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## Man's religious freedom bows to ex-wife's equality rights

By Cristin Schmitz

Ottawa

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After reserving for a year on the complex question of when secular courts can step in to matters involving religion, the Supreme Court has split 7-2 to order a Jewish man to pay damages to his ex-wife for reneging on his civil undertaking to grant her a religious divorce.

The majority's decision cites the principle that freedom of religion must give way when it disproportionately harms significant countervailing rights, values and interests, including the parallel rights of others to their own beliefs and opinions.

Justice Rosalie Abella's judgment rejects the argument of respondent Jason Marcovitz that his religious freedom was infringed by a Quebec Superior Court judgment in 2003 that hit him with \$47,500 damages for his 15-year refusal to honour para. 12 of a civil divorce contract in which he pledged to consent to give Stephanie Bruker a "get" – a Jewish religious divorce.

"The public interest in protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations, are among the interests and values that outweigh Mr.

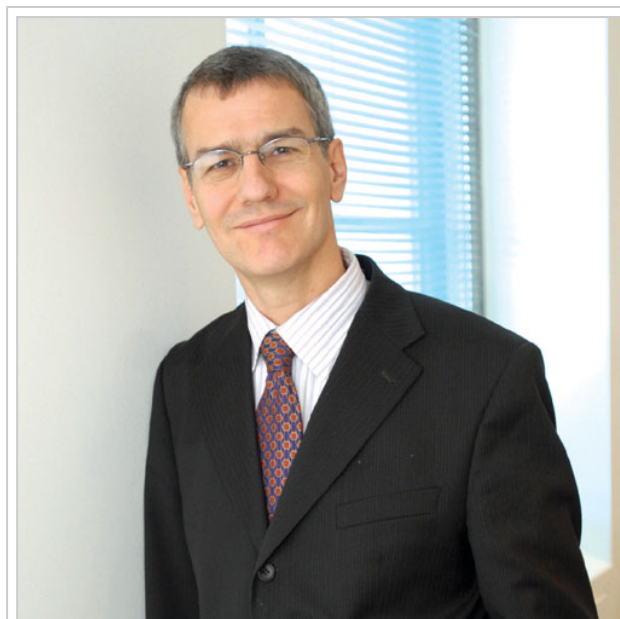
Marcovitz's claim that enforcing para. 12 of the consent would interfere with his religious freedom," Justice Abella wrote in a judgment backed by the court's other two Jewish members, Justices Morris Fish and Marshall Rothstein, as well as by Chief Justice Beverley McLachlin and Justices Michel Bastarache, Ian Binnie, and Louis LeBel.

Andrew Lokan of Toronto's Paliare Roland was counsel for the intervener Canadian Civil Liberties Association which contended that Marcovitz's argument about what amounts to purely religious, non-justiciable matters went too far.

He said the majority's "sensible" decision adopts "a practical approach to the line between civil disputes that are properly the subject of the civil courts and matters of a more religious character that are not."

Lokan predicted "disputes involving matters of religion are not going to be treated as a judicial no-fly zone as long as they are properly grounded in civil obligations and... where religious claims do come before the courts, [the claims] are going to be measured against fundamental Canadian values such as, in this case, gender equality."

Lokan said these "important and far-reaching principles" are going to come up in other contests involving tension between matters of religious morality and civil justice.



Andrew Lokan, who acted for the Canadian Civil Liberties Association, said "disputes involving matters of religion are not going to be treated as a judicial no-fly zone." Photo by Paul Lawrence [Click here to see full sized version.](#)

In the wake of the ruling, Bruker's counsel, Alan Stein of Montreal's Stein and Stein, said Jewish couples will be able to include get provisions in their prenuptial agreements knowing they are enforceable by civil damage claims.

"Freedom of religion is not absolute," Stein observed. It "is still subject to the wellbeing of Quebec citizens and our democratic values.

"Marcovitz's counsel, Anne-France Goldwater of Montreal's Goldwater, Dube, said the majority "have sent this obvious strong message that if there is [a clash between] freedom of religion, and equality rights, equality rights trump freedom of religion. That's a very, very strange position for them to take, and it's not consistent with anything they have ever said," Goldwater observed. "In the past they have said when you have competing rights you take a 'contextual approach'—you kind of mush [the rights] together, there is no hierarchy... and you try to balance Charter rights."

In their ruling, the majority questioned whether Marcovitz's refusal to consent to a get was genuinely motivated by his religious convictions, rather than by his admitted anger at his ex-wife.

However, even if his religious objection was genuine, the judges stressed that "Ms. Bruker remained, between the ages of 31 and 46, Mr. Marcovitz's wife under Jewish law, and dramatically restricted in the options available to her in her personal life. This represented an unjustified and severe impairment of her ability to live her life in accordance with this country's values and her Jewish beliefs. Any infringement of Mr. Marcovitz's freedom of religion is inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada."

Dissenting vigorously, Justice Marie Deschamps decried the majority's "shortsighted approach." She said her colleagues were jettisoning Canadian courts' important, historically "neutral" role with respect to religious matters and were saddling the judiciary with an inappropriate new role of enforcing purely religious precepts and undertakings.

Backed by Justice Louise Charron, Justice Deschamps concluded that the parties' dispute over Marcovitz's pledge to consent to a get was not justiciable by a civil court because his was "a duty of conscience alone" rather than a contractual obligation.

"The question before the court is 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," Justice Deschamps reasoned. "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."

The case arose from the parties' 1980 divorce after 11 years of marriage. Marcovitz undertook in their "consent to corollary relief agreement," which also dealt with matrimonial property and support, to appear before Montreal's rabbinical authorities "immediately upon a decree nisi of divorce being granted", to obtain a get, without which Orthodox Jews are unable to remarry inside their faith.

When the time came, however, Marcovitz refused, arguing among other things, that his ex-wife was harassing him and trying to alienate his children. Bruker then sued him in 1989 for \$500,000 for having ruined her chances of remarrying and having children with an observant Jewish partner, a claim she later hiked to \$1.35 million.

In 1995, 15 years after their civil divorce, Marcovitz finally consented to the get. But in defending Bruker's lawsuit, he urged that his previous refusal had been a matter of religious conscience (in order to be valid, consent to a get must be uncoerced and freely given) and that his undertaking in his divorce agreement was a moral obligation, not a valid and binding civil obligation justiciable under Quebec law in a secular court. Moreover, even if a breach of the undertaking was justiciable, he urged, the Quebec Charter's guarantee of freedom of religion exonerated him.

Bruker responded that although the civil court could not force Marcovitz to consent to give a get, it could award damages because he breached a voluntarily assumed contractual obligation.

The Supreme Court agreed with Bruker. In restoring the trial judgment, the majority rejected the Quebec Court of Appeal's unanimous judgment that Marcovitz's obligation was purely religious in nature and was thus not justiciable.

"The fact that para. 12 of the consent had religious elements does not thereby immunize it from judicial

scrutiny," Justice Abella held.

"We are not dealing with judicial review of doctrinal principles, such as whether a particular get is valid. Nor are we required to speculate on what the rabbinical court would do. The promise by Mr. Marcovitz to remove the religious barriers to remarriage by providing a get was negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. This puts the obligation appropriately under a judicial microscope."

Reasons: *Bruker v. Marcovitz*, [2007] S.C.J. No. 54.

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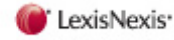
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