Citation: Reference Re Certification in the Manitoba Health Sector, 2019 MBCA 18

Date: 20190304
Docket: AI18-30-09159

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen

IN THE MATTER OF: ***A reference pursuant to section 143(4) of The Labour Relations Act, CCSM c L10***

AND IN THE MATTER OF: ***Case No. 124/18/LRA—Application for Certification***

B E T W E E N:

	)	***J. Giesbrecht***
	)	*for the Manitoba*
MANITOBA ASSOCIATION OF	)	*Association of Health*
HEALTH CARE PROFESSIONALS	)	*Care Professionals*
	)	
	)	***K. D. LaBossiere*** *and*
(Applicant)	)	***K. M. Kersey***
	)	*for the Concordia*
	)	*Hospital*
- and -	)	
	)	***T. D. Gisser***
	)	*for the Manitoba Labour*
CONCORDIA HOSPITAL	)	*Board*
	)	
	)	*Reference heard:*
(Employer)	)	***January 7, 2019***
	)	
	)	*Judgment delivered:*
	)	***March 4, 2019***

MAINELLA JA

Introduction

[1] In 2017, the Legislative Assembly ushered in a new model of collective bargaining in the Manitoba health sector by the enactment of *The Health Sector Bargaining Unit Review Act*, CCSM c H29 (the *Act*).

[2] This matter comes before this Court as a reference from the Manitoba Labour Board (the Board). The Board may refer any question of law for a final determination by this Court (see section 143(4) of *The Labour Relations Act*, CCSM c L10 (the *LRA*)). This reference concerns a controversy that has arisen as to the correct procedure for non-unionised employees in the health sector organising for the purpose of collective bargaining under this new model. The dispute is about who is the appropriate decision-maker as to an application for certification in the health sector. The two possibilities are the Board exercising its authority under the *LRA* or the Commissioner exercising his authority under the *Act*.

[3] For the following reasons, it is my view that, since the coming into force of the *Act*, the Commissioner is the sole decision-maker as to an application for certification in the health sector.

Relevant Statutory Provisions

[4] The preamble and sections 1(2), 2(1), 2(3), 5(1), 6, 15(1), 15(2)(a)-(c), 19, 20, 22, 26, 27 and 30 of the *Act* read as follows:

> WHEREAS the health sector in Manitoba has a large number of collective bargaining units and restructuring is required to improve patient care;

AND WHEREAS it is desirable to streamline collective bargaining processes by establishing a fixed number of bargaining units, allowing for the selection of bargaining agents for those units through representation votes, and appointing employer bargaining representatives;

AND WHEREAS it is appropriate to appoint a commissioner to guide the establishment of the new collective bargaining framework;

Labour Relations Act definitions
1(2) In this Act, "**bargaining agent**", "**collective agreement**", "**employee**" and "**union**" have the same meaning as in [the *LRA*].

Appropriate bargaining units
2(1) The following seven bargaining units are hereby established as the appropriate bargaining units for each health region and the province-wide health employer:

. . .

All unionized employees to be included
2(3) All unionized employees in the health sector must be included in a bargaining unit.

Appointment of commissioner
5(1) The Lieutenant Governor in Council must appoint a commissioner to inquire into and make decisions in relation to bargaining unit restructuring and union representation in the Manitoba health sector in accordance with this Act.

Commissioner to determine composition of bargaining units
6 The commissioner must, by order, determine the composition of the bargaining units established by subsection 2(1) for each health region and the province-wide health employer, having regard to the following factors:

(a) the need to enhance operational efficiency;

(b) the need to promote integration of health care delivery in the province and across the continuum of patient care;

(c) the need to facilitate the development of consistency in terms and conditions of employment;

(d) improvements in an employer's ability to restructure or reorganize its services or functions, and to integrate services or functions;

(e) community of interest among employees;

(f) that only unionized employees are to be included in a bargaining unit;

(g) any other factor that the Lieutenant Governor in Council specifies by regulation.

Jurisdiction of the commissioner
15(1) The commissioner has exclusive jurisdiction to inquire into and make decisions and orders about all matters and questions arising under this Act.

Questions for decision of the commissioner
15(2) Without limiting subsection (1), in any proceeding before the commissioner — or on written application by any person or organization that, in the commissioner's opinion, is affected by or has an interest in the determination of the question, or on the commissioner's own initiative — the commissioner may decide any question for the purposes of this Act, including but not limited to, whether

(a) a person is an employer, employee, professional employee or a member of a union;

(b) an association or organization is a union;

(c) an employee or group of employees is included in a bargaining unit;

Commissioner may issue, amend or rescind certificates
19 For the purpose of carrying out responsibilities under this Act, the commissioner may, by order, issue, amend or rescind any bargaining certificate, including a multi-employer certificate.

Incidental orders
20 In addition to the decisions and orders the commissioner is authorized to make under this Act, the commissioner may make any order

(a) that is incidental to a power or duty of the commissioner under this Act; or

(b) that requires compliance with a decision or order made by the commissioner.

Same effect as if made by Labour Board
22 A decision or order of the commissioner has the same force and effect as a certification or other decision or order of the Labour Board, and

(a) is to be treated for all purposes as if it were made by the Labour Board; and

(b) is enforceable in the same manner as a decision or order of the Labour Board.

Conflict with Labour Relations Act
26 Subject to section 27, if there is a conflict or inconsistency

(a) between this Act and [the *LRA*]; or

(b) between an action, decision or order taken or made by the commissioner under this Act and an action, decision or order taken or made under [the *LRA*];

this Act or the action, decision or order taken or made under this Act prevails.

Labour Relations Act applies after revised agreement concluded
27 After a revised collective agreement has been concluded, all matters respecting that agreement are to be dealt with under [the *LRA*], and not by the commissioner under this Act.

Certificate of commissioner admissible
30 A copy of a decision or order of the commissioner appearing to be signed by the commissioner is admissible in evidence in any

> proceeding as conclusive proof of the decision or order, unless the contrary is shown. Proof of the commissioner's appointment or signature is not required.

[5] The definition of "union" and sections 34(1) and 143(4) of the *LRA* read as follows:

> **Definitions**
> **1** In this Act
>
> . . .
>
> "**union**" means any organization of employees formed for purposes which include the regulation of relations between employers and employees, and includes a duly organized group or federation of such organizations and for the purpose of this definition an organization may be composed of only one employee;
>
> **Right to apply for certification**
> **34(1)** A union seeking to be certified as the bargaining agent for employees in a proposed unit appropriate for collective bargaining may, subject to this Act and the regulations, apply to the board for certification as the bargaining agent for employees in the proposed unit.
>
> **Reference to Court of Appeal**
> **143(4)** Where the board or any panel of the board considers it to be in the interests of the efficient administration of this Act or the promotion of harmonious employer-employee relations, the board or panel may refer any question of law before it for final determination by the Court of Appeal, and the Court shall hear and render a decision on the question within six months of the date of the reference.

Background

[6] The Board is an "independent and autonomous specialist tribunal responsible for the fair and efficient administration and adjudication of

responsibilities assigned to it under" the *LRA* or any other legislation (section 138(1) of the *LRA*). Traditionally, an application for certification in the health sector, and other areas of provincial jurisdiction, has been determined by the Board pursuant to the *LRA*.

[7] The stated purposes of the *Act* in its preamble are "restructuring" and "streamlin[ing]" collective bargaining in the health sector under the "guid[ance]" of an appointed Commissioner. The preamble further declares that this reform is "required to improve patient care" because of the existing "large number" of collective bargaining units and the "desirab[ility]" of a new model for collective bargaining. The role of the Commissioner is to "inquire into and make decisions in relation to bargaining unit restructuring and union representation in the Manitoba health sector in accordance with [the] *Act*" (section 5(1) of the *Act*). The *Act* was proclaimed in force on May 9, 2018. On that same date, the Commissioner was appointed.

[8] A brief summary of the new model of collective bargaining for the health sector created by the *Act* is as follows. Seven bargaining units and one employers' organisation for each health region or province-wide health employer are created for the purpose of collective bargaining. The composition of the employers' organisations are set by the *Act*. The Minister responsible for the *Act* must appoint the employers' bargaining representatives. The Commissioner is responsible for determining the composition of the bargaining units, conducting representative votes of employees to select a single bargaining agent (if the bargaining unit consists of employees from more than one union), designating the receiving collective agreement that will form the basis within each bargaining unit for negotiating

a revised collective agreement and making any decisions necessary to implement the new bargaining model for the health sector.

[9] The Manitoba Association of Health Care Professionals (the union) has been certified by the Board under the *LRA* as the bargaining agent for a number of bargaining units in the health sector including several at the Concordia Hospital (the employer) in the City of Winnipeg.

[10] On June 7, 2018, the union filed an application for certification with the Board seeking to represent a proposed bargaining unit at the employer consisting of all employees in the Occupational Therapist classification (the certification application). In addition to requesting approval of the certification application, the union requested that the Board merge the new unit into a previously certified bargaining unit at the employer represented by the union.

[11] The employer responded to the certification application in conformity with its obligations under the *LRA*, but raised a preliminary objection. It advised the Board that, because of the *Act*, the Board "does not have jurisdiction over [the certification application] at this time." It informed the Board that the certification application "should be decided by the Commissioner, rather than the Board" because the *Act* gives the Commissioner the responsibility for "all issues regarding determination of representation within the health care sector".

[12] The union disagreed with the employer's objection. It told the Board that the certification application was "within the jurisdiction of the [Board]" because the employees in question were "not unionized," and therefore did not fall into one of the bargaining units identified by the *Act*. It

submitted that the "Act limits the Commissioner's jurisdiction" to employees already unionised that fall into one of the bargaining units defined by the *Act*. The union said that the Board had to decide the certification application to allow the employees to participate in the new collective bargaining model created by *Act*. Only after certification occurred, would the jurisdiction of the Commissioner "arise."

[13] Ultimately, after conducting a hearing on the employer's jurisdictional objection, the Board decided that it was "in the interests of the efficient administration of the [*LRA*] and the promotion of harmonious employee-employer relations" to refer the dispute to this Court pursuant to section 143(4) of the *LRA*.

[14] At the same time the Board was considering the employer's jurisdictional objection, a representation vote of the employees in question was conducted by the Board. Of the 15 eligible employees, six voted in favour of certification, two voted against certification and seven abstained by not voting.

[15] On October 12, 2018, the Board formally referred the following question of law to this Court based on an agreement as to the wording of the reference by the union and the employer:

> Following the proclamation of [the *Act*], does the Application for Certification of Manitoba's health care sector fall within the jurisdiction of the Manitoba Labour Board under [the *LRA*], or within the jurisdiction of the Commissioner appointed pursuant to [the *Act*]?

[16] The question of law referred requires statutory interpretation of the *LRA* and the *Act*, and the interplay of the two statutes.

[17] On the reference, the employer says the appropriate decision-maker for the certification application is the Commissioner for essentially two reasons. First, the ordinary meaning of the *Act* (sections 5, 6, 15, 19, 22, 26) contemplates a broad comprehensive jurisdiction of the Commissioner to achieve its legislative purpose as set out in the preamble and the explanatory notes for the *Act* when it was before the Legislative Assembly as Bill 29, *The Health Sector Bargaining Unit Review Act*, 2nd Sess, 41st Leg, Manitoba, 2017 (assented to 2 June 2017), SM 2017, c 25 (Bill 29). An application for certification is a question of "union representation" (section 5(1) of the *Act*), which the Commissioner may decide pursuant to sections 15(1)-(2) of the *Act*. "A decision or order of the commissioner has the same force and effect as a certification or other decision or order of the [Board]" (section 22).

[18] The second argument of the employer is that the Commissioner has the powers as conferred by the *Act* and, by implication, all powers practically necessary to accomplish the object intended by the Legislative Assembly. Accordingly, the jurisdiction to decide a certification application by necessary implication operates in favour of the Commissioner by virtue of *The Interpretation Act*, CCSM c I80 (the *IA*), section 32(1); and section 20 of the *Act*.

[19] In response, the union submits that the decision-maker for the certification application is the Board for basically two reasons. First, it asserts that the *LRA* and the *Act* overlap, as they both deal with collective bargaining in the health sector and are not in conflict, thus, under the rules of statutory

interpretation, the statutes should be interpreted to avoid any conflict. The union says the two statutes do not conflict because the *Act* lacks a procedure for non-unionised employees to exercise their right to organise in the health sector. In contrast, the *LRA* has such a procedure—a union may apply for certification of unrepresented employees to the Board pursuant to section 34(1) of the *LRA*—and the Board has a well-established capacity and regulatory framework to properly consider and decide such applications.

[20] The union further argues that, absent express legislation to the contrary, the right to apply for certification under the *LRA* cannot be curtailed. The union submits that the employer's interpretation of the law would have the effect, potentially contrary to the right of freedom of association protected by section 2(*d*) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), of restricting employees from organising. According to the union, only once an employee becomes unionised is the jurisdiction of the Commissioner triggered. It asserts that sections 2(3) and 6 of the *Act* confirm that the jurisdictional threshold for the Commissioner is that the employee in the health sector is already unionised. The union also says that, because the *Act* does not give the Commissioner express authority for union certification, it would be inappropriate to infer that right as incidental to his powers.

[21] The Board took no position on the reference. The Commissioner did not appear on the reference, although the Court was advised he was aware of it.

Discussion

The Role of This Court on the Reference

[22] Although rarely exercised, federal and provincial statutory procedures for referring questions of law to the courts are an accepted aspect of the judicial function under the *Constitution Act, 1867* (see *Attorneys-General (Provinces) v Attorney-General (Canada)* (1912), 3 DLR 509 at 514 (PC); and *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 15). Manitoba has had reference legislation since 1890 (see *An Act for Expediting the Decision of Constitutional and other Provincial Questions*, SM 1890 (3rd Sess), c 16).

[23] The role of the court on a reference is "only advisory" (*AG (Provinces)* at p 517). Practically, however, such opinions are treated like any other judicial opinion and followed (see *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 40). While a reference resembles ordinary litigation, as it takes place in open court based on the arguments of counsel and results in reasons available to the public, this Court is not exercising its usual function of reviewing a decision of a lower court or an administrative tribunal based on a standard of review (see *Automobile Injury Compensation Appeal Commission v Constantin et al*, 2010 MBCA 76 at paras 19-20; and *Public Utilities Board v Manitoba Public Insurance Corp et al*, 2011 MBCA 88 at para 4). On a reference there is no standard of review. Rather, this Court's duty is to hear, consider and answer the question(s) put before it, subject to a residual discretion to refuse to provide an answer or give a qualified one (*Reference re Broome v Prince Edward Island*, 2010 SCC 11 at para 6).

[24] Reasons why it may be inappropriate to answer a reference, or give a qualified answer, are varied but include: undue prejudice to the interests of third parties not participating in the reference (see *AG (Provinces)* at pp 515-16; and *Reference re Constitution Act, 1867, ss 91 and 92* (1991), 80 DLR (4th) 431 at 440 (Man CA)); mootness (see *Re: Objection to a Resolution to amend the Constitution*, [1982] 2 SCR 793 at 806); non-legal questions (see *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 545); excessively abstract questions (see *Re Bills of Sale and Chattel Mortgage Act, and Crop Payments Act*, [1927] 2 DLR 50 at 53 (Man CA); *McEvoy v Attorney General (NB)*, [1983] 1 SCR 704 at 707-15; and *Reference re Goods and Services Tax*, [1992] 2 SCR 445 at 485-86 (*GST*)); and an insufficient factual underpinning to the reference to properly answer the question(s) (see *Secession of Quebec* at para 30; and *Broome* at para 6).

[25] If it is appropriate to provide some form of answer, what is of utmost importance for a court on a reference is to limit the scope of it to the question(s) asked, to the extent that the record reasonably allows, and go no further. As Guy JA explained in his concurring opinion in *Reference Re Section 46A of The Labour Relations Act (Man)* (1962), 36 DLR (2d) 560 (Man CA), "We must confine ourselves to the questions submitted" (at p 567). It is not the responsibility of the court on a reference to evaluate the wisdom of the policy choice behind legislation, or stray afield by answering questions beyond which the court's opinion was asked (see *Cour de Magistrat de Québec Procureur Général de Québec v Barreau de la province de Québec et al*, [1965] SCR 772 at 779-80; *Agricultural Products Marketing*, [1978] 2 SCR 1198 at 1290; and *GST* at 487).

[26] I am satisfied that the question asked by the Board is an appropriate one for this Court to answer. The dispute before the Board transcended its role of interpreting its home statute, the *LRA*, and the Board's use of its reference power under the *LRA* was an expeditious and prudent way to resolve the plausible suggestion of it having a jurisdictional conflict with another administrative body, the Commissioner (see *Tucker v SMWIA, Local 511*, 1997 CarswellMan 390 at paras 116-19 (QB), rev'd on other grounds 1999 CarswellMan 317 (CA)). I am further satisfied that this Court has a proper factual record to properly answer the question asked by the Board and there is no reason to exercise the discretion to refuse to answer it either in whole or in part. In particular, although the Commissioner was absent at the hearing of the reference, I am satisfied from the record and the submissions of counsel that it is appropriate to proceed without hearing from him.

Statutory Analysis

[27] The starting point to answering this reference is the modern approach to statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87).

[28] The interpretative process is also guided by section 6 of the *IA*:

> **Rule of liberal interpretation**
> **6** Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

The Scheme and Object of the *Act* and the Intention of the Legislative Assembly

[29] The scheme of the *Act* supports the Commissioner being the decision-maker for an application for certification in the health sector. Collective bargaining in the health sector is being restructured. It falls to the Commissioner to determine the composition of statutorily-defined bargaining units based on the criteria set out at section 6 of the *Act*. In that process, the Commissioner will be well-placed to weigh questions related to requests for unionisation of non-union employees. In his explanation on the second reading of Bill 29 (Manitoba, Legislative Assembly, *Debates and Proceedings (Hansard)*, 2nd Sess, 41st Leg, vol LXX No 35B (6 April 2017) as to the role of the Commissioner in overseeing the new model of collective bargaining, the Hon Kelvin Goertzen, Minister of Health, Seniors and Active Living, stressed the importance of one decision-maker to oversee the reform. He stated (at p 1165):

> We thought that this was an important part of the provision, and we've looked at other jurisdictions in terms how they've done it when they've gone through similar—the similar process. And having a commissioner involved in the reorganization is important because you'll have someone who is specifically dedicated, we believe, specifically knowledgeable.

[30] The employer relies on both the preamble of the *Act* and the explanatory notes for Bill 29 to define the legislation's purpose for the purpose of statutory interpretation. Reliance may properly be placed on the *Act*'s preamble as an interpretative aid (see *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28 at para 32). Section 13 of the *IA* states:

> **Preamble**
> **13** The preamble of an Act forms part of it and is intended to assist in explaining its meaning and intent.

[31] As previously mentioned, the purpose of the *Act* as stated in the preamble is to restructure the large number of collective bargaining units in the health sector to improve patient care; to streamline collective bargaining by a new collective bargaining model; and for the Commissioner to guide the establishment of the new model. This supports the view that the Commissioner's role as to any question relating to collective bargaining in the health sector, which would include non-unionised employees organising through an application for certification, is exclusive.

[32] In terms of the usefulness of the explanatory notes to the *Act* when it was Bill 29 to address its purpose, explanatory notes are less authoritative than a preamble as an interpretative aid, but they do show some insight into legislative purpose (see *R v TELUS Communications Co*, 2013 SCC 16 at para 138). In my view, the explanatory notes to the *Act* when it was Bill 29 provide nothing beyond what is stated in the *Act*'s preamble to assist in ascertaining legislative purpose.

The Concept of Certification

[33] The union and the employer agree that, but for the *Act*, section 34(1) of the *LRA* clearly provides a procedure for certification in the health sector. In order to properly interpret the ordinary meaning of the *Act* and determine whether the Commissioner has the authority to decide an application for certification, some explanation of the concept of certification is required.

[34] In *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048, Beetz J gave the following brief overview of the concept of certification, in the context of the Québec, *Labour Code*, RSQ, c C-27 (at para 147):

> Certification is a mechanism whereby an association which counts among its members an absolute majority of all an employer's employees, or of a separate group of an employer's employees, is recognized as the sole representative of those employees to this employer for collective bargaining purposes.

[35] Another description of the concept of certification comes from Professor Sara Slinn in her article "An Analysis of the Effects on Parties' Unionization Decisions of the Choice of Union Representation Procedure: The Strategic Dynamic Certification Model" (2005) 43 Osgoode Hall LJ 407 (at p 412):

> Union certification is the process by which a labour relations board grants a trade union the exclusive right to represent a specified group of employees (the "bargaining unit") for the purposes of negotiating and administering a collective agreement with the employer.
>
> Although the particulars vary among jurisdictions, applicant unions must satisfy four basic requirements in order to obtain certification: (1) qualification (the applicant must be a trade union within the meaning of the relevant labour legislation), (2) appropriateness (the bargaining unit applied for must be appropriate for collective bargaining), (3) timeliness, and (4) evidence of sufficient support for certification among the employees.

The Text

[36] In my judgment, the text of the *Act* goes against the union's submission that the Commissioner's jurisdiction is triggered only when the

employee is already unionised, leaving questions of applications for certification solely with the Board to decide pursuant to the *LRA*.

[37] Section 15(1) of the *Act* grants the Commissioner "exclusive jurisdiction to inquire into and make decisions and orders about all matters and questions arising under this Act." Section 15(2) goes on to grant the right to any person or organisation to make written application to the Commissioner if they are "affected by or has an interest in the determination of" a question arising under the *Act*.

[38] The Commissioner may "decide any question" for the purposes of the *Act* such as if a person is a "member of a union" (section 15(2)(a)), "an association or organization is a union" (section 15(2)(b)), or if "an employee or group of employees is included in a bargaining unit" (section 15(2)(c)). The definition of a "union" under the *LRA* (section 1) also applies for the purposes of the *Act* (section 1(2)). The decisions of the Commissioner exercising such powers as mentioned in sections 15(2)(a)-(c), or 15(1) generally, have the same force and effect as "certification" by the Board and are "to be treated for all purposes as if it were made by the [Board]" (section 22(a) of the *Act*). The Commissioner also has the power to issue a "bargaining certificate," which is evidence of the granting of certification (sections 19 and 30 of the *Act*).

[39] In my view, the ordinary meaning of sections 15(2)(a)-(c) provides for an application for certification to the Commissioner on behalf of non-unionised employees wishing to organise for the purpose of collective bargaining. The Commissioner has all the necessary authority to decide all of the conceptual requirements that characterise certification. If satisfied, he has

the power to certify and issue a bargaining certificate. Whether the certified union is the ultimate bargaining agent for the bargaining unit in which the unionised employees are placed by the Commissioner pursuant to sections 2 and 6 of the *Act* is a different question given the representational process created by section 8 of the *Act* to determine the bargaining agent. In summary, the union's interpretation of the *Act* that the Commissioner lacks the express authority to decide certification applications is not persuasive.

[40] I would also note that the powers mentioned in sections 15(2)(a)-(c) of the *Act* are not exhaustive, but only illustrations of the Commissioner's broad "exclusive jurisdiction" under section 15(1) of the *Act* to decide "all matters and questions arising under th[e] Act." Section 15(2) makes it clear that the "question[s]" the Commissioner may decide, as listed in sections 15(2)(a)-(g), are to be "without limiting subsection [15](1)" and "includ[e] but [are] not limited to" those questions. Both of these legislative statements warn the reader against inappropriately attempting to narrow by interpretation the Commissioner's authority by solely considering whether or not a particular issue raises a question in the list set out in sections 15(2)(a)-(g) of the *Act*.

[41] As Professor Sullivan explains, "The purpose of a list of examples following the word 'including' is normally to emphasize the broad range of general language and to ensure that it is not inappropriately read down so as to exclude something that is meant to be included" (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at para 4.39). The proper reading of section 15(1) of the *Act* is that, if a matter or question arises under the *Act*, the Commissioner has the exclusive jurisdiction to inquire into and make decisions and orders about it. The list of

"includ[ed]" questions that the Commissioner may decide in section 15(2) does not in any way diminish his broad authority given by section 15(1) to decide matters in his mandate such as "union representation" in the health sector (section 5(1) of the *Act*) (see *Caisse populaire Desjardins de l'Est de Drummond v Canada*, 2009 SCC 29 at para 15).

[42] The text of the *Act* also dispels the union's assertion that somehow a substantive vested right, the right to organise, has been curtailed unless the Board continues to decide applications for certification. The Commissioner has that authority. All that has changed is the Legislative Assembly has created a different procedure with a new decision-maker for deciding the same issue, certification applications in the health sector. As Dickson J (as he then was) noted in *Gustavson Drilling (1964) Ltd v MNR*, [1977] 1 SCR 271 at 282, "No one has a vested right to continuance of the law as it stood in the past".

[43] The union's related submission that the Board is more capable of performing the role of deciding certification applications in the health sector based on resources, institutional expertise and a well-established regulatory framework (see *Manitoba Labour Board Rules of Procedure*, Man Reg 184/87 R) is a policy argument outside the scope of the reference question. This Court is restricted to answer only who the appropriate decision-maker is under the law to decide certification applications in the health sector—the Board or the Commissioner. The merits of the choice made by the Legislative Assembly, or the fact that regulations regarding certification applications have not yet been created pursuant to section 31(1) of the *Act*, are not for this Court to weigh or comment on given its narrow role on this reference as explained previously.

The Statutory Context

[44] As I stated earlier, the Commissioner's mandate is broad in relation to the health sector and includes "to inquire into and make decisions in relation to . . . union representation" (section 5(1) of the *Act*).

[45] I reject the union's argument that the *LRA* and the *Act* overlap and are meant to work together in the manner the union described. While the union is accurate that the starting point for statutory interpretation is of course the presumption of coherence that the *LRA* and the *Act* do work together (see *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 38; and *Thibodeau v Air Canada*, 2014 SCC 67 at para 93), there cannot be different administrative decision-makers deciding exactly the same question, being certification applications in the health sector. Leaving aside the breadth of the Commissioner's jurisdiction under section 15(1) for the purposes of argument, section 34(1) of the *LRA* and sections 15(2)(a)-(c) of the *Act* cannot stand together (see *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14 at para 47; and *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at paras 41-43). Because the bargaining units in the health sector are defined by section 2(1) of the *Act* and the Commissioner is solely responsible for their composition (sections 6 and 15 of the *Act*), it would lead to an unreasonable result if the Board had any role in certification applications. To be blunt, one cook is sufficient for each kitchen.

[46] Section 26 of the *Act* is clear that the provisions of the *Act* are meant to prevail in situations of inconsistency or conflict with the *LRA*.

[47] The union's submission that, as counsel put it, "mischief" may occur if the Commissioner refuses to allow non-unionised employees to attempt to organise by delaying or refusing applications for certification, is entirely speculative and too far afield from the reference. The only comment I would make to address concerns about how the Commissioner may exercise his jurisdiction in light of the protections afforded by section 2(*d*) of the *Charter*, is that the *Act* provides for a mechanism for judicial review of alleged legal errors by the Commissioner (see section 25(2)).

Conclusion

[48] The ordinary meaning of the *Act* is that the Commissioner can decide an application for certification in the health sector and has the exclusive jurisdiction to do so. Any conflict or inconsistency with this approach to the Board's jurisdiction has been addressed by legislative fiat in section 26 of the *Act*. This interpretation is also the one that is most consistent with the scheme and object of the *Act* and with the intention of the Legislative Assembly. The idea that the Board may continue to decide certification applications in the health sector under the *LRA* cannot reasonably be accepted on any principled examination of the *Act* and the *LRA* when read together.

[49] Because I am satisfied that the Commissioner has the express power under the *Act* to the exclusion of all others to decide applications for certification in the health sector, it is unnecessary to comment on the employer's alternative argument that, by necessary implication, the Commissioner has the authority to decide certification applications under the *Act*.

[50] One final issue requires comment before formalising my answer to the question the Board referred to this Court. I wish to make it clear at the outset that in no way should these comments be taken as a criticism of the Board or its use of its reference power; the issue is how section 143(4) of the *LRA* has been drafted.

Concern About Section 143(4) of the LRA—Judicial Independence

[51] During the course of these proceedings, this Court advised of its concern as to section 143(4) of the *LRA* requiring the Court to "hear and render a decision on the question within six months of the date of the reference" (emphasis added). In order to be able to meet this timeframe, the parties were given short deadlines to file materials and the schedule of the Court as to the hearing of cases was adjusted.

[52] The other members of this panel and I have an unease as to the constitutional implications of the reference procedure created by section 143(4) of the *LRA* relating to statutory direction that the entire reference must be heard and decided within six months, as opposed to it only being heard within six months. The Attorney General was not a party to these proceedings to defend the legislation so I will be circumspect with my concerns.

[53] As Côté J explained in her concurring reasons in *Groia v Law Society of Upper Canada*, 2018 SCC 27, "Judicial independence is, without question, a cornerstone of Canadian democracy. It is essential to both the impartiality of the judiciary and the maintenance of the rule of law" (at para 167). A key aspect of judicial independence is institutional

independence of judicial tribunals "regarding matters affecting adjudication" (*MacKeigan v Hickman*, [1989] 2 SCR 796 at 826).

[54] There is nothing inappropriate for a legislative direction to the courts as to the importance of timeliness in certain types of cases (for example see the *Extradition Act*, SC 1999, c 18, section 51(1); and the *Youth Criminal Justice Act*, SC 2002, c 1, section 3(1)(b)(v)). What is concerning about section 143(4) of the *LRA* is the legislative direction that the entire process of the reference must be complete within six months of the day on which it is commenced.

[55] It is noteworthy that in no other situation of reference jurisdiction for this Court under provincial law does a comparable requirement exist (see *The Contaminated Sites Remediation Act*, CCSM c C205, section 47; *The Public Utilities Board Act*, CCSM c P280, section 58.4; *The Residential Tenancies Act*, CCSM c R119, section 174; *The Manitoba Public Insurance Corporation Act*, CCSM c P215, section 186; and *The Constitutional Questions Act*, CCSM c C180, section 1).

[56] In my view, the inflexibility of section 143(4) risks the quality of justice. Judges are well aware of the importance of timeliness in rendering decisions without legislative direction. The modern legal culture is attempting to do away with complacency in all fields of the justice system. Proper judicial reasoning requires time, effort and a good deal of thought. Cases often consist of records that run into the hundreds of pages. The reasons of this Court are often delayed for complex legal research to be done, and there is always the possibility of dissenting or concurring judgments, which may require additional time. The importance of well-crafted appellate reasons go

beyond the minimum requirement of telling the parties why the decision was made, providing public accountability and permitting effective appellate review (see *R v REM*, 2008 SCC 51 at para 11). Well-crafted reasons are important to the proper administration of justice because, in the common law tradition, written decisions (particularly from appellate courts) are important as to how third parties conduct themselves and how future court cases will be determined in similar situations.

[57] All of this said, the judges involved in this case all had the necessary time to do what was needed to be done. Also relevant is that, in this reference, only one question was asked, the facts were not complicated, the time to perfect the appeal for hearing was minimal, the number of counsel was manageable and the Court had the benefit of excellent written and oral submissions.

[58] However, each reference is different. It is not uncommon for there to be many interested parties, several complicated questions of law and other problems associated with the reference that take time to sort out before it can be heard. All of these circumstances can contribute to delaying the hearing with the result that the Court has less time to deliberate and prepare proper reasons to do justice to the reference. While the Court will always endeavour to respect the law, the current wording of section 143(4) of the *LRA* is of sufficient concern that this panel expresses the sincere hope that the proper officials will consider whether the law should be revised to ensure that it fully accords with the constitutional principle of judicial independence.

Disposition of the Reference

[59] I would answer the question of the law on the reference as follows:

> Following the proclamation of *The Health Sector Bargaining Unit Review Act*, SM 2017, c 25, the Application for Certification of Manitoba's health care sector falls within the exclusive jurisdiction of the Commissioner appointed pursuant to *The Health Sector Bargaining Unit Review Act*, CCSM c H29.

[60] As this is a reference, as opposed to an appeal, the considerations on costs are different than in ordinary litigation (see *Reference Re Section 46A of The Labour Relations Act (Man)* at p 565; and *Juges en chef, juge en chef associé et juge en chef adjointe de la Cour supérieure du Québec c Procureure générale du Québec*, 2018 QCCA 654 at paras 8-9). Each of the parties will bear their own costs.

Mainella JA

I agree: Chartier CJM

I agree: Simonsen JA