her to conclude that the mandate caused UMFA to lose a four-year contract with the U of M. Next, it argues that there was no evidence to support her finding that the mandate caused the strike.

[43] UMFA argues that Manitoba mischaracterizes and minimizes the nature of the *Charter* breach. It submits that it was the totality of Manitoba's conduct that brought about substantial interference in the collective bargaining between the U of M and UMFA, thereby constituting the section 2(d) *Charter* breach.

[44] Further, UMFA argues that Manitoba conflates the analysis of the good faith collective bargaining process which section 2(d) protects with the section 24(1) *Charter* analysis of damages.

[45] UMFA argues that the findings of fact made by the trial judge were fully supported by the evidence and no palpable and overriding errors were made by her.

The Nature of the Unconstitutional Conduct

[46] In order to explain this issue, it is necessary to examine paras 147-48 of *MFL 2021* which are at the core of the argument made by Manitoba that the trial judge mischaracterized the nature of the breach. They state:

> The critical issue on this ground is Manitoba's third point. Manitoba's argument rests on the premise that the conduct that was being scrutinized as unconstitutional was that it had imposed a new mandate on the U of M late in the bargaining process. Manitoba submits that the trial judge failed to address the legal question of whether this action violated section 2(d). Manitoba states that the case law establishes that rolling back and overturning completed agreements does not necessarily amount to substantial interference (see *Meredith* [*Meredith v Canada (Attorney General)*, 2015 SCC 2]; and *Syndicat canadien* [*Canada (Procureur général) c Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163]). It submits that, if rollbacks do not amount to substantial interference, then issuing new mandates late in the bargaining process also does not.
>
> I would agree with Manitoba's submission if that were the conduct being scrutinized as unconstitutional. The problem with Manitoba's position is that the impugned conduct before the trial judge was not simply the imposition of a new mandate late in the bargaining process. It was more than that. 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.
>
> [emphasis added]

[47] I am not persuaded by Manitoba's position that the mandate itself was constitutional and that only the secrecy aspect of it infringed section 2(d) of the *Charter*. The cases of *Meredith v Canada (Attorney General)*, 2015 SCC 2; and *Canada (Procureur général) c Syndicat canadien de la fonction publique, section locale 675*, 2016 QCCA 163, leave to appeal to SCC refused, 36914 (25 August 2016), that this Court applied in *MLF 2021* when finding that the *PSSA* did not breach section 2(d), do not stand for the proposition that all government legislated rollbacks and the overturning of completed agreements are necessarily constitutional. Neither do they necessarily apply to government mandates that purport to do the same. Each case must be decided on its facts.

[48] Furthermore, I agree with UMFA that the argument made by Manitoba is, in essence, the same argument that was made in *MFL 2021*, which this Court rejected in the above paragraphs.

[49] As earlier stated, the breach of the *Charter* was found as a result of the unique combination of the two facets which included the significant rate change in the mandate imposed late in the bargaining process and the instructed secrecy. That this Court intended the totality of the conduct to constitute the breach is reinforced in *MLF 2021*, which states (at para 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. . . .

[50] While the trial judge may have misspoken to the extent (if any) that she characterized the conduct as two separate breaches, I repeat that it is the totality of the breach which is to be considered in the determination of a remedy pursuant to section 24(1) of the *Charter*. As stated in *Health Services and Support — Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, "The inquiry in every case is contextual and fact-specific" (at para 92). In my view, to parse out the secrecy aspect of Manitoba's conduct and only award damages for that facet of its conduct would not fully address the breach that this Court upheld.

[51] With the nature of the breach now defined, I will consider the errors alleged regarding the damages that she ordered.

Alleged Factual Errors

Error in Finding the Parties Would Have Signed a Four-Year Contract

[52] As earlier stated, the trial judge found that Manitoba's unconstitutional conduct in imposing the mandate caused UMFA to lose the benefit of a collective agreement similar to that offered by the U of M on September 13, 2016. She used the 17.5% wage increase over a four-year period as an aid in determining damages in the amount of $15 million based, in part, on wages that UMFA members would have received had there been no interference with the process. It is not in issue that the trial judge had evidence before her regarding the quantum of wages that UMFA members would have received had such a deal been struck.

[53] Manitoba argues that it was speculative and arbitrary for the trial judge to find that the parties would have entered a four-year contract. It submits that such a finding was not supported by the bargaining history. It points out that all of the proposals made by UMFA were for a one-year term and that UMFA had turned down the only four-year proposal offered by the U of M. Manitoba also submits that the facts that (1) UMFA made a one-year offer on October 30, 2016, after having learned of the mandate; and (2) UMFA settled for a one-year contract with a 0% wage increase after the strike, demonstrate that there was no intent to negotiate a four-year contract.

[54] The trial judge carefully considered the arguments made by Manitoba. She reviewed the entire bargaining process based on the evidence before her. She found that meaningful progress had been made in the 2016 negotiations as far back as March 2016 and that progress was being made regarding the resolution of the wage issue. Relying on portions of the Labour Board decision, she noted that the fact that a party makes a counteroffer (as here, where UMFA made a counteroffer to the U of M's September 13, 2016 offer) does not necessarily allow the other party to fundamentally deviate from previous positions taken (see para 47).

[55] Regarding the 0% wage increase proposal made by UMFA on October 30, 2016, she found that it was a reaction to Manitoba's *Charter*-infringing conduct. She accepted the evidence of Dr. Hudson that the new reality imposed by the mandate caused a need for UMFA to shift its priorities to governance and other non-compensatory issues. She also accepted his evidence that monetary compensation had been the number one priority of UMFA members and found that UMFA had shown a degree of satisfaction with the September 13, 2016 offer in that regard. She drew an inference that

a 17.5% wage increase was substantially acceptable to UMFA (see paras 50, 59). As already stated, the 17.5% wage increase was to occur over the term of a four-year contract.

[56] In my view, Manitoba is asking this Court to reweigh the evidence. While it is true that the actions of UMFA, taken on their own, may lead to the conclusion that it was seeking a one-year contract, the trial judge accepted the evidence that UMFA advanced in reaching her conclusion. I am not convinced that she committed a palpable and overriding error in that regard.

Error in Finding That the Mandate Caused the Strike

[57] Manitoba also argues that the trial judge erred in finding that the mandate caused the strike. It submits that UMFA did not strike over wages but, rather, over metrics and governance issues. In this regard, it points to a number of instances where UMFA indicated that a 0% wage increase was acceptable and that it wanted to discuss other issues, including workload and metrics. It emphasizes that, while wages may have been one of the top priorities, UMFA was prepared to give them up to achieve non-monetary gains. Again, Manitoba relies on the November 20, 2016 one-year agreement that was reached with a wage pause as evidence that it was not wages that caused the strike.

[58] Manitoba also refers to the reasons of the Labour Board, which held that, while the fact that the U of M did not disclose the mandate constituted an unfair labour practice, it did not cause the strike.

[59] The trial judge was well aware of the findings of the Labour Board. However, as agreed by the parties, she found that she was not bound by its

finding (see *Gordon v Canada (Attorney General)*, 2016 ONCA 625 at para 83).

[60] I note that the Labour Board decision involved the conduct of the U of M and not the totality of the conduct that constituted the section 2(d) *Charter* breach. Despite this, the decision of the trial judge does appear to be inconsistent with that of the Labour Board to the extent that the Labour Board found that the strike was caused by UMFA's demands regarding the governance and related issues.

[61] In my view, the difference lies in the evaluation of, and the weight placed on, the evidence. As argued by UMFA, there was evidence in the bargaining history to demonstrate that the parties were heading toward a freely negotiated resolution of the matter—proposals had been modified and compromises had been made. A professional mediator had been brought in. All of this history was considered by the trial judge (see para 47).

[62] Most importantly, the trial judge relied on the nature and effect of the breach in reaching her conclusion. She stated (at paras 48-49):

> 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.
>
> Manitoba's mandate, imposed on [the U of M], served to substantially impact the capacity of union members to come together, react to, and pursue their collective goals related to wages. Without question, [the U of M] 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.
>
> [emphasis added]

[63] While Manitoba argues that the statement emphasized above constituted a palpable and overriding error, I am not convinced that the trial judge did anything more than make strong evidentiary findings and place weight on facts that the Labour Board did not consider determinative. While I agree that the decision of the Labour Board in this case is relevant and informative, and another judge may have concluded differently, I am not convinced that the trial judge committed a palpable and overriding error.

Alleged Error in Not Compensating for Loss of Process Rather Than Outcome

[64] Although not listed as a separate ground of appeal, Manitoba argues that the trial judge erred in respect of the manner in which she assessed damages.

[65] Manitoba argues that, by awarding damages to compensate employees for monetary loss assumed to be caused by the implementation of the mandate and for pecuniary damages associated with the strike, the trial judge erred in basing her assessment on the outcome of the process, rather

than on the breach of process that section 2(d) guarantees. It suggests that an appropriate award would be in the range of $500 to $1,000 per UMFA member.

[66] In support of its position, Manitoba relies on *Health Services* in arguing that section 2(d) of the *Charter* constitutes a procedural right and does not guarantee a substantive or economic outcome (see para 91). Thus, it maintains that the trial judge should only have compensated UMFA for the adverse impacts on the process flowing from the manner in which the mandate was imposed.

[67] Manitoba submits that an example of where the court got the issue of damages right in this regard can be found in *Saskatchewan Federation of Labour v Saskatchewan*, 2016 SKQB 365 (*SFL 2016*). That case involved the determination of section 24(1) damages resulting from the Supreme Court of Canada's decision in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, which struck down provincial legislation on the basis that it eliminated the right to strike in breach of section 2(d) of the *Charter* and could not be saved by section 1.

[68] Manitoba submits that, in *SFL 2016*, Ball J refused to award the unions compensatory damages based on their argument that, but for the section 2(d) breach, they would have had more bargaining power and negotiated a better settlement. In reaching his conclusion, Ball J stated that section 2(d) protects "associational activity, not a particular process of result" and that to order monetary losses for assumed losses by the employees in that case would be "using the remedial provisions of ss. 24(1) to provide

substantive guarantees that are not provided by ss. 2(d) of the *Charter*" (at para 48).

[69] At the outset, I would note that *SFL 2016* dealt with legislation struck down pursuant to section 52(1) of the *Charter*. It was not dealing with government policy and its implementation in the form of a mandate. The main part of Ball J's decision dealt with his jurisdiction to grant a section 24(1) remedy in such a situation. After considering Supreme Court of Canada jurisprudence regarding the availability of a section 24(1) remedy where legislation has been declared invalid, he found that, on the facts of the case before him, he had no jurisdiction to order a section 24(1) remedy (see *SFL 2016* at para 37).

[70] Alternatively, if he had found that he had jurisdiction, Ball J stated that he would not order damages (see para 56). He noted that it could not be assumed that having the right to strike would have resulted in financial gain for the employees. He pointed out that a strike, or the threat of one, does not ensure that employees' demands will be met (see paras 45-47). In that case, none of the unions' claims identified personal losses of the employees. Ball J stated that the losses claimed by the unions for "'minimizing the unions' bargaining power' and for loss of 'dignity and independence' [were] speculative at best and incapable of quantification for compensatory purposes" (at para 51).

[71] The difference between *SFL 2016* and the present case is that here, the trial judge found that, but for Manitoba's conduct, the strike would not have occurred and the parties would have continued their negotiations, which would have resulted in a wage increase over the four-year period that was

substantially higher than that which was imposed by the mandate and closer to the September 13, 2016 offer. She was able to quantify the loss based on the evidence before her.

[72] Furthermore, I agree with UMFA that Manitoba's process argument conflates the issue of the infringement of section 2(d) of the *Charter* with that of losses flowing from the breach of the right. That is, it conflates the rights analysis with the remedial analysis. Remedies, by their nature, will generally be related to outcomes.

[73] As earlier stated, 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. In determining compensatory damages pursuant to section 24(1) of the *Charter*, the parties are to be put in the same position as if their *Charter* rights had not been infringed.

[74] A recent example of the above can be found in *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184, rev'd 2016 SCC 49.

[75] At issue in that case was legislation which unilaterally nullified terms of employment as set out in a collective agreement dealing with important working conditions for teachers. It also prevented future collective bargaining on the subject (see para 305). The trial judge declared the legislation to be invalid pursuant to section 52(1) of the *Constitution Act, 1982*. In addition, the trial judge awarded damages in the amount of $2 million (see para 391).

[76] The majority of the British Columbia Court of Appeal reversed the trial judge's decision and held that the legislation did not infringe section 2(d) of the *Charter*. Donald JA dissented.

[77] In its one-paragraph decision, the Supreme Court of Canada stated that, "The majority of the Court would allow the appeal, substantially for the reasons of Justice Donald."

[78] In Donald JA's view, the scope of the infringement was more significant in that case than in *Meredith* (see para 310). He found that the government substantially interfered with the section 2(d) rights of the union (see para 376) and that the legislation was not justified under section 1 (see para 390).

[79] Donald JA held that the $2 million damage award made by the trial judge was inappropriate, and allowed the appeal in that regard (see para 393). Pursuant to section 24(1), he ordered that the deleted working conditions be reinstated into the collective agreement immediately (see paras 399, 401). In his view, "allowing the Working Conditions to remain deleted would force teachers to continue to suffer from unconstitutional government action and legislation" (at para 399). He stipulated that, "[a]ny future deletion or alteration of these terms must occur as the result of the collective bargaining process or after a constitutionally compliant process of good faith consultation" (*ibid*).

[80] I agree with UMFA that this remedy imposed "a substantive outcome" (i.e., reinstatement of the Working Conditions in the collective agreement) and is contrary to Manitoba's argument that the remedy must focus on harm caused by the lack of process, as opposed to outcome.

Quantum of the Award

[81] As earlier indicated, Manitoba's arguments regarding quantum of award are based on the assumption that the trial judge committed the legal and factual errors that it alleges.

[82] Manitoba also submits that this Court should bear in mind that the Labour Board's ruling against the U of M for its unfair labour practice resulted in a payment of $2.5 million to UMFA ($2,000 to each UMFA member) and should be factored into the quantum of award.

[83] It further submits that non-pecuniary damages in the range of $500 to $1,000 per UMFA member is appropriate.

[84] This argument was made before the trial judge. She rejected the contention that her award would constitute double compensation. She held that the order made by the Labour Board was only made against the U of M and did not address Manitoba's conduct. She found that the consequences of the two violations were not the same (see para 44). She further held that it did not compensate for the membership's losses of income or benefits or the losses incurred by the strike action (*ibid*).

[85] Given that I have not found that the trial judge made any of the errors as alleged by Manitoba and I see no palpable and overriding error in her rejecting the argument on double compensation, I would not give effect to Manitoba's arguments in this regard.

Conclusion and Decision

[86] In this case, the $15 million damages award addressed all three functions of *Charter* damages—compensation, vindication and deterrence. The damages ordered regarding the strike were compensatory. I am not convinced that the trial judge erred in law or made a palpable and overriding factual error. Her decision is subject to review on the deferential standard and I would not interfere with it.

[87] In the result, I would dismiss the appeal with costs.

JA

I agree: JA

I agree: JA