



COMMENT

By
**Terrance
Carter
(and Derek
Mix-Ross)**

The Supreme Court should not be an arbiter of religion

The Supreme Court of Canada recently held in *Bruker v. Marcovitz* that the failure to perform a religious obligation may give rise to civil damages. Although it is generally recognized that the result in this decision was equitable, the analysis employed by the court raises a number of serious concerns, articulated by the dissent, about the court's interference in religious matters.

In its 7-2 decision released on Dec. 14, 2007, the SCC upheld a decision of the Quebec Superior Court ordering a Jewish husband to pay \$47,500 in damages to his

ex-wife for withholding his consent to a religious divorce, a "get". The husband had contractually agreed to provide his consent to the *get* 15 years earlier.

Justice Rosalie Abella, writing for the majority, concluded that the agreement to give a *get* was a valid and binding contractual obligation under Quebec law. The majority did not accept the husband's argument that compelling him to provide the *get* would unjustifiably violate his freedom of religion. To the contrary, the court held that "any harm to the husband's religious freedom in requiring him to pay damages for unilaterally breaching his commitment is significantly outweighed by the harm caused by his unilateral decision not to honour

it."

Although the majority was quick to point out that it was not conducting "a judicial review of doctrinal religious principles," it in fact did exactly that. The majority

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condemned a Jewish man's refusal to provide a religious divorce as "arbitrarily den[ying] his wife access to a remedy she independently has under Canadian law," and as constituting "an unjustified and severe impairment of a [Jewish woman]'s ability to live her life in accordance with this country's values and her Jewish beliefs."

While this particular religious practice may not reflect generally accepted societal standards, it is not the court's role to be arbiter of which religious principles or doctrines are "fair" or obligatory. As

Justice Marie Deschamps, writing for the dissent, observed, where religion is concerned, the state leaves it to individuals to

make their own choices.

Religious practices should not be regulated or interfered with by the state unless they infringe on an individual's civil rights. In this case, as the dissent observed, the husband's refusal to grant a *get* did not affect his wife's *civil* rights, as she was free to remarry and have legitimate children under Canadian and Quebec law. Only her

religious rights were in issue, and she was free to accept the religious consequences of her husband's refusal or to discontinue her membership in that particular religious community.

In the words of Justice Deschamps, "it is not up to the state to promote a religious norm"; that is a role that should be "left to religious authorities."

This is the view that has traditionally been observed by courts in Canada. However, this case represents a significant shift from that position, as the Supreme Court of Canada, for the first time, now seems prepared to involve itself in assessing the merits and fairness of religious doctrines. This approach is all the more apparent in the Supreme Court's statement that its role under the *Canadian*

see CARTER p. 15

OMERS lawsuit is back on track after Ontario Court of Appeal ruling

By **John Jaffey**
Toronto

An action for breach of fiduciary duty and unjust enrichment against one of Canada's largest pension plans, two related companies and three former directors is "on" again, ruled the Ontario Court of Appeal.

Justice Eileen Gillette held that a largely successful motion by the several defendants, to strike various parts of the statement of claim under Rule 21 for not disclosing a reasonable cause of action, must be overturned. She held that, based on the facts in the statement of claim, the action must be permitted to proceed, apart from certain specific claims for breaches of fiduciary obligation.

The Ontario Municipal Employees Retirement System (OMERS) plan provides pension services to some 342,000 employees of municipalities and local boards throughout Ontario. As of four years ago, its assets exceeded \$32 billion.

An action on behalf of the members of the plan was started by "Sid" Ryan and Wyman MacKinnon, seeking redress for breaches of trust and fiduciary duty, among other things.

The defendants were the OMERS Board, which administers the plan; Borealis Capital Corporation (BCC), a merchant bank of which OMERS owns 27 per cent; Borealis Real Estate Management Inc. (BREMI), a wholly owned subsidiary of BCC — its real estate management arm; and three former directors of OMERS: Ian Collier, Michael Nobrega and Michael Latimer.

Collier was OMERS' vice-president of merchant banking and private placements before he left to become CEO of BCC in February

2001. He is also a director and shareholder of BCC.

Nobrega was responsible for OMERS' infrastructure investments before he left in 2001 to become president of BCC. He is also a director and shareholder.

Latimer was managing director of OMERS' Realty Corporation when it acquired Oxford Properties Group Inc., one of North America's largest commercial real estate companies. In 2002, he arranged to have his employment transferred to BCC and to become a shareholder.

Ryan and MacKinnon brought a Rule 10 motion, asking to become representative plaintiffs on behalf of all plan members. This motion was contested, and Ryan was held not to be an appropriate candidate because he was not a plan member. However, MacKinnon was named as the representative plaintiff.

The defendants also brought a Rule 21 motion, seeking to have the statement of claim struck on the ground that it did not disclose a reasonable cause of action. The motions judge found he could not determine whether the claim disclosed reasonable causes of action against the various defendants, so he granted leave to MacKinnon to deliver an amended statement of claim without prejudice to the defendants to renew their motion to strike.

The amended claim sought: 1) declarations that the defendants had acted negligently and committed various breaches of fiduciary and trust duties; 2) a declaration that the individual defendants had been unjustly enriched at the expense of the pension fund; 3) an accounting for all monies paid by OMERS to the other defendants pursuant to a series of manage-

ment agreements and transactions; 4) an order for equitable tracing of all monies improperly paid by OMERS to the defendants; and 5) an order that various agreements under which the monies had been paid were void by reason of illegality. Alternatively, the claim sought damages, to be returned to the pension fund, for breach of fiduciary duty and unjust enrichment.

The defendants renewed their Rule 21 motion.

Justice Gillette pointed out that that moving parties "must show that it is plain and obvious that the claim could not succeed at trial (*Hunt v. Carey Canada Inc.*, [2990] 2 S.C.R. 959)." She noted that "The material facts pleaded must be deemed to be proven or true, except to the extent that the alleged facts are patently ridiculous or incapable of proof."

The facts on which the statement of claim relies involved the delegation of management of OMERS' real estate assets (valued at over \$7.5 billion) to BCC "despite BCC's lack of experience or expertise in real estate management," and BCC's incorporation of BREMI to assume the real estate management functions. At this time, Latimer was still employed by OMERS, and he negotiated on behalf of OMERS with Collier and Nobrega on behalf of BCC. Only after the management agreements were signed did Latimer relocate to BCC.

The statement of claim further alleges that in the spring of 2002, the OMERS Board and BREMI executed a five-year management services agreement making BREMI exclusive provider of management services for OMERS' real estate assets.

In her reasons, Justice Gillette

found that BREMI paid "the grossly understated value" of \$11 million for OMERS' real estate management business, and that OMERS agreed to pay \$3.7 million of BREMI's start-up costs, in addition to several categories of fees and "imprudent" buy-out agreements with Collier, Latimer and Nobrega.

She wrote, "OMERS paid BREMI or BCC approximately \$62 million in management fees for the eighteen-month period between June 2002 and December 2003. This amount far exceeded the amounts that OMERS paid to Oxford in fees when the latter managed the same assets. The fees were incommensurate with the services purported to have been rendered and grossly in excess of market rates or of the costs that OMERS would have incurred had it continued to manage its real estate assets internally. These fees resulted in excessive compensation to the Corporate Defendants and their senior officers and shareholders, including the Individual Defendants."

She concluded, "The OMERS Board breached its fiduciary obligations and duty of care to the Plan members by entering into the various imprudent agreements. The various agreements are void by

reason of illegality and as being contrary to public policy. The fees and payments made by the OMERS Board, pursuant to those agreements, were exorbitant and constituted breaches of trust."

"The plaintiff, on behalf of the Plan members, is entitled to trace the improperly advanced trust funds, whether in the form of fees, salary, dividends, commissions or the transfer of equity, to the Respondents and to require the Respondents to disgorge the funds. If any of the proceeds are not traceable, the plaintiff may obtain damages by way of equitable accounting, among other things."

Justices John Laskin and Robert Blair agreed.

Mark Zigler, Jonathan Ptak and Anthony Guindon of Koskie Minsky LLP acted for MacKinnon.

Peter Griffin and Eli Lederman of Lenczner Slaght Royce Smith Griffin LLP acted for OMERS, BCC and BREMI.

Bruce Smith and Evan Atwood of Gowling Lafleur Henderson LLP acted for Collier, Latimer and Nobrega.

Reasons: *Mackinnon v. Ontario Municipal Employees Retirement Board*, [2007] O.J. No. 4860.

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Jail term upheld for a man who admitted to assault and confinement

By Thomas Claridge
Toronto

In its first decision of 2008, the Ontario Court of Appeal has upheld a jail term for a man who admitted to having assaulted and forcibly confined a former girlfriend.

The sole issue in the appeal by Shawn Rahaman was whether his nine-month sentence for the offences should be served in the community.

The court was told that on Feb. 4, 2005, Rahaman drove from his Toronto-area home to Ottawa, where he confronted Indira Maharaj as she stepped off a bus on her way to work. Taking her to his nearby car, he displayed a knife, questioned her about a recent trip to Trinidad and confined her for several hours during which he assaulted her and ripped a necklace from her neck.

On June 14, 2007, he was sentenced by Ontario Court judge Dianne Nicholas after pleading guilty to assault, forcible confinement and carrying a weapon for the purpose of committing an offence.

At the Nov. 21 appeal hearing, Frank Addario of Toronto's Sack

Goldblatt Mitchell LLP argued that since his client was a first offender, had pled guilty, was remorseful and gainfully employed and represented no danger of reoffending, the sentencing judge erred in failing to grant a conditional sentence to be served in the community.

Writing for a unanimous court, Justice David Watt noted that appellate courts "are bound to show substantial deference to sentences imposed at first instance, whether after trial or following entry and acceptance of pleas of guilty," and termed the appeal "a close case."

He upheld the jail term despite finding that the trial judge erred in failing to give credit for more than two years spent on restrictive bail conditions, in wrongly blaming Rahaman for all the long delay in going to trial and considering the appellant's description of the offence to a psychiatrist an aggravating factor.

Although agreeing that letting Rahaman serve the sentence in the



Frank Addario

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community would not endanger public safety, he cited the court's ruling in *R. v. Boucher* (2004), 186 C.C.C. (3d) 479, as establishing that in cases involving violence

arising out of an existing or failed domestic or romantic relationship, the main sentencing objectives were denunciation and deterrence.

"Further, sentences imposed must promote a sense of responsibility in offenders and an acknowledgement of the harm done, not only to the immediate victim, but also to the community at large. In cases like this, the likelihood of enduring psychological trauma to the victim from the irrational, controlling and obsessive nature of the misconduct is significant."

Although agreeing that some such cases warrant conditional sentences, he noted this one involved planned conduct. "The appellant refused to accept rejection and to acknowledge the end of his relationship with the complainant. Instead, bent on confrontation, he armed himself

with a knife and drove from Mississauga to Ottawa. He planned to confront the victim, by his own admission, to scare her. The confinement lasted several hours. The

victim missed work and was compelled to lie to her employer about the reasons for her absence.... The appellant's conduct demeaned and degraded her."

He concluded that despite the sentencing judge's errors she had reached the correct result. "Unlawful confinement, brandishment of a weapon and assault will not be tolerated as acceptable methods to rekindle a flagging romantic relationship." Associate Chief Justice Dennis O'Connor and Justice Eileen Gillese agreed.

Addario told *The Lawyers Weekly* it "certainly was a close case, a judgment call about when denunciation alone trumps zero risk to public safety."

He said it might be inferred that the result "reflects the court's frustration with the persistence of domestic violence. The hoped-for result is that those contemplating such violence will notice the tough sentences being meted out in advance, and turn away."

John McInnes of the Crown law office represented the respondent Crown.

Reasons: *R. v. Rahaman*, [2008] O.J. No. 1.

Witnesses and records become hard to locate after 10 years

LIMITATIONS

—continued from p. 1—

In this case, the city's negligent conduct occurred in 1984 when the development permit was issued allowing the homes to be built, but no damage to the homes was incurred until after the expiry of the limitation period some 14 to 15 years later.

Counsel for the plaintiffs, Robert White, who acted on a *pro bono* basis for the appeal, told *The Lawyers Weekly*, "In law, negligence doesn't become a completed cause of action until damage occurs. Until the time damage occurs, you can't sue in negligence. In this case, by the time the damage occurred, the limitation period had already passed. Therefore, the plaintiffs could never

have sued, they were totally deprived of their rights by the court's interpretation of the *Limitations Act*."

Justice Côté explained in his judgment that the application of

"The plaintiffs could never have sued, they were totally deprived of their rights by the court's interpretation of the *Limitations Act*."

the limitations legislation is "to eliminate the harm to defendants of very belated litigation." Counsel for the city of Edmonton, Lee Fenger, stated that the court's decision "strikes(s) a balance between the rights of plaintiffs to bring an action and the rights of defendants to dispose of records or discontinue insurance."

Justice Côté explained, "After 10 years, witnesses and records often become hard to locate in our fast-moving society. And memories certainly fade very badly... The danger of long-hidden losses must land on someone's shoulders. We cannot legislate it away."

While White acknowledged this need to put a "sunset on potential causes of action," and to allow people to get on with their lives, he said that limitations legislation is "not designed, nor intended to deprive someone of ever having a cause of action." He said "In this case it deprived the plaintiffs of

ever having a right to sue...it actually deprived them of a substantive right."

In his dissent, Justice Côté said limitations legislation "is not constitutional legislation" and that no

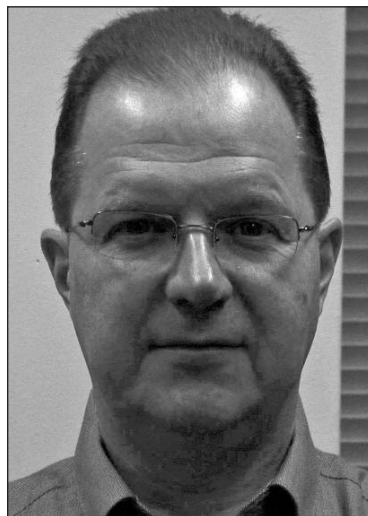
constitutional argument was put before the court. "The Legislature is sovereign on this topic...[w]e cannot amend the *Act*, nor can we ignore its history or its scheme," Côté wrote.

While Fenger acknowledges the ramifications of the Court of Appeal's limitations decision for plaintiffs in Alberta, his co-counsel for the city, Darrell Lopushinsky, referred to the impact of the decision on municipalities.

The majority decision found the city liable for not disclosing one particular geological report to the developers regarding the condition of the land on which the homes were built. The majority in the Court of Appeal did not disagree with the trial judge's assessment that the city had failed to consult the geotechnical reports in its possession, to disclose all of the relevant reports and to require further investigation.

Lopushinsky said that the duty imposed by the decision, to disclose information and reports related to the condition of lands, is practical for municipalities to fulfill at the stage where development permits are being requested. However, following the granting of a development permit, if a property is sold and then perhaps sold again, some real, practical issues begin to arise with respect to the duty to disclose. Lopushinsky said he questions whether this duty of disclosure could be extended to a subsequent, subsequent purchaser and raises some concerns regarding the practical ability of municipalities to meet such a requirement.

Reasons: *Bowes v. Edmonton (City of)*, [2007] A.J. No. 1500.



Darrell Lopushinsky

Further judicial interference may result

CARTER

—continued from p. 5—

Charter of Rights and Freedoms is to "ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion."

It remains to be seen how this decision will be interpreted in the future. It may be limited in application to its own facts. On the other hand, it may be interpreted more broadly to justify further judicial interference with religious practices.

One of the dissent's areas of concern was the potential for courts to inappropriately apply their secular power to penalize a "refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays, etc." It would seem that the majority's reasons would certainly grant lower courts the flexibility to employ this approach, a development which should be of concern to people and communities of faith in Canada.

Terrance Carter is managing partner of Carters Professional Corporation and counsel to Fasken Martineau DuMoulin LLP on charitable matters. Derek Mix-Ross is an articling student with Carters.



Lee Fenger