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v. Government of Manitoba
Cited as: 2021 MBQB 122

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

THE MANITOBA HUMAN RIGHTS COMMISSION and RICHARD NORTH,	)	APPEARANCES:
	)	
	)	SACHA R. PAUL
	)	MIRANDA D. GRAYSON
applicants,	)	for the applicant, The
	)	Manitoba Human Rights
	)	Commission
- and -	)	
	)	RICHARD NORTH
GOVERNMENT OF MANITOBA,	)	on his own behalf
	)	
	)	
respondent.	)	CHARLES P.R. MURRAY
	)	for the respondent
	)	
	)	
	)	JUDGMENT DELIVERED
	)	June 1, 2021

CHARTIER J.

INTRODUCTION

[1] This is an application for judicial review of the decision of Adjudicator Robert Dawson acting under the authority of ***The Human Rights Code***, C.C.S.M.

c. H175, (the "***Code***"), dated January 8, 2018, wherein he determined that the respondent Government of Manitoba (Manitoba Vital Statistics Agency) did not discriminate against Richard North by refusing Mr. North's request of February 24, 2013 to register a 1974 ceremony involving Mr. North and Christopher Vogel as a marriage. In essence he found that there was no discrimination because there was no marriage between Mr. North and Mr. Vogel in 1974 for the respondent to register as a court had determined the 1974 ceremony was not a ceremony of marriage.

[2] Mr. North had resubmitted this request of February 24, 2013 after having done so on two previous occasions, one in 1974 where his request was denied both by the Office of Vital Statistics and on appeal of that decision to the County Court of Manitoba. A second request was made in 2003 and was again denied by the Manitoba Vital Statistics Agency.

[3] In this third request, the denial of which precipitated Mr. North's December 15, 2015 complaint under the ***Code*** which is at issue in this case, Manitoba responded by saying it could not comply with the request, both as a result of the previous decision of the County Court of Manitoba in ***Re North v. Manitoba (Recorder of Vital Statistics)***, [1974] M.J. No. 269 (QL), 52 D.L.R. (3d) 280 (MB Co Ct), which had determined that the ceremony involving Mr. North and Mr. Vogel on February 11, 1974 was not a ceremony of marriage, and because the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***") did not have a retroactive application.

[4] In 1974, the common law permitted marriage only between persons of the opposite sex, however same-sex marriage has been lawful since 2004 in Manitoba pursuant to judicial authority, and since 2005 pursuant to federal statutory authority. The issue that arises in this judicial review application is whether there was discrimination on the part of Manitoba under the ***Code*** for its present-day refusal and failure to register the 1974 ceremony between Mr. North and Mr. Vogel as a marriage. For reasons that follow, I find the adjudicator's decision was reasonable and this application for judicial review must be dismissed.

[5] At the outset of the hearing, I raised the issue as to whether ***The Constitutional Questions Act***, C.C.S.M. c. C180, applied in relation to some of the arguments being brought forward as new issues not raised before the adjudicator. If that statute applied, notice of this proceeding would have to be given to the Attorney General of Canada. Both the applicant The Manitoba Human Rights Commission (the "Commission") and the respondent submitted that ***The Constitutional Questions Act*** was not engaged and therefore there was no need to adjourn this proceeding in the event that I did consider the additional issues raised by the Commission. I have considered and accepted the parties' submissions that ***The Constitutional Questions Act*** is not engaged in this application.

PREVIOUS PROCEEDINGS

[6] It is necessary to consider the historical backdrop to the applicant's present complaint of discrimination under the ***Code***. On December 5, 1973, Mr. North and

Mr. Vogel wrote to the Recorder of Vital Statistics requesting a marriage licence. By letter dated December 11, 1973, they were advised that given the common law definition of marriage as the union of one man and one woman, it was not possible for a marriage to occur between persons other than of opposite sexes.

[7] Undeterred, Mr. North and Mr. Vogel were subsequently involved in a religious ceremony at a Unitarian Church in Winnipeg on February 11, 1974 and a notice of marriage and supporting documents in relation to that religious ceremony were submitted to the Office of Vital Statistics for registration. The Office of Vital Statistics did not then register what it referred to as "… this event which occurred on February 11th, 1974" on the basis that it "… is not one which can be registered under The Marriage Act … because both parties to this event were of the male gender." The refusal letter of March 1, 1974 also advised Mr. North of his right under the legislation to appeal the refusal to register.

[8] The decision was appealed to the County Court of Manitoba and was heard by Philp J. (as he then was). Taking into account the common law definition of marriage and that Mr. North and Mr. Vogel were both male, he determined in ***North*** that:

> 16 I view it as self-evident that the ceremony performed on February 11, 1974 was not a ceremony of marriage, it was a nullity. … That the applicants purported to comply with all of the conditions of solemnization prescribed in The Marriage Act cannot alter the fact that a marriage did not take place.

[9] In June 2003, Mr. North sent a letter to the Manitoba Vital Statistics Agency seeking to have the 1974 ceremony between he and Mr. Vogel registered as a marriage. By letter dated June 20, 2003, the Agency again declined to do so, both

on the basis of the County Court of Manitoba decision, and on the basis that the ***Charter*** did not have a retroactive effect.

[10] On August 31, 2004 Mr. North and Mr. Vogel, together with four other applicants, filed a notice of application in the Manitoba Court of Queen's Bench seeking, in part, a declaration "… that a marriage between two persons of the same sex is a lawful and valid marriage in Manitoba"; and an order in the nature of *mandamus* "requiring the Director of the Vital Statistics Agency ... to register the marriages of the Applicant couples Christopher Gerald Vogel and Richard Alton North ... when they occur…".

[11] The formal order of the Court dated September 16, 2004, in ***Vogel v. Canada (Attorney General)***, [2004] M.J. No. 418 (QL), records Manitoba's position taken at the hearing as follows:

> 3.0 The Director of Vital Statistics Agency undertaking that in accordance with its general regulatory process, the Vital Statistics Agency will issue marriage licences to same-sex applicants whose applications conform with the requirements of *The Marriage Act* and will register the marriages of same-sex couples that are solemnized in Manitoba after the pronouncement of this Order in accordance with the law.

[12] Immediately following that decision, Manitoba recognized the right of same-sex couples to marry in this province. However, Mr. North and Mr. Vogel did not then apply for a marriage licence in light of, and subsequent to, that decision. There is no issue that Manitoba would have registered a marriage between Mr. North and Mr. Vogel solemnized after the Court of Queen's Bench decision in 2004. However, it is the 1974 ceremony that Mr. North is seeking to have

registered as a marriage and his complaint is that the respondent's refusal to do is discriminatory under the ***Code***.

PRESENT PROCEEDINGS BEFORE THE HUMAN RIGHTS COMMISSION

[13] On February 24, 2013, Mr. North wrote to the Director of Vital Statistics requesting that the 1974 ceremony between him and Mr. Vogel be registered as a marriage. By letter dated August 26, 2013, the province indicated it could not comply with this request. There were several further communications from Mr. North requesting registration, and the province continued to indicate its inability to comply with the request, as a result of the 1974 ruling of the County Court of Manitoba, which reflected the state of the law on marriage at that time.

[14] On December 15, 2015, Mr. North filed a complaint pursuant to the ***Code***, alleging that the Manitoba Vital Statistics Agency was discriminating against him on the basis of his sexual orientation by continuing to refuse to register the 1974 ceremony between Mr. North and Mr. Vogel as a marriage. The complaint specifies that the discrimination relates to s. 13 of the ***Code*** relating to the provision of services. That section states that "[n]o person shall discriminate with respect to any service … unless bona fide and reasonable cause exists for the discrimination."

[15] Manitoba responded to the Commission in respect of Mr. North's complaint of discrimination by way of letter dated January 15, 2016 authored by Heather

Leonoff, Section Head of the Constitutional Law Section in the provincial Justice Department, an excerpt of which reads as follows:

> Mr. North's complaint is that Manitoba will not register his 1974 marriage. His position is that since he is legally entitled to marry today, his marriage from 1974 should be considered lawful. In essence he asks that the *Charter* protection for equality be given retroactive application. However, the law is clear that the *Charter* applies only prospectively. As the Supreme Court stated in *Benner v. Canada*, "The *Charter* does not apply retroactively and this Court has stated on numerous occasions that it cannot apply retrospectively"; *Benner v. Canada*, [1997]1 SCR 358 at paragraph 40. In other words, Justice Yard's decision did not and could not apply to events from 1974 and Manitoba cannot register Mr. North's and Mr. Vogel's marriage from 1974 because that marriage is a nullity. None of the legal changes that have occurred since that date have operated to make the marriage legally valid.

[16] On May 3, 2017, a board of adjudication was appointed to hear the complaint. The complaint was heard in November 2017 and the adjudicator's decision rendered on January 8, 2018. The adjudicator accepted Manitoba's submission and ruled that "[i]n 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" (***North v. Manitoba***, 2018 MBHR 1 (CanLII), at para. 20). Further, the adjudicator found that "… the sexual orientation of the complainant was not, and is not, a factor in its rejection of his application for registration" (at para. 21). Finally, based upon the evidence before him, the adjudicator found that it was not open to the Manitoba Vital Statistics Agency to register a marriage which a court had found to be a nullity, because "[i]t is simply not open to a statutory delegate to exercise its discretion in a manner contrary to law" (para. 22). As such, the complaint of discrimination was dismissed.

[17] A notice of application for judicial review of the adjudicator's decision was filed in the Manitoba Court of Queen's Bench on February 7, 2018 and the application was heard on April 12, 2021. It has to be said that the Commission jettisoned the grounds set out in its notice of application and argued new grounds at the hearing of this matter, which were neither argued before the adjudicator nor set out in an amended notice of application. The respondent submitted that I ought not to hear the new grounds on this application.

SUBMISSIONS OF THE PARTIES

[18] The applicant Commission submits that it would be inherently unfair to preclude a decision maker from reconsidering the validity of the marriage given the changes in the law and the present legality of same-sex marriage. The Commission submitted that adjudicator Dawson effectively applied the doctrine of issue estoppel in finding that he was bound by the County Court of Manitoba's conclusion that the marriage was a nullity. The Commission submitted that the standard of review of the adjudicator's decision was correctness.

[19] Before this Court, the Commission put forward three new arguments:

a) the equality rights within the ***Canadian Bill of Rights***, S.C. 1960, c. 44, supported protection for same-sex marriage as of 1960 and therefore at the material time of 1974;

b) same-sex marriage should be recognized as a common law right given the substantial changes in the law pursuant to the ***Charter*** and therefore "[a]n incremental change ought to be found to have occurred in

the common law separate and apart from the application of s. 15(1) of the ***Charter***," and

c) the ***Civil Marriage Act***, S.C. 2005, c. 33, should apply retroactively.

[20] The applicant Richard North stated that he was not participating in the application for judicial review and was attending strictly as an observer. His view was that the true respondent in this case was not the Director of the Vital Statistics but rather the Premier of Manitoba.

[21] Manitoba submitted the standard of review was reasonableness and the adjudicator's decision was reasonable. It disputes the Commission's characterization of the adjudicator's decision as having applied issue estoppel in failing to reconsider the County Court of Manitoba's decision in ***North***. It says the parties were not trying to re-litigate an issue before the adjudicator which had already been decided between them. Rather the complaint raised by Mr. North, and taken up by the Commission under the ***Code***, alleged 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. It says that whether or not Manitoba had discriminated against Mr. North contrary to s. 13(1) of the ***Code*** was a new issue. Manitoba specifies that the proceedings before the adjudicator were not a collateral attack on the County Court decision of ***North*** but the applicant's change in argument in this judicial review has made it one. It submitted that this Court ought not to consider the new issues raised by the Commission on this judicial review

application which are better left to be considered in an appropriate forum. The respondent also submitted that the ***Charter*** does not have retroactive application.

ISSUES

Was the decision of the adjudicator under the *Code*, that Manitoba did not discriminate within the meaning of s. 13(1) of the *Code* relating to provision of services, reasonable?

[22] For reasons that follow, the adjudicator's decision was reasonable.

Should this Court consider the new issues raised by the Commission in this judicial review, not raised before the adjudicator, that the decision of this Court in *North* should not be binding? If so, does the consideration of the new issues impact the reasonableness of the adjudicator's decision?

[23] For reasons that follow, I have exercised my discretion to consider the new issue relating to the ***Civil Marriage Act*** but have declined to consider the new issues relating to the ***Canadian Bill of Rights*** and on whether same-sex marriage is now a right at common law independent of the ***Charter***. My consideration of the new issue relating to the ***Civil Marriage Act*** does not impact my determination that the adjudicator's decision was reasonable, as I have found that this statute has neither retroactive, nor retrospective application to 1974.

ANALYSIS

[24] The ***Constitution Act, 1867*** divides issues respecting marriage between the federal Parliament and provincial legislatures. Section 91(26) of the ***Constitution Act, 1867*** gives the federal Parliament exclusive jurisdiction over "Marriage and Divorce". Section 92(12) limits Manitoba's jurisdiction to the "Solemnization of Marriage". As explained by the Supreme Court of Canada in

Reference re Same-Sex Marriage, 2004 SCC 79 (CanLII), this means that Parliament has exclusive legislative authority over capacity to marry and the provinces have authority "… in respect of the performance of marriage once that capacity has been recognized" (at para. 18).

[25] In addition to providing for the solemnization of marriages, Manitoba also maintains a registry of marriages. It does this pursuant to its constitutional authority over "Property and Civil Rights" (s. 92(13)) or "Matters of a merely local or private Nature" (s. 92(16)). Registration of marriages is provided for in ss. 11-13 of ***The Vital Statistics Act***, C.C.S.M. c. V60.

[26] Prior to 2005, Canada relied on the common law to define certain aspects of capacity. Based on the common law case of ***Hyde v. Hyde,*** (1865-9) 1 P. & D. 130, Canada permitted marriage only between persons of the opposite sex. This common law rule was held to be unconstitutional and in violation of the equality provisions of the ***Charter*** in several cases across the country beginning in 2002. In 2004, Yard J. of this Court struck down the opposite-sex requirement in the common law definition of marriage in Manitoba. In 2005 Parliament passed the ***Civil Marriage Act*** which defined marriage in s. 2 as "… the lawful union of two persons to the exclusion of all others."

[27] In 1974, Mr. North and Mr. Vogel were unable to meet Canada's requirements for capacity because they were of the same sex. The Province of Manitoba's constitutional authority over solemnization deals with the requirements necessary to contract a valid marriage if capacity is established. They were also

unable to meet Manitoba's requirements for solemnization because they could not complete a truthful affidavit regarding lawful capacity.

[24] In his 1974 decision, Philp J. of the County Court of Manitoba (as he then was) noted the shared constitutional jurisdiction of Parliament and the provincial legislature on marriage. He noted that at common law, marriage was defined as a voluntary union of one man and one woman, and because Mr. North and Mr. Vogel were both male, he held in ***North*** that:

> 16 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 to be registered under subsection 12(3) of The Vital Statistics Act, quoted above. That the applicants purported to comply with all of the conditions of solemnization prescribed in The Marriage Act cannot alter the fact that a marriage did not take place.
>
> 17 Subsection 12(3) of The Vital Statistics Act, supra, gives to the respondent an administrative function involving discretion. The respondent, in my view, was correct in deciding that he was not satisfied as to the "truth and sufficiency" of the applicants' statement of marriage and acted properly in refusing to register same.

[25] I agree with Manitoba's submission that whether or not Manitoba discriminated against Mr. North contrary to s. 13(1) of the ***Code*** (provision of services) was a new issue and the adjudicator was not called upon to determine whether or not the applicants could re-litigate the issue of the validity of the marriage or could re-litigate before him the issue of whether the 1974 marriage was lawful or existed at law. The issue was whether the adjudicator's decision, that Manitoba's actions in following the decision in ***North***, did not amount to discrimination within the meaning of the ***Code***, was reasonable. The complaint raised by Mr. North and taken up by the Commission under the ***Code*** alleged the

Manitoba Vital Statistics Agency has discriminated, and continues to discriminate, against him on the basis of sexual orientation when it refused and continues to refuse to register his 1974 marriage. This is not a case that engages the doctrine of issue estoppel. I also agree with the respondent that the applicable standard of review of the adjudicator's decision is reasonableness.

Was the decision of the adjudicator under the *Code*, that Manitoba did not discriminate within the meaning of s. 13(1) of the *Code* relating to provisions of services, reasonable?

[26] I find the applicable standard of review in this case is reasonableness which includes the adjudicator's interpretation of his home statute (see ***Canada (Minister of Citizenship and Immigration) v. Vavilov,*** 2019 SCC 65 (CanLII), at paras. 16 and 25).

[27] The ***Code*** defines discrimination in s. 9(1)(b) as "differential treatment of an individual" on the basis of certain characteristics including sexual orientation. Section 13(1) of the ***Code*** states:

> 13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

[28] I find no reviewable error in the adjudicator's reasoning that Manitoba did not discriminate against Mr. North. He was treated identically to all other persons whose ceremony of marriage was determined to be a nullity. He was treated identically to all other persons whose marriage had been the subject of a court decision specifically directing the province not to register. Abiding by the rule of law does not amount to discrimination.

[29] Further, the adjudicator reasonably determined that "[i]n 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" (***North v. Manitoba***, 2018 MBHR 1 (CanLII), at para. 20). Moreover, that decision citing common law authority was certainly correct when it was rendered in 1974 and merely applied the common law definition of marriage at that time: see ***North*** (at paras. 12 and 13) and ***Reference re Same-Sex Marriage***, (at para. 21).

[30] I find no reviewable error in the adjudicator's further finding that this was the "only basis upon which" Manitoba refused to register the marriage and that "the sexual orientation of the complainant was not, and is not, a factor in [Manitoba's] rejection of his application for registration" (at para. 21). In light of this finding that sexual orientation was not engaged, a finding which the adjudicator was entitled to make under his home statute, his decision to dismiss the discrimination complaint is reasonable. In finding that sexual orientation was not engaged, he found that Manitoba has refused to register a marriage that a court has ruled is a nullity and accepted the evidence of the Acting Director in this regard. Finally, I find no reviewable error in his finding that the statutory delegate could not exercise her discretion contrary to law. The Supreme Court of Canada has observed "[p]eople generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no

different" (***Canada (Attorney General) v. Hislop***, 2007 SCC 10 (CanLII), at para. 103).

[31] As I will discuss further in these reasons, the Commission is effectively seeking retroactive relief which has no legal basis either under the ***Charter*** or the ***Civil Marriage Act***.

Should this Court consider the new issues raised by the Commission in this judicial review, not raised before the adjudicator, that the decision of this Court in *North* should not be binding? If so, does the consideration of the new issues impact the reasonableness of the adjudicator's decision?

[32] Section 42 of the ***Code*** states that an adjudicator has exclusive jurisdiction to determine any question of fact, law, or mixed fact and law, that must be decided in rendering a final decision respecting the complaint. An adjudicator's jurisdiction to provide relief under the ***Code*** is set out in s. 43. That jurisdiction was commented upon by the Manitoba Court of Appeal in ***Billinkoff v. Winnipeg School Division no.1***, 1999 CanLII 14067 (MB CA), 134 Man R (2d) 99, as follows:

> 46 … When adjudicating a complaint, the adjudicator is to decide whether a party has "directly or indirectly contravened [the] Code in the manner alleged in the complaint" (s. 43(1)). The adjudicator may order a party to comply with *The Human Rights Code* (s. 43(2)). There is no statutory authority to make rulings beyond what is set forth in s. 43.

[33] The Supreme Court of Canada reviewed the applicable principles relating to a court's consideration of a new issue raised for the first time on judicial review in the case of ***Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association***, 2011 SCC 61 (CanLII), at paras. 22-26. In that case the Supreme Court of Canada stated that an applicant on judicial review does not have

a right to require a court to consider a new issue and a court has the discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so.

[34] I have determined that I will not consider the new issues relating to the ***Canadian Bill of Rights***, and whether same-sex marriage is now part of the common law independent of the ***Charter***, as I agree with Manitoba that those issues do not fall within the jurisdiction of the adjudicator adjudicating this particular complaint under the ***Code***, and is more properly brought in another forum, perhaps by way of declaratory relief. There is also nothing in the record to support that such submissions were even remotely contemplated. I am exercising my discretion not to hear these new arguments because they neither had to be decided by the adjudicator pursuant to s. 42 of the ***Code***, nor did they arise as an issue to be decided pursuant to s. 43 of the ***Code*** as they were not "alleged in the complaint." Even if I am wrong and the adjudicator would have had such jurisdiction, this Court is nonetheless deprived of a ruling on these issues, including perhaps an initial ruling on jurisdiction, by the decision maker ordinarily tasked by the legislature to make that decision, which is always preferable. It would therefore be inappropriate to consider these issues on this judicial review application.

[35] However, I view the new argument relating to the ***Civil Marriage Act*** differently than the two preceding arguments. I note that the ***Civil Marriage Act*** was referred to by Manitoba in its initial response to Mr. North's complaint of discrimination. It is true that although the possible retroactivity of the statute was

not raised, the issue of retroactivity in relation to the ***Charter*** was raised both by Manitoba explicitly, and by Mr. North implicitly in his complaint when he refers to Manitoba's "policy of not recognizing same sex marriages prior to 2004". I have been persuaded that it would have been open for the adjudicator to consider whether the ***Civil Marriage Act*** had retroactive effect had that argument been put to him in determining whether or not this complaint was well founded pursuant to the ***Code***.

[36] I also find support for this view in the decision of ***Paul v. British Columbia (Forest Appeals Commission)***, 2003 SCC 55 (CanLII), which stands for the proposition that a provincial tribunal can consider a question of constitutional or federal law arising in the course of a primary determination in applying their enabling legislation, and must take into account all applicable federal and provincial rules. The relevance of whether the ***Civil Marriage Act*** has retroactive effect is of course that it could cast doubt on the basis of Manitoba's refusal to register the 1974 ceremony between Mr. North and Mr. Vogel. I will therefore consider the new argument in relation to the ***Civil Marriage Act*** because consideration of that legislation would have been within the ambit of the adjudicator's jurisdiction.

THE *CIVIL MARRIAGE ACT* HAS NEITHER RETROSPECTIVE NOR RETROACTIVE APPLICATION TO 1974

[37] Prior to 2005, outside of Quebec, there was no federal statutory provision defining marriage and accordingly that definition was based on the common law (see para. 26 of these reasons). On July 20, 2005, Parliament enacted the ***Civil***

Marriage Act. Before doing so, Parliament sought the advice of the Supreme Court of Canada by way of a reference to that Court (see ***Reference re Same-Sex Marriage***).

[38] Section 2 of the ***Civil Marriage Act*** defines marriage as follows:

> 2 Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

Section 4 of the ***Civil Marriage Act*** states that:

> 4 For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

[43] In ***Gustavson Drilling (1964) Ltd. v. Minister of National Revenue***, 1975 CanLII 4 (SCC), [1977] 1 S.C.R. 271, the Court states that "[t]he general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act."

[44] In this regard, it is also useful to distinguish between the terms "retroactivity" and "retrospectivity". Although a ***Charter*** case involving the retroactivity of the ***Charter***, ***Benner v. Canada (Secretary of State)***, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358, offered concise definitions of these terms, which are of course applicable to the statutory construction of all legislation. There the Court stated as follows:

> 39 The terms, "retroactivity" and "retrospectivity", while frequently used in relation to statutory construction, can be confusing. E.A. Driedger, in "Statutes: Retroactive Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69, has offered these concise definitions which I find helpful:

> A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

[45] For reasons that follow, I find that the ***Civil Marriage Act*** has neither a retroactive nor a retrospective application to 1974 and as a result, my consideration of the new issue does not impact my determination that the adjudicator's decision was reasonable.

[46] I agree with Manitoba's submission that the language contained in either s. 2 or s. 4 of the ***Civil Marriage Act*** does not evince an intent to make those provisions retroactive. I agree with Manitoba's submission that the intent of the ***Civil Marriage Act*** can at most be read as having a retrospective application to no further than the period around 2002 to 2004 when decisions throughout the country began recognizing same-sex marriage pursuant to s. 15 of the ***Charter***.

[47] This construction is also consistent with the lengthy preamble to the legislation which contains many references to the ***Charter***. The preamble also references the court decisions from the various provinces recognizing the right to equality under the ***Charter*** and the fact that many Canadian couples of the same sex have married in reliance on those court decisions. It is also clear from the provisions in the preamble that this legislation came about in the context of those

Charter based decisions and the federal government's acceptance of those decisions (see ***Reference re Same-Sex Marriage*** at paras. 41-42).

[48] The operative provisions of the legislation, including the identical wording of the definition section now comprising s. 2 of the ***Act*** was put before the Supreme Court of Canada for consideration in ***Reference re Same-Sex Marriage***. The Supreme Court of Canada noted at para. 43 that the wording of s. 2 of the ***Act*** "embodies the government's policy stance in relation to the s. 15(1) equality concerns of same-sex couples. This, combined with the circumstances giving rise to the *Proposed Act* and with the preamble thereto, points unequivocally to a purpose which …" flows from the ***Charter***.

[49] If the purpose of the operative provision of the ***Civil Marriage Act*** flows from the ***Charter***, it would not have retroactive or retrospective application before the ***Charter***'s coming into force and effect, at least without statutory language to the contrary. The cases relied on by the Commission are distinguishable as they do not address the issue of retroactivity or retrospectivity of the ***Civil Marriage Act*** in light of its clear purpose which is intimately related to the equality provisions of the ***Charter*** .

[50] Having rejected the submission regarding the ***Civil Marriage Act***'s retroactive or retrospective application to 1974, this new submission therefore has no bearing on the reasonableness of the adjudicator's decision.

RETROACTIVE AND RETROSPECTIVE APPLICATION OF THE CHARTER

[39] Although this is a judicial review of an adjudication of a complaint of discrimination under the provincial ***Human Rights Code***, an underlying premise of the complaint is Manitoba's failure to retroactively recognize same-sex marriage back to 1974. I will therefore conclude by referring to some cases involving retroactivity and the ***Charter***. While the impact of the ***Charter*** has been very significant it does not operate to change history. The Supreme Court of Canada stated in ***Benner*** at para. 40 that the ***Charter*** does not apply retroactively or retrospectively.

[40] In ***Benner***, Iacobucci J. summarized his conclusions regarding the test for determining when a particular application of the ***Charter*** would be retrospective as follows:

> 44 Section 15 cannot be used to attack a discrete act which took place before the *Charter* came into effect. . .
>
> 45 The question, then, is one of characterization: is the situation really one of going back to redress an old event which took place before the *Charter* created the right sought to be vindicated, or is it simply one of assessing the contemporary application of a law which happened to be passed before the *Charter* came into effect?

[41] The Ontario Court of Appeal relied on ***Benner*** in ***Mack v. Canada (Attorney General)***, 2002 CanLII 45062 (ON CA) (at paras. 10-12) in determining that people who had been discriminated against by the Chinese head tax could not seek redress under the ***Charter***. The Court agreed that the claim was properly characterized as seeking redress for a discrete act that had taken

place over 50 years ago. The Court concluded that the claim could not succeed as this would amount to a retrospective application of the ***Charter***.

[42] The Nova Scotia Court of Appeal in ***Bauman v. Nova Scotia (Attorney General)***, 2001 NSCA 51 (CanLII) also relied on ***Benner*** in finding that the pre-***Charter*** termination of a widow's pension on remarriage was not discriminatory. Bateman J.A., for the Court, recognized that the "most significant relevant feature of this case" is the date of remarriage. "… It was the event of remarriage that resulted in termination of the pension, not the status of being remarried" (at para. 36). The Court concluded that "[t]o revisit the termination of the survivors pensions, post-*Charter* would be an impermissible, retrospective application of the *Charter*" (at para. 48).

[43] I agree with the respondent that Mr. North's claim is about a discrete event. He is seeking to change his invalid marriage into a valid marriage on the basis that he and Mr. Vogel would be entitled to be married today. In other words, to have the ***Charter*** applied retroactively or retrospectively. What Mr. North is seeking is to redress an old event which took place before the ***Charter*** created the right sought to be vindicated.

CONCLUSION

[56] In light of the conclusions set out above, the adjudicator's decision that Manitoba did not discriminate against Mr. North by failing to register his 1974 ceremony as a marriage was reasonable. This application for judicial review is therefore dismissed.

_____ J.