

Perry Mason vs. Duddy Kravitz: Do Canada's secular courts have a role in adjudicating breaches of religious promises?

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In a now-classic episode of *The Sopranos* called "Denial, Anger, Acceptance" (Season 1, Episode 3), Tony Soprano is hired by a Hasidic hotel owner to convince the Hasid's estranged son-in-law to give his daughter a get -- a religious Jewish divorce -- in exchange for 25 per cent of his hotel business. The Hasidic son-in-law, though, turns out to be so resistant to persuasion, no matter how much Tony's henchmen beat him up, that one of them eventually remarks, "If we don't kill this prick we should put him to work." A prophetic scene.

On Dec. 5, the Supreme Court of Canada heard arguments in a landmark appeal of a Montreal woman seeking damages from her ex-husband, who withheld a get from her for 15 years. The woman, Stephanie Bruker, was originally awarded \$47,500 compensation from ex-husband Jason Marcovitz for having been unable to remarry or have legitimate children according to Jewish law in the interim, but the decision was overturned by the Quebec Court of Appeal. The case is extremely significant, because the outcome (a decision from the Supremes is expected sometime in late spring or early fall, 2007) will determine, for essentially the first time, whether secular courts can adjudicate on breaches of religious promises, especially when those promises have been agreed to in a civil contract.

The implications for various religious contracts are obvious. If a Muslim woman contracts to follow sharia law at the time of her marriage, can she be sued subsequently for violating it? Can a Jehovah's Witness father who has undertaken in writing to follow Witness doctrine be sued by his wife if he grants an ailing child a blood transfusion? What if the religiously oriented items either party has agreed to are abhorrent in the eyes of civil law?

The facts of the case read like a combination of Perry Mason and Duddy Kravitz. In 1969, Stephanie Bruker, a 20-year-old Conservative Jew, and Jason Marcovitz, 37 an Orthodox, were married in Montreal. After 11 years of marriage they entered into a civil divorce, during which they both agreed, in what is known in Quebec family law as "Consent to Corollary Relief," to also appear before the Jewish Beth Din, the rabbinical authorities, for "the purpose of obtaining the traditional religious get." Bruker appeared, Marcovitz did not -- for a decade and a half. Bruker claims her ex's motive was primarily spite. "Men who do this usually have a lot of hate toward women," she recently told Maclean's. "He didn't give me the get because of hate." Marcovitz claimed he was dragging his feet because Bruker, who, according to Marcovitz's lawyer, has a history of emotional instability, was harassing him and trying to warp his children's affections for him. In 1995, though, after 15 years of stonewalling, Marcovitz granted the get.

End of story? Not quite. Bruker in the meantime had sued Marcovitz for half a million dollars for damages arising out of her protracted get-less state, during which time, she claimed, she was unable to remarry under Jewish law and bear legitimate children (a claim that was true, although Bruker in fact could have sought to have the marriage annulled, which she didn't). In 2003, Quebec Superior Court Justice Israel Mass agreed, albeit in moderation, awarding Bruker \$47,500 in damages, on the grounds that the pre-nuptial agreement was civilly enforceable as a contract, even though it obliged Marcovitz to participate in what was an admittedly religious act. Two years later, the Quebec Court of Appeal overturned the decision, arguing that the part of the pre-nup that dealt with the getting of the get was unenforceable precisely because it required a religious act, and so deprived Marcovitz of his religious freedom. Enter a second appeal, and the Supreme Court.

But this case is like an onion; its layers are legion. It turns out, for instance, that there's a yawning gulf between the legal argument each side made to the Supreme Court on Dec. 5, and the larger implications the respective lawyers fear if his or her side loses. Bruker's lawyers, for instance, contended primarily that the case was non-religious and purely contractual (Marcovitz

promised to appear; Marcovitz didn't appear). But Alan Stein, Bruker's lead counsel, is at least as preoccupied with the survival of a law with decidedly religious overtones: Section 21:1 of the Divorce Act. This amendment, passed in 1990 and considered a progressive landmark, stipulates that divorced spouses must act promptly to remove any "barriers" to their opposite's religious remarriage that they have the power to remove. "If the appeal judgment is upheld, it's only a matter of time before someone questions the constitutionality of 21.1," Stein told Maclean's. "It's an evolutionary step backward for the removal of religious barriers."

Conversely, Marcovitz's argument cites his religious freedom to appear or not to appear at the get proceedings (including the Talmudic nicety that by simply appearing under duress his religious rights would have been violated, because Jewish law expressly mandates that the spouses should appear of their own free will). But his lawyer, Anne-France Goldwater of Montreal's Goldwater Dubé, warns direly about the chill a negative judgment would place on any family lawyer's willingness to include in even the most secular divorce agreement what she calls the "goodwill clauses." "Ninety per cent of what I write into these agreements is nonsense in the strict legal sense, in the hope that people will follow it," says Goldwater, as smart a lawyer as she is sporadically profane. "Parents shouldn't deprecate themselves, they shouldn't deprecate their kids. They should share the use of the car for the sake of the kid. Could I put that in there if I knew one day there could be a lawsuit? If you miss a Wednesday visit she'll sue you for babysitting costs? There would be no end to lawsuits. More than 50 per cent of caseloads in Quebec today are family law. The last thing you need to add into the mix is damages."

And if these contradictions aren't enough, consider the main "intervener" in the case, the Canadian Civil Liberties Association. The CCLA, normally the staunchest of defenders of religious freedoms, ultimately found itself determining that where a "party undertakes a civil obligation to perform such an [religious] act, the obligation is prima facie justiciable as long as the Court is not required to determine matters of religious doctrine." In other words, if

you contract to do a religious deed, you should do it, and even pay damages to the injured party if you don't do it. What the courts can't do, though, the association was quick to point out, is force you to do it. What, though, is the threat of a lawsuit if not an attempt to force someone to do what you want them to do?

Should the state intrude on the church to civilize the occasional perversity in religious family institutions? Would the state, by telling Jason Marcovitz to pay damages for failing to provide a get, actually be punishing him for not being a better Jew (Goldwater's assertion)? What is the state and what is the church when it comes to family institutions, for that matter, and can you tell the difference between the two when they sit down at your breakfast table or in a lawyer's boardroom? These are the kinds of questions the Supreme Court now has the pleasure of deciding. When they do, Stephanie Bruker will know whether she was wise to place her fate in their hands, or whether she should have called Tony Soprano in the first place.