

MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF a complaint made under *The Human Rights Code*, CCSM c. H175

BETWEEN

Richard North,
complainant,

AND

Government of Manitoba,
respondent,

AND

Manitoba Human Rights Commission,
Commission.

MHRC File No.: 17 LP 07

The complainant in person

*For the respondent: Ms Heather
Leonoff, QC*

For the Commission: Ms Isha Khan

*Complaint heard: 6, 7, 8, and 9
November 2017*

Reasons published: 8 January 2018

ROBERT DAWSON, adjudicator:

- [1] An individual complains that a government agency has discriminated against him on the basis of his sexual orientation when the agency refused to register his 1974 same-sex ceremony as a marriage. For the reasons that follow, the complaint is dismissed.

Facts

[2] The complainant is a homosexual man. In 1973, another man named Christopher Vogel and he wished to marry. At the time, Manitoba law required applicants for a marriage licence to apply in person at the government office today known as the Manitoba Vital Statistics Agency. The complainant and the man whom he intended to marry accordingly attended at the office. Their application was rejected on the ground that two individuals of the same sex could not marry, because the law defined marriage as the union of one man and one woman.

[3] However, Manitoba law provided an alternative to a government-issued marriage licence. A marriage could take place without such a licence after a church had published banns of marriage to which no one objected. A sympathetic minister of Winnipeg's Unitarian Church agreed to proclaim the banns of marriage for the complainant and Mr Vogel. No one objected. Accordingly, on 11 February 1974, the minister performed a marriage ceremony for the couple.

[4] The complainant and Mr Vogel then sought to register the marriage at what is today known as the Manitoba Vital Statistics Agency. The government office refused, because, as the Recorder of Vital Statistics wrote on 1 March 1974, "both parties to this event were of the male gender".

[5] The complainant appealed the refusal to register the marriage, but Philp CJ (as he then was) denied the application: *North v. Manitoba (Recorder of Vital Statistics)*, (1974) 52 DLR (3d) 280 (MB Co Ct). The Chief Judge could not “conclude that the Legislature... [had] intended to recognize the capacity of two persons of the same sex to marry”: para. 6. He went on, writing at para. 16 that

I view it as self-evident that the ceremony performed on February 11, 1974 was not a ceremony of marriage, it was a nullity. There was nothing before the respondent [that is, the Recorder of Vital Statistics] to be registered....

[6] The complainant made no appeal from that decision of the Manitoba County Court.

[7] However, the slow evolution of Canadian and Manitoba law soon began. Manitoba’s human rights legislation expanded in the mid-1980s to protect against discrimination on the basis of sexual orientation. In 2002, the Ontario Divisional Court first applied the Charter of Rights and Freedoms and reformulated Ontario law in order to permit same-sex marriages. In 2004, the Manitoba Court of Queen’s Bench did the same in an application that the complainant’s partner had made: *Vogel v. Canada (Attorney General)* (2004), [2005] 5 WWR 154 (MB QB).

[8] None of these reforms to the law, though, had any retroactive application to the 1974 ceremony of the complainant and Mr Vogel. When the complainant later renewed his request to what today is known as the Manitoba Vital Statistics Agency, the

respondent therefore continued to refuse to register the 1974 ceremony as a marriage.

Going back to the 1974 decision of *North v. Manitoba (Recorder of Vital Statistics)*, the government agency found that there was nothing to register, because Philp CJ had declared the marriage ceremony to be a nullity.

[9] The complainant nevertheless persisted. Over many years, he wrote to federal and Manitoba politicians, including cabinet ministers, prime ministers, and premiers. Sometimes, the replies were slow, or they never came at all. Other times, the politicians proposed various ways in which to proceed. These options included a new marriage ceremony, registration of only the common-law relationship, arbitration, a special act of the Manitoba Legislature that would make an exception to the registration rules for the benefit of the couple, or a special federal act that would recognize the 1974 ceremony as a marriage. The complainant rejected or ignored all of these suggestions on the ground that he should have to do nothing extraordinary in order to have the Manitoba Vital Statistics Agency register his 1974 ceremony as a marriage.

[10] On 15 December 2015, the complainant filed a complaint pursuant to *The Human Rights Code*, CCSM c. H175. He alleged that the Manitoba Vital Statistics Agency has discriminated, and continues to discriminate, against him on the basis of his sexual orientation when it refused, and continues to refuse, to register his 1974 marriage.

[11] On 3 May 2017, the Chief Adjudicator designated me as the Board of Adjudication that would hear and decide this complaint.

Procedural matters

Motion to amend the complaint

[12] At the opening of the hearing, the Commission moved to amend the complaint. In addition to the complainant, the original complaint had listed all those other “same sex couples who were married in Manitoba prior to 2004” as a class of persons against whom the respondent had discriminated, and continues to discriminate. However, it appears that the complainant and his partner comprise the only same-sex couple who claims to have married in Manitoba before 2004. Accordingly, the Commission moved to delete the listed class from the complaint. Both the complainant and the respondent consented to the amendment. I therefore ordered that the complaint be so amended.

Objections to the Commission’s documentary evidence

[13] Throughout the direct evidence of the complainant and Mr Vogel, many documents were proposed as evidence in the cause. Most of these documents consisted of excerpts from newspaper reports or letters or e-mail messages that the complainant had himself sent to politicians. Another document was a photo of the complainant and his partner in or about 1974. Yet another document was a sheet that the complainant had complied, depicting a graphic that the complainant had selected and setting out

quotations and excerpts from a newspaper article. The respondent objected to these documents, questioning their relevance and undermining their reliability as hearsay evidence. In addition, the respondent described them as self-serving. I nevertheless admitted the majority of these documents into evidence, relying upon the discretion that s. 39(2) of the *Code* extends to me in order to receive

at the hearing such evidence or other information as the adjudicator considers relevant and appropriate, whether or not the evidence is given under oath or affirmation and whether or not it would be admissible in a court of law, unless the evidence is subject to any type of legal privilege.

[14] I disagreed with the respondent, which had characterized these documents as necessarily irrelevant. Based upon my grasp of the evidence at that point in the hearing, I allowed the documents in order to give the complainant and the Commission every fair opportunity to be heard. In the end, I have given little or no weight to these documents in coming to my decision.

Submissions of the parties

The complainant

[15] The complainant chose to adopt the position of the Commission and did not advance his own legal argument. However, during his direct examination, the complainant helpfully explained that he considers himself an ongoing victim of

discrimination by the respondent. In 1974, the complainant and Mr Vogel had participated in a marriage ceremony after publication of banns of marriage. They had satisfied all of the legal requirements in order to marry, except that they were two men. Without doubt, if they had been a heterosexual couple, the office today known as the Manitoba Vital Statistics Agency would have readily registered their marriage. Instead, only because the ceremony involved two men, the respondent had refused such registration. The complainant contended that the respondent has discriminated, and continues to discriminate, against him, and that he is therefore entitled to a remedial order against the respondent.

The Commission

[16] The Commission submitted that it is within the statutory discretion of the Manitoba Vital Statistics Agency to register the complainant's 1974 ceremony as a marriage. The law has evolved since 1974, and the Commission argued that the Manitoba Vital Statistics Agency must exercise its statutory discretion so as to reflect that evolution. In refusing to do so, the Commission submitted that the respondent has discriminated, and continues to discriminate, against the complainant. Lacking any bona fide and reasonable cause for that discrimination, the respondent's refusal violates

The Human Rights Code.

The respondent

[17] The respondent relied upon the 1974 decision of *North v. Manitoba (Recorder of Vital Statistics)*, where Philip CJ characterized the complainant's ceremony of marriage as "a nullity". The respondent argued that the decision continues to bind it and precludes registration. In short, the respondent submitted that there has never been anything for the respondent to register, because a judge has ruled it to be so. No question of discrimination therefore arises.

[18] In the alternative, the respondent argued that, if I found that it had discriminated against the complainant, the 1974 decision of *North v. Manitoba (Recorder of Vital Statistics)* amounts to a bona fide and reasonable cause for the discrimination.

[19] Regardless of which alternative, the respondent underlined that it is beyond the jurisdiction of a human rights adjudicator to overrule that 1974 decision. Ultimately, instead of proceeding by way of a human rights complaint, the respondent opined that the complainant should seek relief through a private act of the federal Parliament, which would overrule the finding in *North v. Manitoba (Recorder of Vital Statistics)* and thereby allow the respondent to register the complainant's 1974 ceremony as a marriage.

Analysis

The respondent has not discriminated against the complainant

[20] Philp CJ characterized the 1974 marriage ceremony of the complainant as a nullity: *North v. Manitoba (Recorder of Vital Statistics)* at para. 16. I accept the respondent's submission that it is not open to a human rights adjudicator to overrule that finding. I therefore conclude that there is no marriage for the respondent to register. In refusing to register that which a court has determined to be a nullity, the respondent is not discriminating against the complainant; it is instead respecting a binding court decision.

[21] I further conclude that this is the only basis upon which the respondent has refused to register the complainant's ceremony of marriage. I adopt the respondent's submission that the sexual orientation of the complainant was not, and is not, a factor in its rejection of his application for registration. In other words, the respondent has refused to register a marriage that a court has ruled to be a nullity, and it is incidental that the affected party is a homosexual man. I accept the evidence of the Acting Director of the Manitoba Vital Statistics Agency, whom the Commission had called in order to explain the registration of marriages and establish the extent of the Director's statutory discretion. In particular, the witness stated that, after assuming the acting directorship of the government agency, she had specifically reconsidered the complainant's

application for registration and confirmed that the 1974 decision of *North v. Manitoba (Recorder of Vital Statistics)* is the impediment to registration. She could not register as a marriage that which a court had ruled not to be a marriage. I have no reason to ignore or doubt the testimony of the Acting Director, which was neither undermined by other questioning nor contradicted through other evidence. In addition, I observed her to be intelligent, composed, and taking special care when responding to questions on direct evidence, seeming to be very much aware of that her testimony should be accurate and complete.

[22] I reject the Commission's argument that it is open to the respondent to exercise its statutory discretion and register the complainant's 1974 ceremony as a marriage. There is a gap in the Commission's argument that I am unable to overcome. In essence, the Commission focused my attention upon the respondent's ongoing refusal to register a same-sex marriage. While Manitoba law in 1974 recognized marriages between only heterosexual individuals, the Commission correctly noted that law has significantly evolved. Given the breadth of the respondent's statutory discretion, the Commission argued that the respondent must exercise that discretion in a way that recognizes, and accords with, the evolution of the law. I entirely accept that decision-makers, such as the respondent, should reflect in their decisions the evolution of the law. However, the obstacle here is the 1974 pronouncement of Philp CJ that the marriage is a nullity. The

Commission's argument ignores that fatal characterization. It is simply not open to a statutory delegate to exercise its discretion in a manner contrary to law.

[23] Given my conclusion that the respondent did not discriminate against the complainant, it is unnecessary that I should consider whether or not the respondent had a bona fide and reasonable cause for the discrimination. For the same reason, I need not set out the remedial order to which the complainant would be entitled.

A special Act of the federal Parliament

[24] This complaint is not about human rights and discrimination on the basis of sexual orientation. Instead, the complaint has more to do with administrative law and the obstructive lingering of court rulings which impede the exercise of statutory discretion. A human rights adjudication is not the forum in which to overcome binding judicial pronouncements. It is well beyond my jurisdiction as a mere adjudicator to overturn, revise, or ignore a court ruling, even an historical decision from 1974.

[25] As counsel for the respondent explained, the complainant's solution lies within the power of the federal Parliament to enact a special Act that would effectively overrule the decision of *North v. Manitoba (Recorder of Vital Statistics)* and deem the complainant's 1974 ceremony to be a marriage which the respondent would then readily register. Without such intervention, a bizarre and embarrassing irony will persist. It is neither fair nor just that the law refuses to recognize the 1974 marriage of a

homosexual couple whose long-standing activism and advocacy have made it possible for same-sex couples of today to take for granted their right to marry.

Decision and order

[26] For the reasons set out above, the complaint is dismissed.

[27] I draw to the parties' attention s. 50(2) of the *Code*, which requires that any application for judicial review must be made the Court of Queen's Bench within 30 days of the making of this decision or within such further time as the court may allow.

[Original signed by]

8 January 2018

Robert Dawson