COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL REGISTRY
No. 500-09-012719-027
(500-05-059656-007)

DATE: March 19, 2004

CORAM: THE HONOURABLE J.J. MICHEL ROBERT C.J.Q.
PAUL-ARTHUR GENDREAU J.A.
LOUISE MAILHOT J.A.
FRANCE THIBAULT J.A.
ANDRÉ ROCHON J.A.

CATHOLIC CIVIL RIGHTS LEAGUE
APPELLANT – INCIDENTAL RESPONDENT – intervener
v.

MICHAEL HENDRICKS
And
RENÉ LEBOEUF
RESPONDENTS – INCIDENTAL APPELLANTS – petitioners
And
ATTORNEY GENERAL OF CANADA
RESPONDENT – respondent
And
ATTORNEY GENERAL OF QUEBEC
IMPLEADED PARTY – respondent
And
COALITION POUR LA RECONNAISSANCE DES CONJOINTS ET CONJOINTES DU MÊME SEXE
INTERVENER – intervener-petitioner
And
CANADIAN HUMAN RIGHTS COMMISSION
INTERVENER

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[1] The respondents Michael Hendricks and René LeBoeuf have applied to dismiss the appeal of the appellant Catholic Civil Rights League against a judgment rendered on September 6, 2002 by the Superior Court of the District of Montreal (the Honourable Louise Lemelin J.). The judgment declared section 5 of the *Federal Law–Civil Law Harmonization Act, No. 1*[1] (Harmonization Act), section 1.1 of the *Modernization of Benefits and Obligations Act*[2] and that part of paragraph 2 of article 365 of the *Civil Code of Quebec* providing that marriage can only be solemnized between a man and a woman to be inoperative. It also suspended the declarations of invalidity for a period of two years.

[2] The respondents invoke two grounds for the dismissal of the appeal. First, they contend that the appellant lacks sufficient legal interest inasmuch as it is not directly affected by the trial judgment, or, because it does not satisfy the conditions of the test developed by the Supreme Court in order to act in the public interest.[3] Second, the appeal is said to be hypothetical or moot because of the occurrence of facts since the judgment of the Superior Court.

[3] The respondents' motion also has an alternative component in which they seek leave to file new evidence in the record as well as an amended factum.

[4] The respondents also ask the Court to allow their incidental appeal in light of the consent of the Attorney General of Canada.

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[5] The debate surrounding the issue of the marriage of homosexuals has been examined in legal proceedings in three Canadian provinces. It is worthwhile to explain the evolution of that process generally.

Quebec

[6] The dispute set the respondents against the Attorneys General of Quebec and Canada. The appellant, as well as the Evangelical Fellowship of Canada and the *Coalition pour la reconnaissance des conjoints et conjointes du même sexe* were authorized to intervene in the case.[4] The judgment of the Superior Court endorsed the

1 S.C. 2001, c. 4.
2 S.C. 2000, c. 12.
3 *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Thorson* v. *Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors* v. *McNeil*, [1976] 2 S.C.R. 265; *Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342.
4 *Hendricks* v. *Quebec (P.G.)*, S.C. Montreal, No. 500-05-059656-007, July 12, 2001, Rolland J., and September 28, 2001, Nadeau J.

respondents' position. It concluded that the legislative provisions preventing the marriage of homosexuals violated the *Canadian Charter of Rights and Freedoms*[5] (the Charter), and suspended the declarations of invalidity for a period of two years.

[7] The Attorney General of Quebec did not appeal the judgment. The Attorney General of Canada, who had filed an appeal, discontinued it on July 14, 2003. Two days later, on July 16, 2003, he seized the Supreme Court of Canada with a reference[6] concerning the draft bill on the *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes*, which authorizes the marriage of two people of the same sex. It should be noted that the appellant was authorized[7] to intervene in the reference and that the questions to be argued are those raised in the reference to the Supreme Court.

[8] On January 22, 2004, the Attorney General of Canada renounced the suspension of the declarations of invalidity ordered by the judgment of the Superior Court.

[9] Lastly, on January 26, 2004,[8] the Government of Canada amended Order in Council PC 2003-1055 of July 16, 2003 by adding a fourth question, with the result that the reference now contains the following four 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?
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> 4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s. 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?

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5 Part 1 of the *Constitution Act, 1982* [Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11].

6 Order in Council PC 2003-1055, July 16, 2003.

7 (It is part of The Catholic Civil Rights League and the Evangelical Fellowships of Canada.) *In the matter of a reference by the Governor in Council concerning the proposal for an act respecting certain aspects of legal capacity for marriage for civil purposes*, Supreme Court of Canada, 29866, January 23, 2004, Iacobucci J.

8 Order in Council PC 2004-28, January 26, 2004.

[10] The appellant filed its inscription in appeal on October 1, 2002, and is the sole party in this Court supporting the validity of the impugned legislation.

British Columbia

[11] On May 1, 2003, the British Columbia Court of Appeal concluded that the definition of marriage under common law, that is, "the voluntary union for life of one man and one woman to the exclusion of all others", violated the *Charter*. It redefined that concept as being "the lawful union of two persons to the exclusion of all others" and suspended the effect of its judgment until July 12, 2004.[9]

[12] Neither the Attorney General of British Columbia nor the Attorney General of Canada appealed the judgment. In addition, on July 8, 2003, with the explicit consent of the Attorney General of Canada and with no opposition from the Attorney General of British Columbia, the Court of Appeal lifted the suspension it had ordered.[10]

[13] Accordingly, since July 8, 2003, homosexuals can marry one another in that province and, in fact, according to information provided at the hearing in this Court, several marriages have been solemnized there.

Ontario

[14] On June 10, 2003, the Court of Appeal for Ontario concluded that the common law definition of marriage violated the provisions of the Charter. It reformulated the definition of marriage as "the voluntary union for life of two persons to the exclusion of all others" and gave immediate effect to that definition.[11]

[15] Neither the Attorney General of Canada nor the Attorney General of Ontario appealed the judgment.

[16] An intervener before the Court of Appeal for Ontario, The Interfaith Coalition on Marriage and Family, to which the appellant in the present case belongs, filed a motion before the Supreme Court for leave to appeal from the judgment of the Court of Appeal for Ontario. The Attorney General of Canada replied with a motion to quash the motion for leave to appeal.

[17] On October 9, 2003, the Supreme Court of Canada granted the motion to quash the motion for leave to appeal, without giving any reasons.[12]

[18] Accordingly, homosexuals can marry one another in Ontario and, in fact,

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9 *EGALE Canada inc.* v. *Canada (Attorney General)*, 2003 B.C.C.A. 251.
10 *EGALE Canada inc.* v. *Canada (Attorney General)*, 2003 B.C.C.A. 406.
11 *Halpern* v. *Canada (Attorney General)*, 172 O.A.C. 276.
12 *Halpern* v. *Canada (Attorney General)*, [2003] S.C.C.A. No. 337.

according to information provided at the hearing in this Court, many marriages have been solemnized.

* * *

[19] A complex and unusual, even unprecedented,[13] legal situation has emerged from these various factors. It is mainly the result of the nature of the provisions of law involved (marriage), the concept of *res judicata* and its application in Canadian public law.

[20] Regardless of its source, whether common law or federal legislation, the impugned legal concept is the same throughout Canada: marriage is the voluntary union of one man and one woman to the exclusion of all others. The basis of the constitutional challenge 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 that is prohibited by the *Charter*.

[21] When the Court of Appeal for Ontario handed down its judgment (June 10, 2003), the time period for lodging an appeal from the judgment of the British Columbia Court of Appeal (May 1, 2003) to the Supreme Court of Canada had not yet expired, and the Attorney General of Canada had not yet made known his intentions in that regard.

[22] Given that it was not appealed, the British Columbia judgment acquired the authority of *res judicata* in the summer of 2003.

[23] The judgment of the Court of Appeal for Ontario also acquired that status on October 9, 2003 as a result of the decision of the Supreme Court of Canada to quash the sole motion for leave to appeal, which had been filed by The Interfaith Coalition on Marriage and Family.

[24] It is important to clearly understand the consequences of the procedural framework. The federal government was a party to the cases. Through the Attorney General of Canada, it defended the constitutionality of a provision of law that is within the jurisdiction of the federal Parliament. It wilfully decided not to appeal the judgments of the courts of appeal that invalidated the traditional definition of marriage.

[25] In public law, the concept of *res judicata* is part of the common law.[14] Its scope may be substantial if three factors are present: (1) a legal proceeding involving the government; (2) a declaration of unconstitutionality issued by a competent court; (3) the absence of an appeal from the judgment. The learned authors Brun and Tremblay give the following example:

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13 Neither the Court nor counsel were able to find precedents drawn from Canadian constitutional disputes.

14 Henri Brun, Guy Tremblay, *Droit constitutionnel* (Cowansville, Qc.: Yvon Blais, 2002) 4th ed. at 21.

> [TRANSLATION]
> For instance, if the government involved was a party to the dispute, a judgment of the Superior Court of Quebec ruling that a regulation is invalid will subsequently be *erga omnes*, i.e. it will regard everyone, unless there is an appeal.[15] [Emphasis added.]

[26] In addition, 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.[16]

and further on:

> 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.[17]

[27] The question thus arises as to *res judicata* with respect to a rule of federal law declared unconstitutional in two Canadian provinces. For example, is it possible for a provision of the *Criminal Code* declared unconstitutional as the consequence of a legal proceeding in one province and involving the Attorney General of Canada, who does not appeal from the judgment, to be valid in another province where the question has not been argued? As a general rule, the Attorney General, as representative of the public interest, avoids that type of situation by bringing the issue before the Supreme Court of Canada or asking Parliament to legislate, which, in both cases, harmonizes the rule of law throughout the country.

[28] It is true that, as a general rule, the judgments of the courts of a province have no extraterritorial effect. It would be legally unacceptable, however, in a constitutional area involving the Attorney General of Canada regarding a matter within the jurisdiction of the federal Parliament, for a provision to be inapplicable in one province and in force in all of the others.

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15 *Ibid.* at 21.
16 Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2001) Vol. II at § 55-2.
17 *Ibid.* at § 55-6.

[29] Apart from these legal questions, it must be noted that the usual position of the parties before the Court is reversed. According to the traditional procedural pattern, in any constitutional challenge, one or more parties seek a declaration of invalidity of a provision of law while the Attorney General defends it. In this case, when the Attorney General of Canada decided to discontinue his appeal from the judgment of the Superior Court, there ceased to be a dispute between the initial parties. This is an unusual situation. The Attorney General, the formal representative of the public interest, is no longer defending the provision of law. Instead, it is a private party who seeks to continue with the appeal and to affirm the validity of the traditional definition of marriage.

[30] What is more, that same private party wants to continue the appeal before the Court on a question identical to that brought before the Supreme Court of Canada through the recent amendment to the federal reference. In the latter case, it must be said that the Government of Canada is asking the Supreme Court a question identical to the one which could have been the object of an appeal from the judgments of the British Columbia Court of Appeal and the Court of Appeal for Ontario.

* * *

[31] The appellant's position requires examination in this unusual legal context. The appellant is an intervener within the meaning of article 208 of the *Code of Civil Procedure*, which gives it the status of a party to the proceeding[18] and, therefore, the right to appeal to this Court.[19] Hence, by allowing its motion and authorizing it to participate in the case, the Superior Court recognized that the appellant had sufficient legal interest to support the Attorney General in the defence of the legislation the respondents impugn on the basis of a violation of section 15 of the *Charter*. In fact, the appellant contended that it could [TRANSLATION] "make a considerable contribution, particularly in regard to the historical and religious aspects of marriage".[20] It was on that basis that the appellant was authorized by the Superior Court to participate in the case.

[32] However, the circumstances of a trial are sometimes unforeseeable and may change in such a way that the intervener loses the capacity to continue with an appeal. That is rare, of course, but it is still possible. It is what has happened here.

[33] Before examining the present matter, a few premises should be remembered. First, the legal interest to act in a constitutional case is a more flexible concept than that of the interest a party can claim in a dispute of a private nature. It is not wholly identical to that provided for in the *Code of Civil Procedure*. LeBel J.A. (as he then was) described the differences and explained the limits:

> [TRANSLATION]

18 Art. 210 C.C.P.
19 Art. 492 C.C.P.
20 Forced intervention declaration, para. 6d).

> The concept of *standing*, at least in constitutional matters, is not strictly identical to the concept of interest within the meaning of Quebec's *Code of Civil Procedure*. It is flexible and broad, but also, as we will see in certain respects, more narrow. Constitutional standing covers a concept that is both more complex and more elusive than strictly procedural interest. It encompasses recognition of the capacity of a party, its interest within the procedural meaning of the term and the very opportunity for the court to rule, because of the nature of the question raised and the circumstances of the case.[21]

[34] Secondly, the Supreme Court distinguished the interest of a petitioner in regard to the invalidity of a law or an action by the State and the role of an intervener supporting the plaintiff or defendant and, therefore, the level of interest required. The participation of that party in the dispute consists in providing opinions and arguments to assist the Court in resolving the issues to be decided. That is the view expressed by Cory J. in *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration)*:[22]

> Public interests organizations are, as they should be, frequently granted intervener status. The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts. Yet that assistance is given against a background of established facts and in a time frame and context that is controlled by the courts.

[35] Thirdly, the mission of representing the public interest belongs, first and foremost, to the Attorney General. However, public interest "includes both the concerns of society generally and the particular interests of identifiable groups", as Sopinka and Cory JJ. wrote in *RJR-MacDonald Inc.* v. *Canada (Attorney General)*.[23] Hence, a petitioner's standing, according to the expression used by Cory J. in *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration)*, *supra*, cannot be confused with that of the Attorney General, who represents "the concerns of society generally". The jurisprudence has, in fact, developed criteria that a petitioner must meet in order to challenge legislation or an act of the government. In that regard, Martland J., after analysing *Thorson* v. *Attorney General of Canada*[24] and *Nova Scotia Board of Censors* v. *McNeil*,[25] set forth those criteria as follows:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and there is no

21 *Paquet* v. *Mines SNA inc.*, [1986] R.J.Q. 1257 (C.A.).
22 *Supra* note 3.
23 [1994] 1 S.C.R. 311 at 344.
24 *Supra* note 3.
25 *Ibid.*

> other reasonable and effective manner in which the issue may be brought before the Court.[26]

[36] The courts have generally applied these criteria liberally. That stems from, among other factors, the rule of law, which is a fundamental constitutional guarantee and one of the pillars of our system of government.[27] Although the Supreme Court has extended the status of petitioner or plaintiff to organizations defending the public interest, it has also required in such cases that the group demonstrate, on a balance of probabilities, that an individual would not be able to contest the government action. Cory J. said the following:

> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.[28]

[37] That being said, even if the appellant is not seeking a declaration of invalidity or inoperability of legislation or government action, but, on the contrary, wants to stand in the stead of the Attorney General, who is then absent from the case, in order to defend the legislation in his place, the Court will use the criteria set forth in the jurisprudence in order to determine the petitioner's interest: a serious question, genuine interest and the absence of other effective means of seizing a court of the question.

[38] There is no doubt that the definition of marriage is a serious question. But, in reality, that issue is no longer the one that the Court must decide, since, as we have seen earlier, by refusing to appeal the judgments rendered in Ontario and British Columbia and by discontinuing his own appeal in Quebec, the Attorney General created a new legal context.

[39] Even if the appellant met the first criterion, however, what about the second, that of a so-called genuine interest? It does not meet that one either. The appellant argues that its interest should not be characterized. It is wrong for several reasons. First, it itself

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26 *Canada (Minister of Justice)* v. *Borowski*, [1981] 2 S.C.R. 575.

27 Cory J. in *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration)*, *supra* note 3, stated the following:

> The rule of law is recognized in the preamble of the Charter which reads:
>
> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:
>
> The rule of law is thus recognized as a corner stone of our democratic form of government. It is the rule of law which guarantees the rights of citizens to protection against arbitrary and unconstitutional government action. This same right is affirmed in s. 52(1).

28 *Supra* note 3 at 252.

defined its area of interest in its proceeding in the Superior Court. Second, as we saw earlier, the jurisprudence distinguishes the intervener's interest from that of the petitioner. Third, the appellant did not demonstrate, on a balance of probabilities, that its particular interest was sufficient for it to stand in the stead of society as a whole that is represented by the Attorney General. Fourth, the standing claimed by the appellant is merely general and affects none of its own rights since, on the one hand, the sole question at issue is that of civil marriage, and, on the other, an explicit provision of law allows any member of the clergy to refuse to solemnize a marriage when a religious impediment exists.[29]

[40] Lastly, the appellant does not meet the third criterion since, in this case, another reasonable and effective way to submit the question to the Supreme Court of Canada is the reference to it, in which the appellant has been recognized by the Supreme Court of Canada as having the status of an intervener.

[41] The respondents also claim that the appeal is hypothetical and moot. Such an issue is decided on the basis of the appellant's interest.[30] In *Borowski* v. *Canada (Attorney General)*,[31] the landmark judgment for determining whether an appeal is hypothetical, the Supreme Court proposed a two-fold analysis: examination of the hypothetical nature of the case, and the court's decision to exercise its discretionary power not to apply the general rule of non-intervention and to assess the merits despite there being no object. Sopinka J. wrote: "The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision".

[42] If the Court concludes that the appeal is hypothetical, it must answer the second question: is it appropriate for it to exercise its discretionary power and decide the outcome in any event? Three factors must be examined at this stage: an adversarial context, the economy of judicial resources and the law-making function of the courts.[32]

[43] What is the situation in this case? The issue before the Court has no consequence for the rights of the appellant, as we saw earlier. On the basis of *Law Society of Upper Canada* v. *Skapinker*,[33] Sopinka J. wrote: "… the inapplicability of a statute to the party challenging the legislation renders a dispute moot". In this case, the respondents' rights now recognized by the Quebec Superior Court and by the courts of appeal of two other provinces are said to be affected. If pursued, the appeal would contemplate, as it were, only the contestation of a political choice by the government,

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29 Art. 367 C.C.Q.
30 *Forget* v. *Quebec (Attorney General)*, [1988] 2 S.C.R. 90.
31 *Supra* note 3.
32 *Ibid.*
33 [1984] 1 S.C.R. 357.

since the government has agreed not to appeal the judgments that have been rendered and prefers to obtain the opinion of the Supreme Court of Canada before looking anew at its legislation or making any other decision.

[44] If the dispute is moot, should our discretionary power nevertheless be exercised to hear it?

[45] The first factor in the examination is the absence of an adversarial context. In that regard, Sopinka J. wrote:

> The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context.[34]

[46] In this case, there is no fear of the absence of an adversarial context. The appellant intends to take the place of the Attorney General and act in his stead.

[47] The second factor to be considered is concern for conserving judicial resources, viewed from the following standpoint:

> The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action.
>
> ...
>
> There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law.

[48] In this case, there is no question that the appeal duplicates the reference, which has not only been announced but has commenced. Furthermore, the judicial consultation process initiated by the government has a broader scope and will be argued by more interveners—first and foremost, by the Attorney General of Canada himself—than the appeal of which this Court is seized.

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34 *Supra* note 3.

[49] The last factor to be considered is the importance of the law-making function. Sopinka J. wrote the following:

> The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

[50] In the case at bar, the adjudicative function is virtually absent, since the entire debate has shifted. The government has decided to test the legality of the definition of marriage before the Supreme Court of Canada. Will that opinion result in a new law or the absence of new legislation? The answer to that question is political; it is therefore up to the government and, ultimately, Parliament. For the time being, the government has embarked on a process of consultation of the highest judicial authority in the land. It is manifestly in this new context that the law will be elaborated, and not through a decision of this Court.

[51] In short, the Court believes that the appellant meets only the first of the three factors for the exercise of judicial discretion in favour of prolonging the appeal. Hence, it will refuse to render a judgment on the merits of the appeal and will grant the motion for its dismissal.

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[52] In their incidental appeal, the respondents ask the Court to amend section 5 of the Harmonization Act and replace the words “of a man and a woman” with “of two persons”, to reverse the conclusion suspending the declarations of invalidity for a period of two years and to order a designated officiant, pursuant to article 366 of the *Civil Code of Quebec*, to solemnize their marriage.

[53] In a letter dated January 22, 2004, counsel for the Attorney General of Canada wrote:

> About this cross-appeal, I will tell the Court of Appeal that the Attorney General of Canada do not request any longer that the Superior Court judgment be stayed for the period set by Justice Lemelin.

[54] Since the beneficiary of the period of suspension of the declarations of invalidity agrees that it should come to an end, the conclusion in the judgment of the Superior Court ordering the suspension should be struck.

[55] As for the request that section 5 of the Harmonization Act be amended, in light of the principles laid down by the Supreme Court in *Schachter* v. *Canada*[35] and *Vriend* v.

35 [1992] 2 S.C.R. 679.

Alberta,[36] and the grounds of the trial judge, we are of the opinion that, in the circumstances, it is not appropriate to amend the text of that legislation. In fact, the respondents explicitly abandoned that conclusion.[37]

[56] Given the declarations of invalidity, there is no longer any obstacle to the solemnization of the respondents' marriage by a competent officer, and the order the respondents seek to that effect will be issued. Accordingly, after publication of the notice provided for in article 368 of the *Civil Code of Quebec* and in the absence of valid opposition, since homosexuality is not a valid ground of opposition, the respondents' marriage may be solemnized in accordance with the law.

FOR THESE REASONS, THE COURT:

[57] **GRANTS** the motion to dismiss the appeal, with costs;

[58] **DISMISSES** the principal appeal, with costs;

[59] **ALLOWS** the incidental appeal in part, without costs;

[60] **STRIKES** the fifth conclusion of the judgment of the Superior Court;

[61] **ORDERS** any competent officer within the meaning of article 366 of the *Civil Code of Quebec* to comply with any request for the marriage of the respondents, after publication of the notice provided for in article 368 of the *Civil Code of Quebec* and in the absence of valid opposition.

J.J. MICHEL ROBERT C.J.Q.

PAUL-ARTHUR GENDREAU J.A.

LOUISE MAILHOT J.A.

FRANCE THIBAULT J.A.

ANDRÉ ROCHON J.A.

Mtre Guy J. Pratte and Mtre Georges R. Thibaudeau
BORDEN, LADNER, GERVAIS
For the appellant – incidental respondent

36 [1998] 1 S.C.R. 493.

37 See the letter from Mtre. Martha A. McCarthy, filed in the Court record, with the letters from all the parties involved in the incidental appeal.

Mtre Colin K. Irving and Mtre Catherine McKenzie
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Mtre Martha A. McCarthy
EPSTEIN, COLE
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Mtre Michel F. Denis
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Mtre Andrea Wright
For the intervener Canadian Human Rights Commission

Date of hearing: January 26, 2004