IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Dunbar & Edge* v. *Yukon (Government of) & Canada (A.G.)*
2004 YKSC 54

Date: 20040714
Docket: S.C. No. 04-A0048
Registry: Whitehorse

Between:

STEPHEN DUNBAR AND ROBERT EDGE

Petitioners

And:

THE GOVERNMENT OF THE YUKON TERRITORY AND THE ATTORNEY GENERAL OF CANADA

Respondents

Before: Mr. Justice P. McIntyre

Appearances:

James R. Tucker and Martha A. McCarthy	For the Petitioners
John W. Phelps	For the Attorney General of Canada
Lenore M. Morris	For the Government of the Yukon Territory

MEMORANDUM OF RULING
DELIVERED FROM THE BENCH

[1] McINTYRE J. (Oral): There are five parts to this judgment.

I. INTRODUCTION

[2] Stephen Dunbar and Robert Edge are males who want to marry on July 17, 2004. They asked the Vital Statistics Office of the Yukon Territorial Government for a marriage licence in January 2004; but they were not allowed to fill out the application form. The Yukon Territorial Government explained its position in writing by letter dated April 22, 2004, from Joe MacGillivary, the Registrar of Vital Statistics. He stated:

> The common law definition of marriage in Yukon remains the union of one man and one woman. As a result, until such time as the federal Parliament enacts legislation to allow same sex marriage, or the common law definition of marriage is changed in the Yukon, we are of the view that Yukon Vital Statistics is unable to issue marriage licenses to same sex couples.

II. NATURE OF APPLICATION

[3] By Petition filed June 9, 2004, Dunbar and Edge applied for an Order that:

i) A declaration, pursuant to s. 52 of the *Constitution Act* (1867) that the common law bar against same-sex marriage is of no force or effect because it violates rights and freedoms guaranteed by s. 15 of the *Charter* and does not constitute a reasonable and demonstrably justifiable limit on those rights within the meaning of s. 1 of the *Charter;*

ii) An Order in the nature of *mandamus* requiring the issuer of marriage licences in the Yukon Territory to issue a marriage licence to the petitioners as a couple and to any other same-sex couples who otherwise meet the legal requirements for capacity to marry;

iii) An Order in the nature of prohibition preventing the issuer of marriage licences in the Yukon Territory from refusing to issue licences to the petitioners as a couple or to other same-sex couples solely because the applicants for the marriage licences are of the same-sex; and

iv) An Order that the petitioners be granted their costs associated with bringing this action.

III. POSITION OF THE PARTIES

[4] By Affidavit sworn the 28th of June of 2004, Joe MacGillivary, the Registrar, advised that because marriages can be performed in the Yukon without a marriage licence after the publication of banns, that the Yukon Government will register the applicants' marriage retroactively if either of two events occurs within three years:

a) The Supreme Court of Canada declares the traditional definition of marriage as a union of one man and one woman to be incompatible with the *Charter of Rights and Freedoms*;

b) Legislation is enacted by the Government of Canada which defines marriage for civil purposes in such a way as to include the Petitioners' union.

[5] The applicants want a marriage licence before their wedding, and they want their marriage to be registered in the normal course. They do not want to be treated differently.

[6] The Yukon Government does not oppose the declaration of invalidity sought in Part 1 of the Petition but objects to an Order in the nature of *mandamus* or prohibition, because it undertakes that if the Court makes a declaration of invalidity, the Yukon Government will issue a marriage licence to the applicants and any other same-sex couple who qualify for one.

[7] The Attorney General of Canada concedes that the opposite sex requirement for marriage is unconstitutional, as not consistent with the equality rights guarantee set out in s. 15(1) of the *Charter* and is not justifiable. However, the Attorney General sought an adjournment of this application to an indefinite future date, following the hearing of a

reference made by the Federal Government to the Supreme Court of Canada on four questions. The questions are as follows, and I am now quoting from the Privy Council document that was put before me:

> Her Excellency, the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to s. 53 of the *Supreme Court Act*, hereby refers to the Supreme Court of Canada for hearing and consideration the following questions:
>
> 1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars and to what extent?
>
> 2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?
>
> 3. Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

[8] Now, the Proposal for an Act that was annexed to those three questions is very brief. The two operative sections state:

> 1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
>
> 2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

[9] Now, there was a fourth question added to the Reference by a document of the Privy Council Order-in-Council, dated January 26, 2004, whereby Question 4 was posed:

> Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for

> Quebec in section 5 of the *Federal Law Civil Law Harmonization Act No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

IV. ANALYSIS

A. The Cases *Egale*, *Halpern* and *Hendricks* and the Reference.

[10] These cases are essential reading on this topic, not just for the sophisticated analysis by the courts on this issue but also to better understand the previous positions taken by the Attorney General of Canada. The British Columbia Court of Appeal released its decision in *Egale,* [2003] B.C.J. No. 994. It reversed the lower court decision. It found that the common-law bar to same-sex marriage contravened s. 15 of the *Charter* and cannot be justified under s. 1 of the *Charter*. The Court reformulated the common-law definition of marriage to mean "the lawful union of two persons to the exclusion of all others." This is found in paragraph 7 of that case. The remedies were suspended until July 12, 2004, to give the Federal and Provincial Governments time to review and revise legislation to accord with the decision. This date was consistent with the expiration date of the 24-month suspension period ordered by the Divisional Court of Ontario in *Halpern v. Canada (Attorney Genera),* [2002] O.J. No. 2714. The Court did not order *mandamus* or prohibition in *Egale* on the basis it was unnecessary to do so, presumably because there was a suspension in place.

[11] Turning from British Columbia to Ontario, in Ontario, the Ontario Court of Appeal released its decision in *Halpern v. Canada (Attorney General)* on June 10, 2003, [2003] O.J. No. 2268. This was an appeal from the divisional court, a court consisting of three Ontario Superior Court judges. The Ontario Court of Appeal dismissed the

Attorney General of Canada's appeal from a declaration of invalidity. Like the British Columbia Court of Appeal, the Ontario Court of Appeal declared the existing common-law definition of marriage to be invalid and reformulated the common-law definition as "the voluntary union for life of two persons to the exclusion of all others."

[12] In the course of argument, I asked counsel to explain the difference between the British Columbia and Ontario formulations, the first referring to "lawful union" and the second to "voluntary union". It was not apparent and is not apparent to me why there is a difference, although counsel for the applicants correctly pointed out that the significant change to the common-law definition is the same in both, that is, to delete one man and one woman and to substitute "two persons".

[13] Unlike the British Columbia Court of Appeal and contrary to the request of the Attorney General of Canada, the Ontario Court of Appeal ordered the declaration of invalidity to have immediate effect. The Court also ordered the Clerk of the City of Toronto to issue marriage licences to the couples and ordered the Registrar General to accept for registration the marriage certificates. The Attorney General of Canada asked the Ontario Court of Appeal to restrict itself to a declaration of invalidity and to suspend the declaration of invalidity for two years. At paragraph 149, the Ontario Court of Appeal rejected the Attorney General of Canada's submission because of the Court's obligation to reformulate a common-law rule that breaches a *Charter* right. I quote from paragraphs 149 to 154:

> We reject the AGC's submission that the only remedy we should order is a declaration of invalidity, and that this remedy should be suspended to permit Parliament to respond. A declaration of invalidity alone fails to meet the court's obligation to reformulate a common law rule that

breaches a *Charter* right. Lamer C.J.C. highlighted this obligation in *Swain* at 978:

> [B]ecause this appeal involves a *Charter* challenge to a common law, judge-made rule, the *Charter* analysis involves somewhat different considerations than would apply to a challenge to a legislative provision. … Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.

No argument was presented to us that the reformulated common law definition of marriage would conflict with the principles of fundamental justice. Nor is there any issue that the reformulated definition would violate the *Charter*.

In addition to failing to fulfil the court's obligation, a declaration of invalidity, by itself, would not achieve the goals of s. 15(1). It would result in an absence of any legal definition of marriage. This would deny to all persons the benefits of the legal institution of marriage, thereby putting all persons in an equally disadvantaged position, rather than in an equally advantaged position. Moreover, a declaration of invalidity alone leaves same-sex couples open to blame for the blanket denial of the benefits of the legal institution of marriage, a result that does nothing to advance the goal of s. 15(1) of promoting concern, respect and consideration for all persons.

We are also of the view that the argument made by the AGC and several of the intervenors that we should defer to Parliament once we issue a declaration of invalidity is not apposite in these circumstances. *Schachter* provides that the role of the legislature and legislative objectives is to be considered at the second step of the remedy analysis when a court is deciding whether severance or reading in is an appropriate remedy to cure a legislative provision that breaches the *Charter*. These considerations do not arise where the genesis of the *Charter* breach is found in the common law and there is no legislation to be altered. Any lacunae created by a declaration of invalidity of a common law rule are common law lacunae that should be remedied by the courts, unless to do so would conflict with the principles of fundamental justice.

The third step remains to be considered, that is, whether to temporarily suspend the declaration of invalidity. As previously noted, the AGC argues for a suspension in order to permit Parliament an opportunity to respond to the legal gap that such a declaration would create. Again, *Schachter* provides guidance on the resolution of this issue. Lamer C.J.C. emphasized, at p. 716, that "[a] delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation." He stated, at pp. 715-16 and 719, that temporarily suspending a declaration of invalidity is warranted only in limited circumstances, such as where striking down the law poses a potential danger to the public, threatens the rule of law, or would have the effect of denying deserving persons of benefits under the impugned law. Further, Lamer C.J.C. pointed out, at p. 717, that respect for the role of the legislature is not a consideration at the third step of the analysis:

> The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the court and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public [*i.e.* potential public danger, threat to the rule of law, or denial of benefit to deserving persons].

There is no evidence before this court that a declaration of invalidity without a period of suspension will pose any harm to the public, threaten the rule of law, or deny anyone the benefit of legal recognition of their marriage. We observe that there was no evidence before us that the reformulated definition of marriage will require the volume of legislative reform that followed the release of the Supreme Court of Canada's decision in *M. v. H.* In our view, an immediate declaration will simply ensure that opposite-sex couples and same-sex couples immediately receive equal treatment in law in accordance with s. 15(1) of the *Charter*.

Accordingly, we would allow the cross-appeal by the Couples on remedy. We would reformulate the common law definition of marriage as "the voluntary union for life of two persons to the exclusion of all others". We decline to order a suspension of the declaration of invalidity or of the reformulated common law definition of marriage. We would also make orders, in the nature of *mandamus*, requiring the Clerk of the City of Toronto to issue marriage licences to the

> Couples, and requiring the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour.

[14] On June 17, 2003, one week after the decision in *Halpern*, the Attorney General of Canada announced that it would not appeal either *Halpern* or *Egale*. On July 8, 2003, the British Columbia Court of Appeal revisited the question of remedy in *Egale*, [2003] B.C.J. No. 1582. The successful applicants had asked that the appeal be reopened to lift the suspensions. The Attorney General of Canada consented to the application. The Court, noting that delay in implementing the remedies would result in unequal application of the law, with Ontario same-sex couples being allowed to marry while British Columbia same-sex couples could not until July 12, 2004, amended their Order to take immediate effect.

[15] On March 19, 2004, the Quebec Court of Appeal released its decision in *Catholic Civil Rights League v. Hendricks*, [2004] Q.J. No. 2593. The Court upheld the trial court's decision of invalidity. The decision of Madam Justice Lemelin on September 6, 2002, had declared two Federal Acts applicable only to Quebec, and part of the Civil Code of Quebec, providing that a marriage can only be solemnized between a man and a woman, to be inoperative. The declaration of invalidity was suspended for two years by Madam Justice Lemelin. On July 14, 2003, the Attorney General of Canada discontinued its appeal of the judgment of Madam Justice Lemelin. On July 16, 2003, the Reference that I have previously referred to was initiated.

[16] On January 22, 2004, the Attorney General of Canada advised the Quebec Court of Appeal that it was no longer seeking the continuation of the suspension of invalidity ordered by Madam Justice Lemelin. This, of course, was consistent with the Attorney

General of Canada's consent before the British Columbia Court of Appeal that resulted in the July 8, 2003, removal of the British Columbia suspensions. The Quebec Court of Appeal, which was sitting, by the way, as a five-person court, noted, as well, that on January 26, 2003, the fourth question had been added to the Reference. The Court of Appeal reviewed the British Columbia and Ontario cases. It noted, at paragraph 16, that an intervenor before the Ontario Court of Appeal in *Halpern* had sought leave to appeal from its decision, that is the decision in *Halpern*, but that the Attorney General of Canada had successfully applied to the Supreme Court of Canada to quash that motion.

[17] The Court of Appeal in Quebec stated, at paragraph 20:

> Regardless of its source, whether common law or federal legislation, the rule of law impugned is the same throughout Canada: marriage is the voluntary union of one man and one woman to the exclusion of all others. The basis for the constitutional attack is also the same, throughout Canada: the prohibition of civil marriage between spouses of the same sex is said to be unconstitutional and inoperative because of its discriminatory nature prohibited by the *Charter*.

[18] The Quebec Court of Appeal held, at paragraphs 22 and 23, that the Attorney General of Canada, not having appealed *Egale* and having been successful in quashing the appeal from *Halpern*, that the matter was *res judicata*, that is, a matter that had previously been decided against the Attorney General of Canada and binding on it. At paragraph 26, the Quebec Court of Appeal cited a noted constitutional authority, Hogg, that is Peter W. Hogg, *Constitutional Law of Canada* 2001 Edition. Quoting then at paragraph 26, the Quebec Court of Appeal noted that Hogg wrote the following:

> Once the Supreme Court of Canada has held that a law is unconstitutional, there can be no doubt about the status of the law: it is invalid, and need not be obeyed. The same result follows from a holding of invalidity by a lower court.

> Moreover, it is unlikely that the government would succeed in obtaining a stay of judgment, or an injunction compelling obedience to the law, pending an appeal. Of course, the holding of unconstitutionality might be reversed on appeal, in which case the theory would be that the law had always been constitutional. Anyone disobeying a law, in reliance on the judgment of a lower court that the law is unconstitutional, does take the risk that the law will ultimately be held to be constitutional. However, it is unlikely that such a person would be exposed to criminal liability by the retroactive effect of the appellate court's reversal of the holding of unconstitutionality.

[19] Further on, the Court of Appeal quoted:

> Once a law has actually been held to be unconstitutional, even if the holding is under appeal, the public interest in the continued enforcement of the law is enormously diminished. The government is therefore usually unsuccessful in obtaining a stay of judgment to keep the law in force pending the decision on appeal.

[20] The Quebec Court of Appeal was mindful of the Reference and all four questions therein. Notwithstanding its knowledge of the Reference and in view of the Attorney General of Canada's position before them, who was no longer requesting a suspension of the Order of invalidity, the Quebec Court of Appeal struck the suspension of declaration of invalidity and ordered solemnization of the marriage according to law.

B. The Attorney General of Canada's Request for an Adjournment

[21] Despite the position the Attorney General of Canada took in British Columbia and Quebec, agreeing to the immediate application of the declaration of invalidity and, of course, the consequent marriage by many same-sex couples in both of those jurisdictions, as indeed I am informed has occurred in Ontario, the Attorney General

suggests before me that this matter should be adjourned to a date sometime after the Reference, noting that the Yukon Government will register the marriage retroactive to July 17, 2004. The Attorney General argues that the Reference and Parliament's response to it are a preferable process; that this Court should not decide this matter in the absence of a full evidentiary record, including material defending the common-law definition of marriage or a "contradictor" to defend the common-law definition of marriage; that deciding this case on its merits is premature, given the reference and the proposed new legislation; that the petitioners have provided no evidence of real prejudice, and that to hear this matter would be a waste of scarce judicial resources.

[22] I reject the argument of the Attorney General of Canada for five reasons:

1. As has been decided in British Columbia, Ontario and Quebec and is agreed to by the Attorney General of Canada, the opposite sex requirement of the common law has been determined to be inconsistent with the equality guarantee of s. 15(1) of the *Charter*. This means that three courts of appeal have held common law or judge-made law or in Quebec, statute law, to be discriminatory. Two of the courts have reformulated the common law. Thus, the common law in British Columbia and Ontario is now different in those jurisdictions. For my part, I agree with the reasoning of the Provincial Courts of Appeal I have referred to, and I agree with the reformulations of the common law, and I adopt their reasoning in this case.

2. I do not consider it open to the Attorney General of Canada to ask this Court to defer to the Reference and to Parliament. The Attorney General of Canada is not divisible by province. The office of the Attorney General of

Canada is responsible for federal law. The capacity to marry is a federal issue. To paraphrase paragraph 28 of *Hendricks*, it is legally unacceptable in a federal constitution area involving the Attorney General of Canada for a provision to be inapplicable in one province and in force in all others. As a result of the action or inaction of the Attorney General of Canada, in my view were I to agree with the request for an adjournment, a legally unacceptable result would be perpetuated in the Yukon. I do not accept that *R. v. Wolf,* [1975] 2 S.C.R. 107, cited by the Attorney General of Canada, is applicable. *Wolf* deals with questions of *stare decisis*, not a constitutional question where the Attorney General of Canada has decided not to appeal the decisions of provincial courts of appeal, consented to the lifting of suspensions of declaration of invalidity, and successfully moved to quash an appeal to the Supreme Court of Canada by an intervenor in *Halpern*, an intervenor who would be a "contradictor" to the present position of the Attorney General of Canada. As previously referred to, the British Columbia Court of Appeal noted in paragraph 7 of its July 8, 2003, decision: "To fail to act now in the face of an acknowledged constitutional violation will result in an unequal application of the law."

3. A reference is, of course, a question of consultation, which, as observed by the Quebec Court of Appeal at paragraph 50 of *Hendricks*, may or may not result in new legislation, a political question for the Government and ultimately Parliament. Thus, we know not what may be ultimately decided in the Supreme Court or, indeed, in Parliament; and we cannot predict when either might occur.

4. As to the need for a record, in my view, I have no need for more evidence than the refusal of the Yukon Territorial Government to issue a licence or to register the marriage because of its understanding of the common law and the acknowledgement by the Attorney General of Canada that the common law rule is discriminatory. It is true that there appears to have been a great deal of evidence before the courts of first instance and appeal in British Columbia, Ontario and Quebec; but there is no need to repeat this evidence before me or any other member of this Court in order to arrive at a conclusion already reached after tremendous application of judicious effort by three provincial courts of appeal in order to lead to a conclusion that the Attorney General of Canada properly acknowledges is correct, that is, that the common-law definition of marriage is unconstitutional, a conclusion that is, after all, a conclusion of law, not fact, and for that I cite paragraph 30 of *Halpern*. Incidentally, the reasoning of the Attorney General of Canada is very clearly set out in its factum filed with the Supreme Court of Canada in the reference. This factum, which is part of the record material before me, was authored in part by Peter W. Hogg, previously referred to.

5. Finally, I agree with counsel for the applicants that the Attorney General's request for an adjournment is essentially a preemptive request for a suspension of remedy or stay. As noted above, the Attorney General's request for a suspension of remedy to defer to Parliament was rejected by the Ontario Court of Appeal in *Halpern* because of the Court's obligation to reformulate a common-law rule that breaches the *Charter*. I agree with that reasoning and adopt it.

V. CONCLUSION

[23] To conclude, first I dismiss the Attorney General of Canada's application for an adjournment to await the result of the Reference and the response of Parliament. Second, in my view, it is not necessary in this case to decide whether the invalidity of the common-law definition of marriage is *res judicata* vis-à-vis the Attorney General of Canada, the legal office of the Crown responsible for the federal constitutional power relating to the capacity to marry; because the Attorney General of Canada acknowledges the unconstitutionality of the common-law definition. Third, it is not necessary for this Court to do a separate new analysis of the s. 15(1) breach. For the reasons expressed by the British Columbia Court of Appeal in *Egale* and the Ontario Court of Appeal in *Halpern*, and in particular, bearing in mind the framework of analysis utilized by the Ontario Court of Appeal, I hold that the common-law definition of marriage is invalid, because it violates s. 15(1) equality rights and cannot be justified under s. 1 of the *Charter*. I reformulate the common-law definition of marriage, using the Ontario wording of "voluntary," simply because the original common-law definition in *Hyde v. Hyde* (1866), L.R.1 P & D 130, 133 used "voluntary," and because it has not been made apparent to me why the British Columbia Court of Appeal used the word "lawful". The critical wording refers to who can marry.

[24] Therefore, the new common-law definition of marriage in the Yukon is "the voluntary union for life of two persons to the exclusion of all others."

[25] As to remedy, I am prepared to accept the undertaking by the Yukon Territorial Government, given through its counsel, that it will immediately issue a marriage licence and register the marriage following a decision such as the one I have just made; but I do

pause at this time to make sure that I understand correctly the Yukon Territorial Government's position. Have I captured your position correctly, Ms. Morris?

[26] MS. MORRIS: That's correct, yes.

[27] THE COURT: So, following this decision, there will be an immediate issuance of a marriage licence, and the wedding ceremony will be registered?

[28] MS. MORRIS: Yes, there are some documents that the petitioners have to provide that are standard. Once that's done, then a marriage licence will be issued.

[29] THE COURT: Thank you. In view of that undertaking, then, it is not necessary, in my view, to issue an Order for *mandamus* or prohibition.

[30] Counsel, do you have anything in respect of costs or anything further to say?

[31] MR. TUCKER: Yes, My Lord, there is a portion of the brief which we have submitted, commencing at paragraph 136, and going to paragraph 139 with respect to costs. We seek special costs and specific solicitor and own client costs against the respondents for Mr. Dunbar and Mr. Edge having to have brought this application. The essence of this request is simply that they did nothing wrong. They were forced by the conduct or lack of conduct of the two levels of government, especially in light of the recent decisions from the Courts of Appeal for Quebec, British Columbia and Ontario, to bring this court application to seek equal treatment under the law. They were discriminated against by the application of an obiter comment in a trial court decision from England from 1866, which was applied to the common-law definition

of marriage in spite of those Court of Appeal decisions. The discrimination has been acknowledged; yet we are here. While the period of time between the commencement of this action and its conclusion has been relatively short, as I can assure the Court and I think that the Court is probably aware that it's required an enormous amount of preparation; and as a natural result of that, an enormous amounts of costs. Costs normally follow the cause in any event, but the normal tariff of costs will only compensate Mr. Dunbar and Mr. Edge a portion of what they have had to bear to get to this point, to get to be treated the same as everybody else; and that would be unfair.

[32] THE COURT: Mr. Phelps.

[33] MR. PHELPS: My Lord, the Attorney General of Canada certainly opposes an Order for solicitor and own client costs and is rather concerned with the representation of the enormous amount of preparation that has been used as a reference by my friend just now. The Attorney General of Canada's position with respect to this petition was provided to my friend prior to the petition even being filed, that is, that we would adopt the position taken in the factum before the Supreme Court of Canada but would be taking the position that the matter should not proceed, based on the adjournment application that was before you. All of that was provided even prior to the petition being filed to my friend.

[34] There was no original argument provided to this Court. One of the counsel for the intervenors acted as co-counsel in this matter, and the argument that was put before this Court with respect to the substantive issue was the same argument that was put before the Supreme Court of Canada and the Courts of Appeal, as was the position of the Attorney General of Canada.

[35] The Attorney General also takes the position that it is acting in a timely fashion with respect to resolving this issue on a national level for the now nine remaining jurisdictions that still fall under the old common law and that under the circumstances should not be penalized in the fashion of solicitor and own client costs in this proceeding.

[36] Those are the submissions of the Attorney General.

[37] THE COURT: Thank you, Mr. Phelps. Ms. Morris.

[38] MS. MORRIS: Like the Attorney General of Canada, we would be opposed to special costs being ordered. As my friend, Mr. Tucker has suggested, he says that the petitioners have done nothing wrong or they were forced into this litigation. I would agree that for them to obtain the particular remedy that they sought, they did have to commence the litigation. However, the Yukon Government has not opposed the declaration. We also feel that we have done nothing wrong, that we've simply acted in accordance with our understanding of the law and that we don't think that it's appropriate that special costs be ordered against us.

[39] With respect to the preparation, the main part of this application, of course, was seeking the declaration and the reformation of the common law. I would agree with Mr. Phelps that much of that argument has already been made very compellingly for Mr. Tucker and that to a very large extent, he's been able to simply use and adopt the argument that has been made earlier and the Court decisions in other provinces.

[40] I would also point out that there is only a period of five weeks between when this petition was filed and the hearing of yesterday and today; and there's been no delay on

the part of either of the respondents, that there has been full cooperation, in my submission, with the petitioners.

[41] THE COURT: Thank you very much. With respect to the question of costs, costs, of course, are a matter of discretion. The applicants ask for solicitor client costs. The respondents are opposed to solicitor client costs. In part, arguments are made to me about the quantum of costs. Well, the quantum of costs, except in very unusual circumstances, is subject to taxation; and thus, the real issue before me is whether there are special circumstances that would require the imposition of solicitor client costs. In my view, with respect to the Attorney General of Canada, the approach it has taken is so fundamentally inconsistent with the approach it took in the other provinces and, indeed, with the approach that it acknowledges to be correct in the Supreme Court of Canada, that solicitor client costs should be awarded against the Attorney General of Canada. With respect to the Yukon Territorial Government, it is true, I acknowledge what counsel says on behalf of the Government, that it has not opposed the declaration; but it did not grant the request by the applicants, a request that I now say should have been granted; and it had a choice. It could allow the request or wait for a decision of the Court. It decided to await the decision of the Court, and it now has such a decision, but there is to be a cost associated with that. It is a litigant that lost, in my view, by not acting prior to this decision. Thus, I am going to order that costs on a solicitor client basis be shared by both the Attorney General of Canada and the Yukon Territorial Government.

[42] For greater clarity, this is not solicitor and his own client costs, which I understand to mean costs that are not subject to taxation. I am simply describing these as solicitor

client costs, which are taxable; and I make that specific determination in view of the observations by counsel for the Attorney General of Canada and the Yukon Territorial Government relating to preparation that may well have been done for other purposes. That concludes my ruling with respect to costs.

[43] Are there any technical questions with respect to the ruling on costs?

[44] MR. TUCKER: No, My Lord, thank you.

[45] MR. PHELPS: No, thank you.

[46] MS. MORRIS: No, thank you.

[47] THE COURT: Thank you very much for your efforts, counsel.

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McINTYRE J.