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SUPREME COURT OF CANADA DECISION PERMITS JUDICIAL INTERFERENCE IN RELIGIOUS DISPUTES

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A. INTRODUCTION

In a 7-2 decision released on December 14, 2007, the Supreme Court of Canada has held that the failure to perform a religious obligation may give rise to civil damages. In *Bruker v. Marcovitz,*[1] the Court 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, despite contractually agreeing to do so 15 years earlier. This decision raises a number of challenging and troubling issues for religious institutions and individuals, which are discussed in detail below.

B. BACKGROUND TO THE DECISION

The case arose from a matrimonial dispute involving members of the Orthodox Jewish community who were married in 1969. In 1980, the parties instituted divorce proceedings and three months later entered into a separation agreement which provided, amongst other things, for the partition of property, child support and access. It also contained an undertaking by the husband to appear before rabbinical authorities to obtain a Jewish religious divorce, or a *get*. It was this undertaking which gave rise to a decades-long legal battle, culminating in this Supreme Court of Canada decision.

[1] 2007 SCC 54.

A *get* is a significant aspect of Jewish law. A wife can not obtain a *get* without her husband's consent. Without a *get*, a woman remains the wife of her husband and she cannot remarry in the Jewish faith until the husband agrees to give it. When he does not, the wife is without religious recourse and is known as an *agunah* or "chained wife". Any children she would have from a civil marriage would be considered "illegitimate" under Jewish law.

In this case, the couple's relationship "deteriorated and became stormy" after signing the separation agreement, and the husband refused to grant her the *get* until 1995, 15 years later. As a result, the wife brought an action against the husband claiming $500,000 for "having been restrained from going on with her life, remarrying in accordance with the Jewish faith, and having children."[2]

At trial, Justice Mass of the Quebec Superior Court held that once the husband signed the civil agreement, his obligation to appear before rabbinical authorities to obtain the *get* "moved into the realm of the civil courts".[3] The contract was therefore valid and binding, even though its purpose was partly to compel a religious obligation. In finding that the husband's failure to grant the *get* had direct consequences on the wife by depriving her "of the opportunity to marry within her community during this period," Justice Mass ordered a total of $47,500 in damages.[4]

This decision was appealed to the Quebec Court of Appeal, where a unanimous court held that "the substance of the...obligation is religious in nature, irrespective of the form in which the obligation is stated," and therefore the obligation is a moral one which is unenforceable by the courts.[5] Consequently, the Court of Appeal allowed the husband's appeal, holding that "requiring [the husband] to pay damages in such circumstances would be inconsistent with the recognition of his right to exercise his religious beliefs as he saw fit without judicial intervention."[6]

The wife appealed to the Supreme Court of Canada.

[2] *Ibid.* at para. 109.
[3] [2003] R.J.Q. 1189, at para. 19.
[4] *Ibid.* at para. 35.
[5] [2005] R.J.Q. 2482 at para. 76
[6] *Supra,* note 1, at para. 36.

C. DECISION OF THE MAJORITY OF THE SUPREME COURT OF CANADA

Writing for the majority of the Supreme Court of Canada, Madame Justice Abella observed that there were two issues to be determined in the appeal:

> 1) Whether the agreement to give a *get* was a valid and binding contractual obligation under Quebec law; and
>
> 2) If the agreement to give a *get* was valid and binding, whether the husband could rely on freedom of religion to avoid the legal consequences of failing to comply with the agreement.

The preliminary issue that needed to be determined, however, was whether the wife's claim was justiciable, (i.e. capable of being determined by a civil court) since it was based on a religious, as opposed to a civil, obligation.

Justice Abella acknowledged the line of cases which held that courts should be reluctant to get involved in religious disputes. However, she went on to note that "[n]o case goes so far as to hold that even in cases based upon a civil obligation, where the Court is not required to determine matters of religious doctrine, the Court should be precluded from adjudicating disputes that involve obligations having a religious character."[7]

In this case, Justice Abella concluded that the religious elements of the husband's promise to provide the get did not "immunize it from judicial scrutiny," as it was "negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences."[8] As a result, the obligation was appropriately subject to a "judicial microscope."[9] The court then turned to the remaining issues raised on the appeal.

[7] *Ibid.* at para.43.
[8] *Ibid.* at para. 47.
[9] *Ibid.*

ISSUE 1: Whether the agreement to give a *get* was a valid and binding contractual obligation under Quebec law.

With respect to this first issue, Justice Abella held that "an agreement between spouses to take the necessary steps to permit each other to remarry in accordance with their own religions, constitutes a valid and binding contractual obligation under Quebec law."[10] In coming to this conclusion, Justice Abella examined two of the three types of obligations recognized by civil law: moral obligations and civil obligations.

Moral obligations, it was observed, are "binding only as a matter of conscience or honour and…cannot be enforced by the State."[11] The example provided was the duty of charity toward one's neighbour. Civil obligations, however, can be enforced by the courts, such as the obligation of support between spouses. Although one would have thought that the exercise of a religious act is a moral duty, and thus unenforceable by the courts, the majority held that "there is nothing in the [Quebec] *Civil Code* preventing someone from transforming his or her moral obligations into legally valid and binding ones,"[12] which is precisely what the parties were deemed to have done in this case. Therefore, the husband's undertaking to provide the *get* constituted an enforceable contractual obligation.

ISSUE 2: If the agreement to give a *get* was valid and binding, whether the husband could rely on freedom of religion to avoid the legal consequences of failing to comply with the agreement.

The husband argued that if such a contractual obligation existed, it was null and void as contrary to public order, since it operated to restrain the free exercise of his fundamental freedoms, including the freedom of religion and conscience. Justice Abella agreed that the object of a contract cannot be contrary to public order. In this case, however, it was held that the promise to grant a *get* did not violate the public order. To the contrary, the Court held that enforcing such an obligation would be consistent with "public policy values shared by other democracies."[13]

With respect to the husband's freedom of religion argument, Justice Abella held that the husband could not rely on freedom of religion to escape liability for failing to perform his obligation,

[10] *Ibid.*at para. 16.
[11] *Ibid.* at para. 49.
[12] *Ibid.* at para. 51.
[13] *Ibid.* at para. 90.

because "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."[14]

Justice Abella queried whether the husband sincerely believed that granting a *get* would violate his religious belief or conscience, that the husband never offered a religious reason for refusing to provide a *get*, and that "his refusal to provide the get was based less on religious conviction than on the fact that he was angry at [his wife]."[15] As a result, the Court held that there was no "*prima facie* infringement of [the husband's] religious freedom".[16]

The Court went on to note, however, that even if the husband's freedom of religion was infringed, this was "inconsequential compared to the disproportionate disadvantaging effect on [the wife's] ability to live her life fully as a Jewish woman in Canada."[17] In reaching this conclusion, the Court looked at the decisions of other countries in which agreements to provide a *get* were enforced. The Court also opined that the withholding the *get* infringed the equality rights and dignity of Jewish women by denying them independence and the ability to divorce and remarry. As a result, the husband could not rely on the *Quebec Charter* to avoid the consequences of his legal commitment to provide the *get*, and the wife's appeal was allowed.

D. REASONS OF THE DISSENTING JUSTICES OF THE SUPREME COURT OF CANADA

Justices Deschamps and Charron disagreed with the majority and wrote a dissenting opinion. Justice Deschamps, writing for the dissent, framed the case differently than the majority, and observed that the primary question before the Supreme Court was "whether the civil courts can be used not only as a shield to protect freedom of religion, but also as a weapon to sanction a religious undertaking."[18] For the dissent, the answer to that question was a firm "no".

[14] *Ibid.* at para. 17.
[15] *Ibid.* at para. 69.
[16] *Ibid.* at para. 67.
[17] *Ibid.* at para. 93.
[18] *Ibid.* at para. 101

Justice Deschamps observed that courts are to remain neutral where religious precepts are concerned. This neutrality allows them to legitimately act as arbiters "in relation to the cohabitation of different religions and enables them to decide how to reconcile conflicting rights."[19] The dissent noted that "[i]t would be inappropriate to impose on them an additional burden of sanctioning religious precepts and undertakings."[20] The majority, in Justice Deschamps' view, crossed that line of neutrality in sanctioning, and thereby endorsing, the religious consequences of the husband's delay in granting his consent for a *get*.

In the dissent's view, the case turned on the issue of whether the wife's claim was justiciable. Disagreeing with the reasons of the majority on this matter, Justice Deschamps concluded that the wife's claim was not justiciable. Justice Deschamps noted that courts have long refused to intervene in religious disputes, unless some property or civil right is affected. Here, the wife was not arguing that any of her civil or property rights were being infringed. Indeed, she was not prevented from remarrying under civil law. It was only her religion which prevented her from doing so, and Justice Deschamps emphasized that courts should not involve themselves in such matters.

Justice Deschamps also reviewed the international case law cited by the Abella J. and observed that the solutions adopted by other countries with respect to the granting of a *get* were quite varied and governed by their own internal *private* law rules. Justice Deschamps concluded that "[the cases] establish no principle of public law that is so persuasive that Canadian courts should alter their approach."[21]

The dissent went on to analyze the contractual issues raised in the case, since the wife's claim was advanced and decided by the majority on the basis of contract law. It was observed that, under civil law, "a contract which does not have as its object a juridical act envisaged by the parties at the time of its conclusion…was null."[22] A juridical act was defined as one which was capable of "legal characterization" and "juridical consequences."[23] In this case, the act in dispute was obtaining a religious divorce, which Justice Deschamps held was *not* recognizable in civil law:

> Obtaining a religious divorce is not capable of legal characterization. The rabbinical authorities are not responsible for civil divorce in the way that certain religious

[19] *Ibid.* at para.102.
[20] *Ibid.*
[21] *Ibid.* at para.155.
[22] *Ibid.* at para. 171.
[23] *Ibid.* at para. 174.

> authorities are for marriage. The act they perform or the judgment they render is not recognized in civil law. Neither the undertaking to consent to a religious divorce nor the religious divorce itself has civil consequences.[24]

As a result, the husband's undertaking to appear before the religious authorities to obtain a *get* did not form a valid contractual purpose. Rather, it was a purely moral obligation based on a duty of conscience alone and which could not be enforced civilly, much like an undertaking to go to church regularly, or to a synagogue or mosque.

Finally, Justice Deschamps noted that, even if the obligation at issue was enforceable, determining the appropriate remedy would have been problematic. The damages claimed by (and awarded to) the wife were based on her observance of specific religious precepts. This was problematic, since religion had never been used "as a means of forcing another person to perform a religious act, nor have the courts been used to sanction the failure to perform such an act."[25] The second area of concern for the dissent was that the Court was placing itself in a position of conflict. The court was awarding damages on the basis that children born in a subsequent relationship would have been regarded as illegitimate, even though Canadian law recognizes that all children are born equal, whether inside or outside of marriage. The Court was also awarding damages on the basis that the wife was not released from her marriage and could not remarry, despite the fact that she has been granted a divorce and was free to remarry civilly. Thus, Justice Deschamps held, in awarding these damages, the court improperly recognized a legal situation that was contrary to the rules of Canadian and Quebec family law, which the Court was constitutionally responsible for applying.

On this basis, the dissent held that the appeal should be dismissed, and that the husband's freedom of religion argument did not need to be addressed.

E. COMMENTARY

This decision raises a number of challenging and troubling issues. In this regard, the outcome of this particular decision was undoubtedly equitable in the circumstances. A husband was held accountable for breaching his promise to his wife and effectively preventing her from remarrying or having children in accordance with her religious beliefs. Indeed, the alternative to this outcome - allowing such an act to go unpunished - would

[24] *Ibid.*
[25] *Ibid.* at para. 74.

seem manifestly unfair. However, the analysis employed by the majority of the Supreme Court of Canada in reaching this outcome raises some serious concerns.

At first glance, the decision is arguably limited in its application to its facts. The majority based its decision on the fact that the obligation in issue, albeit a religious one, was contained in a civil contract. Thus, the decision may be seen as having a limited scope and only applying to situations in which an individual has contractually agreed to perform a religious act. The majority also noted that it was not commenting on whether a husband could be compelled to provide a *get* in the absence of a written agreement. However, it would be difficult to successfully argue that compelling a Jewish husband to provide a *get* would unjustifiably infringe his freedom of religion, particularly in light of Justice Abella's holding that "such a *prima facie* infringement does not survive the balancing mandated by this Court's jurisprudence and the Quebec *Charter*."[26]

Other comments relating to the religious issues in this case are equally problematic. For example, although the majority was quick to point out that it was not conducting "a judicial review of doctrinal religious principles,"[27] it in fact did exactly that. The majority 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,"[28] 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."[29]

While this particular religious practice may not reflect generally acceptable societal standards, it is not the Court's role to be arbiter of which religious principles or doctrines are "fair" or obligatory. As Justice Deschamps observed, where religion is concerned, the state leaves it to individuals to make their own choices, and such decisions should not be regulated, interfered with, or sanctioned by the state. 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.

[26] *Ibid.* at para. 70.
[27] *Ibid.* at para. 47.
[28] *Ibid.* at para. 82.
[29] *Ibid.* at para. 93.

As the dissent observed, however, the majority of the Supreme Court of Canada overstepped its bounds by commenting negatively on a religious practice based solely on the religious consequences it had on adherents of that religion. In the words of Justice Deschamps, this interference was improper and "it is not up to the state to promote a religious norm"; that is a role that should be "left to religious authorities."[30]

Justice Deschamps' position has traditionally been observed by courts in this country. As recently as 2004, the Supreme Court of Canada held that:

> [T]he state is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual.[31]

However, the case at hand 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 Charter of Rights and Freedoms* is to "ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion."[32]

This newly-mandated supervision over religion is alarming. How is the court to determine when a person is "arbitrarily disadvantaged by his religion", particularly where the person's decision to practice their religion is a voluntary one? Will the court interfere whenever it views a religious practice as discriminatory against a member of that religion? This development may seem to be a positive one in extreme cases; however, what about other situations? The Quebec Court of Appeal was concerned about this very issue, and in dismissing the wife's claim in this case, it noted:

> Manifestly, it is not the role of secular courts to palliate the discriminatory effect of the absence of a *ghet* on a Jewish woman who wants to obtain one, any more than it would be appropriate for secular courts, in an extra-contractual context, to become involved in similar disputes involving other religions where unequal treatment is the fate of women in terms of their access to positions in the clergy, or as we have seen recently in other

[30] *Ibid.* at para. 132.
[31] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 50. Interestingly, this passage was cited by Justice Abella at para. 37 of her reasons.
[32] *Ibid.* at para. 19.

> contexts, the fate reserved for same-sex couples being denied the right to marry in religious ceremonies of some religious faiths.[33]

This passage was cited with approval by the dissenting justices of the Supreme Court of Canada, who themselves observed:

> Civil rights arise out of positive law, not religious law. If the violation of a religious undertaking corresponds to the violation of a civil obligation, the courts can play their civil role. But they must not be put in a situation in which they have to sanction the violation of religious rights. The courts may not use their secular power to penalize a refusal to consent to a *get*, failure to pay the Islamic *mahr*, refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays, etc. Limiting the courts' role to applying civil rules is the clearest position and the one most consistent with the neutrality of the state in Canadian and Quebec law.[34]

This is the approach that has traditionally been followed by the courts. However, it was not the approach followed by the majority of the Supreme Court of Canada in this case. As such, it remains to be seen how this decision will be interpreted in future decisions. It may be limited in application to its own facts, and may only be employed to impose liability where a party contracts to fulfil a religious obligation. On the other end of the spectrum, it may be interpreted more broadly to justify further judicial interference with religious practices. It would seem that the majority's reasons would certainly grant lower courts the flexibility to employ the latter approach, a development which should be of concern to people and communities of faith in Canada.

[33] *Supra,* note 5 at para. 76.
[34] *Supra,* note 1, at para. 184.

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