

(UN)CHAINED WIVES: UNDERSTANDING THE *BRUKER v. MARKOVITZ* DECISION, AND POSSIBLE ALTERNATIVE LEGAL CLAIMS FOR JEWISH WOMEN WHO ARE DENIED A *GET*

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INTRODUCTION

In its attempt to preserve equality and justice in a multicultural society, Canada's legal community has long grappled with the interaction between its civil laws and citizens' observance of religious doctrine. The clash between a person's sacred beliefs and the state's role in protecting individuals from harmful religious practice has been expounded in prior jurisprudence, particularly in cases concerning Jewish divorce; yet, the judicial reasons in *Bruker v. Marcovitz*¹ focused on contractual questions, in which the court sought a neutral position by averting a comprehensive discussion of the religious issues in the case. What is needed, and what will be found in this article, is an exploration of alternative claims upon which Jewish women may find a legal remedy when denied a bill of divorce from their husbands.

A valid Jewish divorce requires a husband to provide his wife with a *get*, translated from Hebrew as a bill of divorce – these terms will be used interchangeably throughout this paper. If the husband refrains from granting a *get*, it may be appropriate for the state to step in. Such judicial intervention affects individuals and carries wide public policy implications. Thus, it is necessary to confront the logic of Jewish divorce cases, broadly, in order for Jewish women, whose religious practices may be unjustly imposed against them, to have alternative modes of recourse to the institution of divorce.

This paper will begin by providing a contextual background of the Jewish law of divorce and the granting of a *get*. This discussion will look at the relationship between

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¹ 2007 SCC 54 [*Bruker v. Marcovitz*].

Canadian civil courts and the *Beit Din* – the Rabbinical court. The next section of this paper will examine the judicial reasons in *Bruker v. Marcovitz*, which centred upon the contractual issues between the two parties and generally avoided a comprehensive look at the subject of religion. I then will move on to discuss the trial and appellate court decisions of the case. A more detailed analysis of the 2007 Supreme Court of Canada decision will examine the ruling, with specific attention on the dissent and the freedom of religion defence that was proposed by Marcovitz.

Next, this paper will detail the legislative amendments made to the *Ontario Family Law Act*² and the *Divorce Act*.³ Attention will be directed toward the broad support that the amendments have garnered. I will argue that the additions to these legislative schemes have bound the courts to the religious issue of Jewish divorce, and that the courts are thus unable to escape religious dialogue in their decision-making processes.

This paper will then deal with alternate divorce claims which may be potentially available to Jewish women like Mrs. Bruker, especially in cases where no contract has been formed or when an agreement is rendered unenforceable at law. The first alternative suggested is that the husband's actions amount to a tort, as has been recently held in several cases in Israel. This position will be followed by an argument supporting a potential gender discrimination claim based on provincial human rights legislation. Additionally, I will propose the possibility of basing a claim on the best interests of the children, living and unborn. My final argument will explore what has been titled the "affidavit route," which is available under the *Ontario Family Law Act* and the *Divorce Act*.

The conclusion of this paper will comment on the general themes evident in the judges' reasons at each stage of *Bruker v. Marcovitz*. Closing remarks will include a summation of my legal analysis regarding alternate routes for legal recourse and the effects that this article might have, not only for future Jewish divorce cases, but for the relationship between law and religion as a whole.

² *Ontario Family Law Act*, R.S.O. 1990, c. M.3.

³ *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 21.1(2) [*Divorce Act*].

I. JEWISH DIVORCE LAW AND THE *GET*

The union of a husband and wife in a Jewish marriage ceremony has legal implications under both Jewish and civil law. A Rabbi who marries a couple, in the capacity of a clergy member, assists in the formation of a Jewish marriage contract and as well solemnizes a civil marriage in his capacity as a marriage officer licensed by the state. Should the marriage break down, it is to be dissolved through two distinct processes: first, the civil marriage is to be terminated through divorce in a civil court and second, the Jewish marriage must be dissolved through termination of the contract before a Jewish Rabbinical court, or *Beit Din*.⁴

The nature of the agreement between a Jewish husband and wife is unilateral, whereby the husband agrees to acquire a woman as his wife. This contractual relationship structure may create oppressive repercussions for women, as is evidenced in *Brucker v. Marcovitz*. Religious authorities are unable to dissolve the marriage since mutual consent of the parties is necessary. If mutual consent is achieved, then delivery of a bill of divorce will legally end the marriage under Jewish law.

Under Jewish law, the granting of the *get* may only be given by the husband, and it will be invalid according to the Rabbinical courts if the husband has been coerced to provide it by third parties or civil authorities. This reality exposes the complex issues which arise between religious rights and a civil court's interventionist role:

Only the husband can give a *get* and rabbinic law states that it will be invalid (*meuseh*) if given under most forms of coercion [...]. There are a strictly limited number of situations in which a Rabbinical court will make such an order instructing the husband to give a *get* by issuing a *chiyuv get* (compulsory order) but *batei din* are reluctant to make these orders and find it very difficult to enforce them when they do. Their reluctance may stem from [...] disapproval of women initiating divorce, fear of making an

⁴ Lisa Fishbayn, "Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce" (2008) 21 Can. J.L. & Juris. 71 at para. 16 [Fishbayn].

error which violates biblical law, and fear of mistakenly permitting an adulterous marriage.⁵

A Jewish wife cannot end her marriage through abandonment, and only upon the granting of a *get* does a husband renounce the rights he had taken up over his spouse and pronounce her a free woman.⁶ It is regarded as against the spirit of Jewish law for a woman to be entitled to dismiss her husband by giving him such a bill.⁷ Recalcitrant husbands, however, may refuse to grant a *get* to their wives, thereby curtailing the wife's autonomy and prompting a call for justice and state protection of the wife. The individual impact and the public policy ramifications of the Jewish laws of divorce may call for judicial intervention into the affairs of the religious community.

II. BRUKER V. MARCOVITZ: BACKGROUND FACTS

The facts of *Bruker v. Marcovitz*, as articulated at each level of the case, are simple and are primarily premised on a negotiated agreement between the two parties, and less so on the religious questions, values, and individual rights at stake. It is necessary, however, to acknowledge the values inherent in both legal and religious precepts when confronting these fact situations.⁸ Stephanie Bruker was 20 years old when she married Jason Marcovitz in 1969. Mrs. Bruker was a life-long member of a Conservative synagogue with Orthodox practices in Montreal, Quebec, while Mr. Marcovitz, then 32 years old, was a practicing Orthodox Jew.⁹ Divorce proceedings were commenced in 1980. At the time of their civil divorce, which was finalized in 1981, Marcovitz and Bruker entered into an agreement concerning custody, access, division of property, and support terms.¹⁰

Additionally, the couple negotiated a Consent to Corollary Relief Agreement. Clause 12 of this document stated that the parties agreed to appear before the Rabbinical

⁵ Fishbayn, *supra* note 4 at para. 19.

⁶ Tanakh: A New Translation of the Holy Scriptures According to the Traditional Hebrew Text (Philadelphia, PA: Jewish Publication Society, 1985) at 311.

⁷ Rev. Dr. M. Mielziner, *The Jewish Law of Marriage and Divorce and its Relation to the Law of the State* (Littleton, Colorado: Fred B. Rothman & Co., 1987) at 117 [Mielziner].

⁸ Ze'ev W. Falk, *Law and Religion* (Jerusalem: Mesharim Publishers, 1981) at 27 [Falk].

⁹ *Bruker v. Marcovitz*, *supra* note 1 at para. 3.

¹⁰ Richard J. Moon, "*Bruker v. Marcovitz*: Divorce and the Marriage of Law and Religion" (2008) 42 Supreme Court L. Rev. at 1 [Moon].

authorities to obtain a *get* upon the granting of the divorce.¹¹ The content and legal significance of this clause was crucial and central to the judicial analysis adopted at each level of the case. Clause 12 provided as follows: “The parties [agree to] appear before the Rabbinical authorities in the City and District of Montreal for the purpose of obtaining the traditional religious *get*, immediately upon a Decree Nisi of Divorce being granted.”¹² Without a *get*, Bruker could not remarry within the Jewish faith, and any subsequent relationship that she entered into would be considered adulterous under Rabbinical law. For the marriage to be dissolved under Jewish law, Marcovitz would need to provide Bruker with a bill of divorce.

For fifteen years, Bruker was denied the *get* from her husband – he did not appear before the *Beit Din* immediately following the civil divorce, as promised in the agreement. Bruker commenced an action for breach of contract. In initiating her proceeding, Bruker sought compensation for the loss suffered as a result of her husband’s failure to give his consent at the time of the civil divorce. Marcovitz, on the other hand, argued that his agreement to give a *get* was not valid under Quebec law and that he was protected by his right to freedom of religion from having to pay damages for breaching the purported contract.¹³

Contract law and issues surrounding the alleged agreement lay at the heart of the judicial reasons at the trial, appellate and Supreme Court levels. It is important to analyze the judges’ findings and direct attention towards other routes available to women in this type of case. In seeking neutrality and only focusing on the enforceability of the contract, the courts refrained from truly delving into religious questions. The significance of a Jewish divorce in the life of the individual inevitably raises concerns about the relationship between law and religion, about the use of law to support or oppose religious practices, and about the values in a pluralistic society.

1. Decision of the Quebec Superior Court

¹¹ *Bruker v. Marcovitz*, *supra* note 1 at para. 1.

¹² Moon, *supra* note 10 at 1.

¹³ *Bruker v. Marcovitz*, *supra* note 1 at para. 2.

The judicial underpinning of the *Marcovitz v. Bruker*¹⁴ decision at the Quebec Superior Court demonstrates the Court's unwillingness to engage in issues surrounding the law of Jewish divorce. At the trial level, the Court scrutinized the contractual nature of the agreement between Marcovitz and Bruker in the context of the *Civil Code of Québec*.¹⁵ The Court stated, "The object of the contract is the juridical operation envisaged by the parties at the time of its formation."¹⁶ There must be an object of the contract for it to be valid, and the Quebec Superior Court found that a legally binding civil obligation, albeit with religious undertones, was created between the two parties and was enforceable. As Marcovitz had breached this obligation, Bruker was awarded damages before the civil court in the amount of \$47,500.¹⁷ The trial judge held that the obligation created by Clause 12 of the Consent to Corollary Relief Agreement was one of a civil contract.¹⁸ Marcovitz had breached that civil obligation by not attending before the Rabbinical authorities immediately after the granting of the Decree Nisi.

The reasons and judgment provided by the trial judge, however, did not entirely address the presence of the religious features at play in the case:

Even if its object can be framed in secular terms, a contract dealing with a religious matter [...] cannot be interpreted without reference to the norms or practices of the religious community, which may be subject to contest. Any attempt by the courts to avoid religious doctrine and rely on "neutral" principles, when interpreting such an agreement, will either ignore or distort the parties' actual intention – their contractual purpose.¹⁹

The court declined to investigate the religious aspects of Marcovitz's refusal to provide a *get* for an extended period of time and what his actual intentions were in not fulfilling the agreement. This topic will be further explored in the discussion of Marcovitz's freedom of religious defence. Although it was appropriate for the court to determine that the religious elements of the contract did not remove it from judicial scrutiny, the

¹⁴ *S.B.B. v. J.B.M.*, [2003] Q.J. No. 2896 at para. 8 [*Marcovitz*].

¹⁵ *Civil Code of Québec*, S.Q. 1991, c. 6.

¹⁶ *Marcovitz*, *supra* note 14 at para. 20.

¹⁷ The Quebec Superior Court observed, at paragraph 26, that Marcovitz had criticized Bruker for having instigated a civil suit in damages, implying that she simply wanted money and did not truly care about receiving a *get*. The court determined that this claim was unfounded for two reasons: first, Bruker could not have instituted a civil action to force a *get*, as under Jewish law the granting of a coerced *get* is invalid, and second, Bruker did everything in her power to obtain the *get*, including phone calls and letters requesting it from Marcovitz, and having representatives of the Jewish community and her family call him on her behalf.

¹⁸ *Marcovitz*, *supra* note 14 at para. 30.

¹⁹ Moon, *supra* note 10 at 7.

underlying religious, equality, and value-laden questions should have been explored more thoroughly.

With regard to secular values, such as human dignity and equal treatment, the Court cannot remain neutral and it ought to have expressly recognized that Marcovitz's refusal to provide a *get* for fifteen years was an excessive use of religious power that is neither acceptable nor tolerable under secular or Jewish law. Both law and religion must be confronted vis-à-vis public morality, ethics, and the right to choice.²⁰ The denial of the *get* impeded Bruker's right to choice in her marriage and divorce rights. It prevented her from meeting or dating an eligible Orthodox Jewish man, let alone marrying one. Since the couple brought this issue before the civil court, it was necessary for that court to evaluate the dispute in both the civil and religious contexts.

While I do not contend that a court is obligated to be the final arbiter on the validity of Jewish divorce law, the practice of those laws must be recognized, at the very least, within a religious framework, and the Quebec Superior Court expressly declined to do so: "In order to make an assessment of damages in this matter, the court does not have to examine Jewish law [...] and is consequently not infringing the domain of the religious authorities."²¹ As the Court became involved in the enforcement of a religious-based contract, it invariably drew itself into debates surrounding the just application of religious doctrine. Subsequently, the limited scope of the decision at the Quebec Superior Court led to further scrutiny of its ruling on appeal and by commentators.

2. Decision of the Quebec Court of Appeal

The decision of the Quebec Court of Appeal emphasized the non-secular nature of Clause 12 and thus more adequately tackled the issues surrounding Jewish divorce law than the Superior Court; yet, the Court of Appeal's narrow approach further highlighted the Court's resolve to remain neutral on issues of religious practice and beliefs. Marcovitz sought the reversal of the judgment of the Quebec Superior Court and the dismissal of Bruker's action. Bruker sought an increase in the amount of

²⁰ Falk, *supra* note 8 at 11.

²¹ Marcovitz, *supra* note 14 at para. 29.

damages awarded to \$1,350,000. In reversing the trial judge's decision, a unanimous Court of Appeal held:

Although one cannot help but be sympathetic to the plight of a Jewish woman whose former husband delays or denies her a get, whether or not he has entered into a premarital agreement to do so or in the context of a consent to corollary relief [...] the substance of the former husband's obligation is religious in nature, irrespective of the form in which the obligation is stated, and accordingly, that an alleged breach of the obligation is not enforceable by the secular courts to obtain damages or specific performance.²²

Further, the Quebec Court of Appeal cited *Syndicat Northcrest v. Amselem* ("*Amselem*")²³ to support its findings. That case held that the state is not the authority on religious dogma and as such, courts should avoid explicitly or implicitly determining the content of a subjective understanding of a religious law.²⁴ Yet, when courts become involved in the enforcement of religion-based contracts, internal disputes may arise surrounding the proper understanding of religious doctrine.²⁵ Nevertheless, in the *Bruker* case, the Court refrained from enforcing such agreements in order to avoid any involvement with internal conflicts of the Jewish community. Avoiding critical religious questions, however, results in an incomplete judicial analysis which cannot be used as a compelling precedent in future jurisprudence. In cases such as the one at issue, where a religious contract has individual and public implications, it is important for courts to explore the laws of a religious group.

Although the Quebec Court of Appeal carefully considered the religious character of the agreement, it failed to take a proper approach to the broad implications of harmful religious practices. Civil courts, as authoritative decision-makers, must strike a balance between achieving justice in the public interest and its commitment to the protection of individual autonomy in spiritual or religious matters. The restrictive approach which

²² *Marcovitz v. Bruker*, [2005] Q.J. No. 13563 at para. 76.

²³ *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 [*Amselem*].

²⁴ *Ibid.* at para. 50.

²⁵ Alvin Esau, "Introduction" in Richard Moon, eds., *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) at 12 [Richard].

served as a basis for the Quebec Court of Appeal's decision prompted the Supreme Court of Canada to further scrutinize matters concerning religious practice and Jewish divorce laws.

3. Decision of the Supreme Court of Canada

The decision of the Supreme Court of Canada more comprehensively addressed the religious concerns in *Bruker v. Marcovitz*, yet the stark conceptual divide between the dissenting and majority opinions demonstrates that a flexible and expansive approach to cases of Jewish divorce is perhaps necessary. The majority judgment, written by Madam Justice Abella, reversed the Quebec Court of Appeal's decision and held that Marcovitz's promise was a binding contract and was thus legally enforceable. She stated,

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 legal enforceable consequences. This puts the obligation appropriately under a judicial microscope.²⁶

Justice Abella's judgment acknowledged that in the interest of public policy, it was necessary to remove the barriers to religious divorce and remarriage – this was precisely what the courts should have noted in decisions at the lower levels. Canadian civil courts are accountable for citizens' gender equality and freedom of choice in marriage. "Underlying [Justice Abella's] judgment is a desire to mitigate the harshness of the divorce rules of the Jewish community and a belief that religious community members may sometimes require legal protection from the rules and practices of their community."²⁷ In enforcing the agreement between Bruker and Marcovitz, Justice Abella responded to the need to challenge the exercise of undue influence in religious contracts and expressly recognized the profound individual and public significance such cases possess.

The dissenting reasons in *Bruker v. Marcovitz* are based purely upon a contractual analysis, to the detriment of a comprehensive discussion of law and religion. This fact

²⁶ *Bruker v. Marcovitz*, *supra* note 1 at para. 47.

²⁷ Moon, *supra* note 10 at 4.

demonstrates that a reluctance to face religious questions remains among Supreme Court judges. Madam Justice Deschamps, with Madam Justice Charron concurring, held that Marcovitz's promise was not legally binding because it lacked a justiciable "object," which is an essential element of an enforceable contract at civil law. Justice Deschamps found that because a religious divorce has no civil consequences, it is not an agreement that may be recognized by law. In turn, the promise to consent to such a divorce was not legally enforceable.²⁸ Respectfully, it cannot be accepted that a religious divorce has no civil consequences. The denial of a woman's liberty, independence, gender equality, and dignity are surely rights that require protection by Canadian courts.

Additionally, Justice Deschamps explicitly acknowledged that courts are to avoid any entanglement with religion and "remain neutral where religious precepts are concerned."²⁹ However, Bruker was not asking the court to rule on the validity of Jewish divorce law and the principles surrounding the granting of a *get* – Justice Abella specifically confirmed this point when she stated that the court was not dealing with the judicial review of doctrinal religious principles, such as whether a particular *get* is valid.³⁰ Rather, Bruker sought damages *because her husband was depriving her of her ability to move forward with her life*. "The courts cannot ignore religion [...] a court must take into account the particular religion, the particular religious right, and the particular personal and public consequences [...] of enforcing that right."³¹ Moreover, Justice Deschamps stated that it is not up to the state to promote religious norms and the courts must leave it to individuals to make their own choices.

This line of reasoning fails to recognize that Marcovitz's behaviour was not the norm, but was rather an unconscionable abuse of power and manipulation of religious doctrine, contrary to Jewish law and secular values. The facts of this case required an investigation into the religious basis for Marcovitz's actions.

III. THE NATURE OF MARCOVITZ'S DEFENCE: FREEDOM OF RELIGION

²⁸ *Bruker v. Marcovitz*, *supra* note 1 at para. 174.

²⁹ *Ibid.* at para. 102.

³⁰ *Ibid.* at para. 47.

³¹ *Ibid.* at para. 18.

The dissenting judges at the Supreme Court of Canada removed *Bruker v. Marcovitz* from the domain of larger questions of equality, fairness, and religious oppression, when the nature of Marcovitz's defence necessitated a thorough inquiry into these issues. Marcovitz, throughout the case, alleged that he was exonerated from breaching the agreement contained in Clause 12 by the operation of s. 3 of the *Quebec Charter of Human Rights and Freedoms*.³² More specifically, he pleaded freedom of religion and asserted that awarding damages to his former wife would be a violation thereof. The majority subtly queried whether Marcovitz believed that his refusal to grant a *get* was a matter of religious conscience. The majority found that "his refusal to provide the *get* was based less on religious conviction than on the fact that he was angry at Mrs. Bruker. His religion does not require him to refuse [...] a *get* [-] the contrary is true."³³ This analysis shows that courts are bound to make determinations about religious practice when those practices run counter to the values of civil society.

However, it may be argued that the majority in *Bruker v. Marcovitz* did not entirely engage the religious aspect of Marcovitz's claim.

Abella J. seemed to assume that in this case the contract could be enforced without the court having to delve into religious doctrine. She thought that Mr. Marcovitz's promise was clear and unambiguous. She noted that he offered no religious reasons for his failure to perform his undertaking and that, in any event, Judaism recognized no reason to refuse consent. Yet Justice Abella could make this determination only after considering the rules and practices of the religious community. [...] It seems likely that her knowledge of Jewish law and practice gave her some comfort in deciding that the religious law was clear on this issue. We are left to wonder, however, what she might have done had there been some dispute [...]

³² *Quebec Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s.3.

³³ *Bruker v. Marcovitz*, *supra* note 1 at para. 69. The court also noted, at paragraph 93, that any infringement of Mr. Marcovitz's freedom of religion was inconsequential compared to the disproportionate disadvantaging effect on Mrs. Bruker's ability to live her life fully as a Jewish woman residing in Canada. It is interesting to note the court's explicit weighing of constitutionally protected rights and the restrictions imposed on Bruker's personal life.

within the Jewish community about whether a husband was ever justified in withholding his consent.³⁴

Madam Justice Abella's reference to Jewish practice to dismiss Mr. Marcovitz's assertion that he was protected by his freedom of religion to deny a *get*, seemed to ignore the Court's decision in *Amselem*, cited at the Quebec Court of Appeal, that an individual's sincerity in his or her spiritual beliefs is protected whether they are an established part of a belief system or not. In countering his defence, Justice Abella did not inquire into Marcovitz's underlying religious reasons for refusing the *get*. It is possible, or even likely, that as a devout Orthodox Jew, he deemed marriage as sacred and only terminable in extreme or very rare cases. Yet, whether or not Marcovitz was sincerely adhering to religious conviction in refusing to provide a *get* was not addressed by the court. This silence speaks to the Court's disinclination to truly explore the religious matters at issue in *Bruker v. Marcovitz*. Although the majority may have more adequately addressed such issues than the dissent, the deficiencies in probing Marcovitz's defence highlight that a more comprehensive approach towards cases of Jewish divorce as a whole is warranted.

Furthermore, freedom of religion is a fundamental personal right and an individual's observance of his or her religious beliefs must be in accordance with general civil laws.³⁵ The courts, then, are obliged to confront issues surrounding questionable religious practices. Hence, even if the Court would have been willing to more thoroughly question Marcovitz's freedom of religion defence, broader religious doctrinal considerations could not be ignored. Richard Moon, citing Lori G. Beaman, explains,

Beaman [...] is skeptical that a judgment about "sincerity of belief" can be made without any consideration or assessment of the "content of belief."
In her view, when a court considers the sincerity of an individual's belief,

³⁴ Moon, *supra* note 10 at 9-10.

³⁵ A more in-depth assessment of the nature of the freedom of religion is beyond the scope of this paper. However, at paragraph 78 of the Quebec Court of Appeal's decision, it is stated that the purpose of freedom of religion or the exercise of religious freedom should not be interpreted as having a coercive component. Essentially, freedom of religion is a fundamental personal right. Courts do not consider the protection of religions *per se* as within their jurisdiction. Rather, recourse can be had to Canadian courts to ensure that individuals can act in accordance with their religious beliefs, subject to laws of general application.

it “cannot help but delve into the content of the beliefs” and make “value judgment[s].”³⁶

This statement suggests that the courts cannot approach cases surrounding religion in a limited way. In cases of Jewish divorce, judicial intervention and decision-making must be undertaken with a liberal focus aimed at safeguarding the rights of individuals and the public at large.

IV. LEGISLATIVE AMENDMENTS AND THE WAY AHEAD

Legislative amendments made to the *Divorce Act* and the *Ontario Family Law Act* indicate that Canadian courts have inextricably tied themselves to adjudicating Jewish divorce issues and as such, must align their decision-making process within a religious context. The *Ontario Family Law Act* was amended in 1986 to permit the application of sanctions to spouses who failed to grant a *get*.³⁷ Similarly, the 1990 reform to the *Divorce Act* now empowers a judge in a civil divorce case to place pressure upon a recalcitrant spouse who refuses to give his or her consent to a religious divorce. While civil courts are not authorized to force the delivery of a bill of divorce, they are permitted to exert their authority regarding the removal of religious barriers to remarriages. For example, a court may order a party to pay very large sums of damages as a way of pressuring a spouse to provide a *get*. These amendments affirm that in a case such as *Bruker v. Marcovitz*, the court has no option but to confront wrongful behaviour purportedly motivated by a religious agenda.

The constructive impact of the remedial legislation shows that Canadian civil courts are both able and required to use their equitable discretion in cases such as *Bruker v. Marcovitz*. Canadian civil legislation has played an active role in fostering a lively and ongoing local, national and international debate about how to find a solution to the problems with Jewish divorce laws. This law reform strategy has been effective in contributing to the transformation of a vulnerable minority, namely, women, and may serve as a model for other similar efforts.³⁸

³⁶ Richard, *supra* note 25 at 11.

³⁷ Fishbayn, *supra* note 4 at para. 38.

³⁸ Fishbayn, *supra* note 4 at para. 1.

Rabbi Mordechai Ochs of the Toronto Beth Din for Divorce stated that the legislative amendments have led to an 85% drop in the incidence of *get*-based extortion and *get* withholding; he further notes that Jewish female activists estimate that the reforms have solved 75% of the *get* refusal cases.³⁹ The success brought about by the legislative reforms strengthens the responsibility of courts to find recourse for women such as Mrs. Bruker.

The widespread support for these amendments also demonstrates the consensus within the Jewish community that it is necessary for the civil courts to play a leading role in arbitrating cases of Jewish divorce.

The *get* legislation is an example of a transformative intervention in a minority religious practice [...] it is carefully designed so that it can be used in ways that are consistent with Jewish legal norms for a valid divorce [...] it has involved rabbinic authorities in the process of drafting, so that they felt comfortable with, and invested in, ensuring the success of the legislation.⁴⁰

Furthermore, Madam Justice Abella remarked that the Orthodox Canadian Jewish population believed that a husband's refusal to provide a *get* was an unwarranted dishonour imposed on Jewish women and where possible, should not be tolerated in Canada's legal system.⁴¹

Thus civil courts, such as the Quebec Court of Appeal in the case at issue, may not rest on the assumption that Jewish divorce cases are simply non-justiciable – the legislative reforms were passed in order for the Canadian legal system to accommodate and protect members of the Jewish community and respond to their needs and interests, especially those faced by women. Yet this sentiment, as articulated by the enactment of the amendments to the *Ontario Family Law Act* and the *Divorce Act*, did not sufficiently influence the decision-makers in Bruker's case. As a result, judicial approaches require refinement and a critical analysis under which Jewish divorce cases may be considered

³⁹ Ron Csillag, "Courts are Reconsidering Country's Divorce Laws (14 October 2005), online: The Jewish Independent <<http://www.jewishindependent.ca/Archives/Oct05/archives05Oct14-03.html>>.

⁴⁰ Fishbayn, *supra* note 4 at para. 52.

⁴¹ *Bruker v. Marcovitz*, *supra* note 1 at para. 81.

when no contract has been created between the parties, or when the courts decline to enforce an agreement between them.

1. Option One: Assuming an Action in Tort

As the aforementioned judicial reasons skirted broader questions regarding the unconscionable use of religious divorce laws, it is necessary to explore alternative avenues by which Jewish women may find legal recourse. In foreign jurisdictions, a husband's actions to deny his wife a *get* have been found to be a civil wrong for which the law may award financial damages. On this basis, Jewish women may choose to pursue their claims before a Canadian court, as it is common practice for our justice system to turn to international regimes in order to examine how similar cases are treated.

In its *Bruker* decision, the Supreme Court of Canada noted that there is international support for the courts' protection of Jewish women from husbands who refuse to provide a religious divorce. Paragraphs 83-93 refer to countries such as France and Australia which have recognized that a husband's actions amount to a civil wrong, and therefore a compensable injury. In 1977, the Family Court of Australia remarked on a husband's ability to remarry, while refusing his wife the same right, as follows: "It is contrary to all notions of justice to allow such a possibility to arise in a court, and to say that the court can do nothing."⁴² It is also consistent with Canadian public policy and values to stand against this injustice and it is thus appropriate to explore, and perhaps emulate, the treatment by civil courts abroad of cases similar to *Bruker v. Marcovitz*.

Israel's Family Courts have increasingly taken the view that a husband's refusal to grant his wife a *get* constitutes a tort for which the law will award financial damages. In Israel, approximately twenty-five such tort cases have been filed since 2000, the majority of which will not be appealed or reopened, as the husbands have since provided a *get*. In 2004, an ultra-Orthodox woman petitioner was awarded 425,000 shekels (\$100,000) by the Civil Jerusalem Family Court Judge, Menahem Hacohen. In 2006, Judge Tzvi Weitzman ordered the estate of a man to pay his estranged wife 711,000 shekels (\$183,578) in

⁴² *Marriage of Shulsinger* (1977), 13 A.L.R.537 at para. 541.

damages for withholding a *get* for twenty-nine years.⁴³ This line of cases demonstrates the benefit of deciding Jewish divorce cases within a broader legal framework.

On December 14, 2008, Judge Tova Sivan of the Tel Aviv Family Court, in the case of *N.S. v. N.Y.*,⁴⁴ accepted a petition for damages of 700,000 shekels (\$181 737), submitted by a Jerusalem-based advocacy group. The action was based on a claim that the wife had endured eleven years of pain and suffering because she had been denied the right to divorce her husband.⁴⁵ Indeed, though not necessarily the case in *Bruker v. Marcovitz*, the plight of women in these circumstances may be tantamount to the intentional infliction of mental suffering. Grounding an action in tort is a realistic alternative for women who possess no contractual basis for their claim.

Canadian civil courts are equally capable of adopting this line of reasoning, as the principles of Jewish divorce law would not be violated in deeming the husband's act tortious. As has been noted, the granting of a *get* will not be recognized by the Rabbinical court if the husband is forced to provide it. Judge Tova Sivan's ruling, stating that a wife's damage claim may be based in tort, would not run counter to Jewish doctrine. In fact, her judgment eliminates the need for a *chiyuv* (compulsory) *get* altogether as the intentional infliction of emotional distress is a manipulation of religious power and a severe infringement of a woman's liberty, irrespective of any rabbinic order.⁴⁶

A women in these cases may not turn to the courts to require her husband to deliver a *get*; however, the availability of substantial damage awards against recalcitrant spouses would constitute a powerful deterrent should they be inclined to deny their wives a *get*. Husbands may come to realize that it would be in their best interest to avoid potentially significant financial liability, and there would accordingly be an incentive for the delivery of the Jewish divorce at an early stage of the proceedings. It would be valuable for Canadian civil courts to consider the judgments of the Israeli Family Courts in order to broaden their authority to award damages based upon a wife's claim in tort.

⁴³ Netty C. Gross, "Agunot Win Landmark Damages" *The Jerusalem Report* (2 February 2009) 8 [Jerusalem Report].

⁴⁴ *N.S. v. N.Y.*, Tel Aviv, 14 December 2008, no. 024782/98.

⁴⁵ Jerusalem Report, *supra* note 43 at 8.

⁴⁶ *Ibid.* at 8.

2. Option Two: Provincial Human Rights Legislation

The Agunah and Gender Inequality

The difficulty in obtaining a Jewish divorce is typically classified as a woman's issue and where the judicial system will not enforce a religious contract, provincial human rights legislative schemes may require that an agreement be enforced in order to alleviate the disadvantage imposed by a recalcitrant husband. The principal passage concerning the *get* and divorce law is found in Deuteronomy XXIV. 1, 2 and demonstrates the gender inequality issues at work:

When a man hath taken a wife, and married her, and it come to pass that she find no favor in his eyes, because he hath found some uncleanness in her: then let him write her a bill of divorcement, and give in her hand, and send her out of his house. And when she is departed out of his house, she may go and become another man's wife.⁴⁷

Though either party may stand in the way of a Jewish divorce by withholding consent, the consequences are graver for a Jewish woman. A man whose wife is refused a *get* is forbidden to remarry under Jewish law while a husband may take a second wife. The absence of a *get* has no practical bearing on the husband's ability to remarry - if the spouses are divorced under civil law, he can remarry within the Jewish faith without suffering the personal consequences which burden his wife.⁴⁸

The dissent at the Supreme Court of Canada did not connect the case to larger issues of gender inequality or oppression. "Madame Justice Deschamps frequently observed that a religious divorce requires mutual consent, and that the wife no less than the husband has the power to prevent a divorce [...] Justice Deschamps also referred to Mrs. Bruker's difficult personality."⁴⁹ This statement demonstrates a reluctance to connect Bruker's case to the wider discriminatory implications of religious disputes. What is required is an analysis of the unequal treatment borne by Jewish wives.

⁴⁷ Mielziner, *supra* note 7 at 116.

⁴⁸ Fishbayn, *supra* note 4 at para. 24.

⁴⁹ Moon, *supra* note 10 at 14.

As a result of the woman's subordinate status in this situation, she is titled an *agunah*, literally translated from Hebrew as "a chained wife," a position which may call for protection under provincial human rights legislation. "The most agonizing moral challenge confronting Jewish law in modern times is nearly 2000 years old. It is the plight of the *agunah* [...] which has troubled Jews through centuries."⁵⁰ Though women in Jewish divorce cases may commonly become victims of their own religious observance, this issue was only marginally dealt with in *Bruker v. Marcovitz*. However, gender discrimination may often lie at the heart of Jewish divorce cases.

Human Rights Violation Claim

A woman who is denied a *get* may argue that her equality rights are being infringed based on gender discrimination, on the prohibited ground of the right to contract on equal terms. The *Ontario Human Rights Code (OHRC)*⁵¹ will serve as an example through which an *agunah* may commence her action under human rights legislation.

In countering the argument that religious contracts are simply unenforceable, Canadian human rights commissions and quasi-judicial bodies may be in a position to safeguard Jewish women's equality rights and recognize the potential for a human rights violation claim. To this end, these bodies must more broadly consider questions of gender discrimination and public policy in Jewish divorce cases, as opposed to a narrow adherence to a contractual focus. Section 3 of the *OHRC* states that every person having legal capacity has a right to contract on equal terms without discrimination based on sex.⁵² If the rights of an *agunah* contained in an agreement are not enforceable at law, she is deprived of her rights to marriage, divorce, and contract on equal terms. If the state does not actively oppose sexist or oppressive practices, then it may be described as tolerating or even accommodating acts that are inconsistent with public values.⁵³ It may be argued, then, that if an agreement providing that a husband deliver a *get* is not enforced, the Canadian judicial system is effectively permitting discrimination and allowing persons to contract out of human rights laws.

⁵⁰ Robert Gordis, "A Different Kind of Hostage" *Jewish Virtual Library* (3 April 1987), online: My Jewish Learning <<http://www.jewishvirtuallibrary.org/jsource/Judaism/agunot1.html>>.

⁵¹ *Ontario Human Rights Code*, R.S.O. 1990, c. 19 [OHRC].

⁵² *OHRC*, *supra* note 51 at s. 3.

⁵³ Moon, *supra* note 10 at 10.

A commission or tribunal may also be inclined to read-in rights which may be due, as public policy requires that contractual agreements be conscionable and fair. Though quasi-judicial bodies may be hesitant to scrutinize contracts which pertain to family matters, the Supreme Court of Canada expressly did so in *Bruker v. Marcovitz*. Human rights legislative schemes ought to be interpreted broadly enough to capture the legislature's objective, that is, the prevention of discrimination and promotion of equal treatment. If not, then the *agunah* may argue that such legislation is under-inclusive and therefore unconstitutional, as was held in *Vriend v. Alberta*,⁵⁴ and might find redress on those grounds.

Some authors suggest that s. 15 of the *Canadian Charter of Rights and Freedoms (Charter)*,⁵⁵ which guarantees equality without discrimination based on sex, may be a viable avenue for women denied a *get* to pursue legal redress. As John Tibor Syrtash notes in his work, *Religion and Culture in Canadian Family Law*, although Canada has not been quick to link *Charter* rights and freedoms to issues relating to spouses, parents, and children, there is a foreseeable end to that reluctance in the future – there is great desirability in the *Charter's* application to family law disputes such as Jewish divorce.⁵⁶ The application of the *Charter* to the issue of Jewish divorce may be more difficult in practice, due to the *Charter's* limited application to government actors; however, the concept nonetheless remains that a husband's refusal to grant a *get* is an issue of gender discrimination and a severe violation of a woman's human rights and dignity.

The prospect of advancing a human rights claim may be a reasonable and viable avenue to be pursued by women in the Jewish divorce dilemma, as the power men enjoy under Jewish law to withhold a *get* is of concern in civil law. "When the *get* is an issue, it is not unusual for husbands to offer quid pro quo in these negotiations by asking the wife to renounce her rights under civil law in exchange for his agreement under the *get*."⁵⁷ The

⁵⁴ *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

⁵⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 15 [*Charter*].

⁵⁶ Shauna Van Praagh, Book Review of *Religion and Culture in Canadian Family Law* by John Tibor Syrtash (1993) 38 McGill L.J. 233 at 2 [Van Praagh].

⁵⁷ Fishbayn, *supra* note 4 at para. 27.

potential for blatant manipulation of authority in the relationship suggests that a husband may use his bargaining power as a tool in family law disputes.

This situation may occur, for example, with negotiations between spouses regarding custody or property division, which may lead to even further subordination of the *agunah*. The state ought to take an active role in reconciling conflicts over Jewish women's claims to gender equality and the religious practices which may undermine that equality. Furthermore, such intervention would not undercut Jewish religious principles. "Judaism, or the ethical monotheism elaborated by the Hebrew Scriptures and the Rabbis, posits as one of its fundamental precepts the equality of all persons before God."⁵⁸ Justice requires, and the state should recognize, a wider scope of remedies for Jewish women who have been denied the granting of a *get* by their husbands.

3. Option Three: Best Interests of the Children Involved

Where a Jewish wife is denied the right to divorce her husband, the *get* may be used as a bargaining instrument in custody or support disputes; thus, it may be appropriate for the *agunah* to ground her claim to receive a *get* on the basis that the best interests of her children are at stake. State intervention directing the husband to provide a bill of divorce may be necessary to protect children from becoming victims of improper settlement agreements. A husband may argue, for instance, that he will only free his wife from the marriage if he is relieved from paying child support.

These sorts of distorted negotiations may leave women and children in poverty after divorce [...] They also subvert the public interest in ensuring that decisions about custody are based on the best interests of the children and not on any extraneous factors. Such *get*-based extortion makes a mockery of the civic public policy of ensuring equality between spouses and financial provision for dependents upon divorce.⁵⁹

The coercive aspects of the *get* were mentioned at para. 7 of the *Bruker v. Marcovitz* decision in the Supreme Court of Canada and have as well been surveyed and documented by B'nai Brith Canada in a study entitled "The Use of 'Get' as a Bargaining

⁵⁸ Milton R. Konvitz, *Judaism and Human Rights* (New York, New York: W.W. Norton & Company Inc., 1972) at 125.

⁵⁹ Fishbayn, *supra* note 4 at para. 27.

Tool in Jewish Divorce Proceedings.”⁶⁰ These sources show that the wellbeing of children is commonly at risk in Jewish divorce proceedings.

The decision of the trial judge in 2003 demonstrates that the court is inclined to consider the welfare of the children involved. The divorce file revealed that the Marcovitz children were being used in the struggle between their parents. Justice Mass remarked, “The divorce file took a tumultuous turn for the worse, with innumerable proceedings and seizures relating to child support [...] Marcovitz saw his daughters on an irregular basis, and there was no civilized contact between the parties.”⁶¹ The animosity which grew as a result of the denial of the *get* negatively affected the children in the case at bar. Had Clause 12 of the agreement been fulfilled at the outset, the couple could have avoided lengthy and exhausting court procedures and costs. It is likely that a more amicable resolution between the spouses would have been possible.

The majority judgment of Madam Justice Abella also indicates that the best interests of the children will be an important factor in the court’s decision. She remarked, “It will obviously depend in each case on the nature of the undertaking and [...] on the extent to which the promise is consistent with our laws, policies and democratic values. An agreement to resolve a custody dispute in a way that offends a child’s best interests [...] will likely be found to be contrary to public order.”⁶² A husband who uses the *get* as a means to unilaterally achieve his aims may not be taking into account the best interests of the children. In these circumstances, a court may be receptive to finding in the wife’s favour. Although Bruker was in a position to plead breach of contract, premising or supporting a claim having regard to the best interests of the children may prove worthwhile in cases when no agreement is found or when a religious contract is unenforceable.

The rights of unborn children may also be at stake in cases of Jewish divorce and though it is unlikely that an *agunah* will succeed on this ground alone, it may be used to buttress the argument founded on a best interests principle. As has been previously noted, if a

⁶⁰ Van Praagh, *supra* note 56 at 8.

⁶¹ Marcovitz, *supra* note 14 at para. 19-20.

⁶² Bruker v. Marcovitz, *supra* note 1 at para. 62.

husband refuses to grant a *get* to his wife, she cannot remarry according to Orthodox religious law, and if she remarries in a civil ceremony, her children, from that civil union, will be characterized as illegitimate under Jewish law. A child who is so labeled as a *mamzer* will not be recognized as a full member of the Jewish community, nor will he or she be able to marry another member of the Jewish faith. The child will be subjected to community scrutiny and deprived of the opportunity to fully practice his or her religion. Justice Mass, in his decision, recognized the significance of this harm. Since Bruker was unable to have a legitimate child, the court awarded her a nominal sum of \$10,000.⁶³

The interests of unborn children have been judicially considered by the Supreme Court of Canada, in cases such as *Dobson v. Dobson (Litigation Guardian)*.⁶⁴ Although this was a case which concerned the negligence of a pregnant mother, it demonstrates that the court is not averse to reviewing the rights of unborn children. Where the welfare of either a live or unborn child is involved in Jewish divorce cases, the repercussions are long-lasting and significant. Therefore, if an *agunah* has no contractual platform on which to base her claim, this may be a possible route through which she may seek compensation.

4. Option Four: The Affidavit Route

Finally, the last mode of recourse that will be considered is the affidavit route under the *Divorce Act* (the *Act*) or the *Ontario Family Law Act*, which may be relied upon by Jewish women who have been denied a *get*. Although the provisions in these legislative schemes do not mention the term *get*, the clear purpose enunciated is the remedying of the issues faced by spouses who are denied the right to divorce. The legislative amendments were adopted in order to protect spouses – women, for the most part – who become vulnerable as a result of their observance of Jewish doctrine.

The affidavit route is a means by which claimants may use the legislative scheme to their benefit, especially when they are unable to rely on an action for breach of contract. This process operates in essentially the same form under both the federal and provincial legislation; the focus of this analysis will be on the former statute. Section 21.1(2) of the *Divorce Act* reads:

⁶³ *Marcovitz*, *supra* note 14 at para. 52.

⁶⁴ *Dobson v. Dobson (Litigation Guardian)* (1999), 174 D.L.R. (4th) 1 (S.C.C.).

(2) In any proceedings under this Act, a spouse (in this section referred to as the “deponent”) may serve on the other spouse and file with the court an affidavit indicating

- (a) that the other spouse is the spouse of the deponent;
- (b) the date and place of the marriage, and the official character of the person who solemnized the marriage;
- (c) the nature of any barriers to the remarriage of the deponent within the deponent’s religion the removal of which is within the other spouse’s control;
- (d) where there are any barriers to the remarriage of the other spouse within the other spouse’s religion the removal of which is within the deponent’s control, that the deponent
 - (i) has removed those barriers, and the date and circumstances of that removal, or
 - (ii) has signified a willingness to remove those barriers, and the date and circumstances of that signification;
- (e) that the deponent has, in writing, requested the other spouse to remove all of the barriers to the remarriage of the deponent within the deponent’s religion the removal of which is within the other spouse’s control;
- (f) the date of the request described in paragraph (e); and
- (g) that the other spouse, despite the request described in paragraph (e), has failed to remove all of the barriers referred to in that paragraph.

This section provides that, in any proceedings under the *Act*, a spouse may file an affidavit which states that the other spouse has failed to remove any barriers to remarriage within his or her control.⁶⁵ Under the *Act*, if the barriers are not removed within fifteen days of the filing of the affidavit, the court is granted the power to dismiss any application filed by the withholding spouse.

⁶⁵ *Divorce Act*, *supra* note 3.

Thus, in any application or defence relating to the granting of a divorce itself, custody of the children, child support or spousal support, the fact that the *get* has not been given upon request may have a severe impact on the position of the “recalcitrant” spouse [...] Unless that spouse has no interest in making or defending a claim, he thus will be heavily encouraged to give the *get* [...] this route avoids the risk of invalidation of the *get*-giving within Jewish law because the secular court, rather than ordering a *get* or making it a condition for an agreement between the ex-spouses, merely makes a decision on an application dealing with a civil matter.⁶⁶

In electing this route, secular courts are not violating religious law; rather, they are using creative and interpretive means to reach a just and reasoned conclusion. The affidavit route is a novel and innovative method of achieving this goal. This approach affirms the necessity of viewing cases of Jewish divorce through a broad lens whereby decision-makers may fulfill their obligation to defend citizens from the abuse of religious doctrine and recognize that a limited dialogue must be replaced with an expansive, contextual approach.

CONCLUSION

The issue of divorce in Jewish law is multi-faceted and may take shape in a variety of forms; the withholding of a *get* may result in restrictions on the ability to remarry or divorce, gender discrimination, the infliction of mental distress or detrimental effects for the children involved. The limited approach adopted at each stage of the *Bruker v. Marcovitz* case highlights the notion that a narrow view in the decision-making process will not suffice. Advancing a claim based in tort, in gender discrimination, upon protecting the best interests of children, or through legislation, may prove successful for the *agunah*. If not, commencing an action under these grounds will, at the very least, expand and develop the discourse necessary to counter the consequences of harmful religious practices.

⁶⁶ Van Praagh, *supra* note 56 at 9.

Women who advance such claims may not be protected by contractual obligations; however, when justice demands, the harm caused to them ought to be redressed. Civil courts must balance, on the one hand, a public commitment to justice and democratic values and, on the other hand, the protection of individual rights in religious matters. As such, judicial decision-making is not insulated from the requirement to determine whether the underpinning of a religious practice is inconsistent with public notions of autonomy and equality in a certain cases. An expansive approach will enable Canadian courts to protect the values which are fundamental to the fabric of a religious community, safeguard the freedoms of society as a whole and achieve justice on a national scale.