SUPREME COURT OF CANADA

CITATION: Bruker *v.* Marcovitz, [2007] 3 S.C.R. 607, 2007 SCC 54

DATE: 20071214
DOCKET: 31212

BETWEEN:

Stephanie Brenda Bruker
Appellant
and
Jessel (Jason) Benjamin Marcovitz
Respondent
- and -
Canadian Civil Liberties Association
Intervener

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps J.

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 100)	Abella J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Fish and Rothstein JJ. concurring)
DISSENTING REASONS: (paras. 101 to 185)	Deschamps J. (Charron J. concurring)

Bruker *v.* Marcovitz, [2007] 3 S.C.R. 607, 2007 SCC 54

Stephanie Brenda Bruker *Appellant*

v.

Jessel (Jason) Benjamin Marcovitz *Respondent*

and

Canadian Civil Liberties Association *Intervener*

Indexed as: Bruker *v.* Marcovitz

Neutral citation: 2007 SCC 54.

File No.: 31212.

2006: December 5; 2007: December 14.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for quebec

Contracts — Validity — Breach — Agreement with religious aspect — Husband refusing to provide wife with Jewish religious divorce after civil divorce despite agreement to do so — Action in damages against husband for breach of contract — Whether matter justiciable — Whether agreement satisfies all requirements to make it valid and binding under Quebec law — Whether husband can rely on freedom of religion to avoid legal consequences of failing to comply with agreement — Civil Code of Québec, S.Q. 1991, c. 64, arts. 1373, 1385, 1412, 1413 — Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 3, 9.1.

Human rights — Freedom of conscience and religion — Agreement with religious aspect —

Jewish religious divorce or "get" — Husband refusing to provide wife with Jewish religious divorce after civil divorce despite agreement to do so — Action in damages against husband for breach of contract — Whether husband entitled to immunity from damages for his breach of contract by invoking freedom of religion — Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 3, 9.1.

The parties were married in 1969. Divorce proceedings were commenced in 1980 and three months later, the parties negotiated a Consent to Corollary Relief. Clause 12 of the agreement stated that the parties agreed to appear before the rabbinical authorities to obtain a Jewish divorce, or *get,* immediately upon the granting of the divorce. The civil divorce became final in 1981, when the husband, M, was 48 and the wife, B, was 31.

A wife cannot obtain a *get* unless her husband agrees to give it. Without one, she remains his wife and is unable to remarry under Jewish law. In this case, despite the wife's repeated requests, the husband consistently refused to provide a *get* for 15 years, by which time the wife was almost 47. The wife sought damages for breach of the agreement. The husband 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 its breach.

The trial judge found that the agreement was valid and binding and that a claim for damages based on a breach of this civil obligation was within the domain of the civil courts. The Court of Appeal allowed the husband's appeal. It found that because the substance of the obligation was religious in nature, the obligation was a moral one and was therefore unenforceable by the courts.

Held (Deschamps and Charron JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Rothstein JJ.: The fact that a dispute has a religious aspect does not by itself make it non-justiciable. Recognizing the enforceability by civil courts of agreements to discourage religious barriers to remarriage, addresses the gender discrimination those barriers may represent and alleviates the effects they may have on extracting unfair concessions in a civil divorce. This harmonizes with Canada's approach to equality rights, to divorce and remarriage generally, to religious freedom, and is consistent with the approach taken by other democracies. [41] [63]

Clause 12 of the agreement satisfies all requirements under the *Civil Code* to make it valid and binding under Quebec law. The promise by the husband to provide a *get* was part of a voluntary exchange of commitments intended to have legally enforceable consequences, negotiated between two consenting adults, each represented by counsel. The Court is not asked to determine doctrinal religious issues, and there is nothing in the *Civil Code* preventing someone from transforming his or her moral obligations into legally valid and binding ones. [16] [20] [47] [51]

Nor is the husband entitled to immunity from damages for his unilateral contractual breach by invoking his freedom of religion under s. 3 of the Quebec *Charter of human rights and freedoms*. The claim to religious freedom must be balanced and reconciled with countervailing rights, values, and harm, including the extent to which it is compatible with Canada's fundamental values. Determining when such a claim must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise. [2] [77]

In this case, the husband's claim does not survive the balancing mandated by the Quebec *Charter* and this Court's jurisprudence. Any impairment to the husband's religious freedom is significantly outweighed by the harm both to the wife personally and to the public's interest in protecting fundamental values such as equality rights and autonomous choice in marriage and divorce. These, as well as the public benefit in enforcing valid and binding contractual obligations, are among the interests that outweigh the husband's claim. [17] [70] [92]

There is no reason to interfere with the trial judge's award for damages, interest and additional indemnity. [97-99]

Per Deschamps and Charron JJ. (dissenting): In Canadian law, a court is not barred from considering a question of a religious nature, provided that the claim is based on the violation of a rule recognized in positive law. The role of a court asked to resolve a private dispute relating to religion is limited to identifying the point at which rights converge so as to ensure respect for freedom of religion. The courts can play this role only if they remain neutral where religious precepts are concerned. The principle of non-intervention in religious practices makes it possible to avoid situations in which the courts have to decide between various religious rules or between rules of secular law and religious rules. In the instant case, the wife, B, has not argued that her civil rights were infringed by a civil standard derived from positive law. Under Canadian and Quebec law, she could remarry and any children born of this new union would have had the same civil rights as "legitimate" children. Only her religious rights are in issue, and only as a result of religious rules. Thus, the ground for B's claim for compensation conflicts with gains that are dear to civil society, and her claim places the courts in conflict with the laws they are responsible for enforcing. Where

religion is concerned, the state leaves it to individuals to make their own choices. It is not up to the state to promote a religious norm. This is left to religious authorities. [102] [122-132]

It can be seen from an overview of the general approach taken by foreign courts with respect to religion and the legal mechanisms used to deal with *gets* that some of the solutions adopted are already available to Quebec and Canadian litigants, but that others are not because the rules are different in Canada. The decisions of each country's courts are based on mechanisms proper to that country and establish no principle of public law that would justify Canadian courts altering their approach. In Canada, the *get* issue is governed by internal private law rules. [154-155]

The clause in issue is found in a corollary relief agreement incorporated into a decree that orders the parties to comply with their undertakings. The inclusion in the corollary relief agreement of an undertaking to appear before the rabbinical authorities has the effect neither of making this undertaking a right or obligation provided for in the *Divorce Act* or the *Civil Code of Québec*, nor of making it relief corollary to the divorce. If clause 12 can serve as the basis for a separate action, it must be regarded as an autonomous clause and must satisfy the requirements of Quebec civil law. In the instant case, the clause in question cannot, legally, be characterized as a contract. It is a purely moral undertaking. Neither the undertaking to consent to a religious divorce nor the religious divorce itself has civil consequences. Since the parties did not envisage a juridical operation, it must be concluded that one of the essential elements of contract formation — the object (art. 1412 C.C.Q.) — is missing. [157-161] [174] [180]

Even if this moral undertaking had been actionable, the assessment of damages would have

required the court to implement a rule of religious law that is not within its jurisdiction and that violates the secular law it is constitutionally responsible for applying. The damages claimed by B are based on her observance of specific religious precepts. Freedom of religion is not recognized as a means of forcing another person to perform a religious act. Nor can the civil courts be used to sanction the failure to perform such an act. B's argument, if it were accepted, would require recognition of a legal situation that is contrary to the rules of Canadian and Quebec family law, and to sanction the religious law would be to impose a rule that is inconsistent with the rights the secular courts are otherwise responsible for enforcing. [178-180]

Cases Cited

By Abella J.

Referred to: *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47; *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481; *Lindenburger v. United Church of Canada* (1985), 10 O.A.C. 191; *Nathoo v. Nathoo*, [1996] B.C.J. No. 2720 (QL); *Amlani v. Hirani* (2000), 194 D.L.R. (4th) 543, 2000 BCSC 1653; *M. (N.M.) v. M. (N.S.)* (2004), 26 B.C.L.R. (4th) 80, 2004 BCSC 346; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Re Morris and Morris* (1973), 42 D.L.R. (3d) 550; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Young v. Young*, [1993] 4 S.C.R. 3; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6; H.C.

292/83, *Temple Mount Faithful v. Jerusalem District Police Commander*, 38(2) P.D. 449; *Christian Education South Africa v. Minister of Education* (2000), 10 B. Const. L.R. 1051; *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591; *D. v. France*, Application No. 10180/82, December 6, 1983, D.R. 35, p. 199; Trib. civ. Seine, February 22, 1957, *Gaz. Pal.* 1957.1.246; Civ. 2e, December 13, 1972, D. 1973.493; *Brett v. Brett*, [1969] 1 All E.R. 1007; *In the Marriage of Shulsinger* (1977), 13 A.L.R. 537; *In the Marriage of Steinmetz* (1980), 6 F.L.R. 554; *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (1983); *Waxstein v. Waxstein*, 395 N.Y.S.2d 877 (1976), aff'd 394 N.Y.S.2d 253 (1977); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (1973); *Minkin v. Minkin*, 434 A.2d 665 (1981); *Jane Doe v. John Doe*, Jerusalem Fam. Ct., No. 19270/03, December 21, 2004; H.C. 6751/04, *Sabag v. Supreme Rabbinical Court of Appeals*, 59(4) P.D. 817.

By Deschamps J. (dissenting)

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), [2004] 2 S.C.R. 650, 2004 SCC 48; *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995; *Re Morris and Morris* (1973), 42 D.L.R. (3d) 550; *Nathoo v. Nathoo*, [1996] B.C.J. No. 2720 (QL); *Amlani v. Hirani* (2000), 194 D.L.R. (4th) 543, 2000 BCSC 1653; *M. (N.M.) v. M. (N.S.)* (2004), 26 B.C.L.R. (4th) 80, 2004 BCSC 346; *Kaddoura v. Hammoud* (1998), 168 D.L.R. (4th) 503; *Despatie v. Tremblay* (1921), 47 B.R. 305; *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586; *Ouaknine v. Elbilia*, [1981] C.S. 32; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Syndicat*

Northcrest v. Amselem, [2004] 2 S.C.R. 551, 2004 SCC 47; *Ouellette v. Gingras*, [1972] C.A. 247; *Curé et marguilliers de l'œuvre et fabrique de la paroisse de St-Zacharie v. Morin*, [1968] C.S. 615; *Mathys v. Demers*, [1968] C.S. 172; *Bergeron v. Proulx*, [1967] C.S. 579; Civ. 2e, April 21, 1982, *Bull. civ.* II, No. 62; Civ. 2e, June 5, 1985, J.C.P. 1987.II.20728; Civ. 2e, June 15, 1988, *Bull. civ.* II, No. 146; Civ. 2e, November 21, 1990, D. 1991.434; *R. (S.B.) v. Governors of Denbigh High School*, [2007] 1 A.C. 100, [2006] UKHL 15; *Brett v. Brett*, [1969] 1 All E.R. 1007; *Leskun v. Leskun*, [2006] 1 S.C.R. 920, 2006 SCC 25; *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976); *Schwartz v. Schwartz*, 583 N.Y.S.2d 716 (1992); *Giahn v. Giahn*, N.Y. Sup. Ct., April 13, 2000, unreported; *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (1983); *Segal v. Segal*, 650 A.2d 996 (1994); H.C. 292/83, *Temple Mount Faithful v. Jerusalem District Police Commander*, 38(2) P.D. 449; Cr. A. 112/50, *Yosifof v. Attorney-General*, 5 P.D. 481; *Jane Doe v. John Doe*, Jerusalem Fam. Ct., No. 19270/03, December 21, 2004; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Christiaenssens v. Rigault*, [2006] Q.J. No. 5765 (QL), 2006 QCCA 853.

Statutes and Regulations Cited

Act respecting the implementation of the reform of the Civil Code, S.Q. 1992, c. 57, s. 9.

Canadian Charter of Rights and Freedoms, s. 2.

Canadian Multiculturalism Act, R.S.C. 1985, c. 24 (4th Supp.).

Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 3, 9.1.

Civil Code of Lower Canada, arts. 982, 983, 984.

Civil Code of Québec, S.Q. 1991, c. 64, arts. 1373, 1378, 1385, 1410, 1412, 1413, 1607, 1618, 1619.

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), ss. 15.1, 15.2, 16, 21.1.

Foundations of Law Act, 1980, 5740-1980, 34 L.S.I. 181 (1979-80), s. 1.

N.Y. Domestic Relations Law § 253 (Consol. 1990).

United States Constitution, First Amendment.

Treaties and Other International Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 9.

Authors Cited

Agostini, Éric. Observation sous Civ. 2e, 5 juin 1985, J.C.P. 1987.II.20728.

Agostini, Éric. Observation sous Civ. 2e, 21 novembre 1990, D. 1991.434.

Atlan, Gabrielle. *Les Juifs et le divorce: Droit, histoire et sociologie du divorce religieux*. New York: Peter Lang, 2002.

Barbier, Pierre. "Le problème du 'Gueth'", *Gaz. Pal.* 1987.484.

Barnett, Adrienne. "Getting a 'Get' — The Limits of Law's Authority?: *N. v. N. (Jurisdiction: Pre-Nuptial Agreement)* [1999] 2 F.L.R. 745" (2000), 8 *Fem. Legal Stud.* 241.

Baudouin et Jobin: Les obligations, 6e éd. par Pierre-Gabriel Jobin avec la collaboration de Nathalie Vézina. Cowansville, Qué.: Yvon Blais, 2005.

Benjamin, Ben. "Judaism and the Laws of Divorce", [2001] *UCL Jurisprudence Rev.* 177.

Bleich, J. David. "Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement" (1984), 16 *Conn. L. Rev.* 201.

Brierley, John E. C., and Roderick A. Macdonald. *Quebec Civil Law: An Introduction to Quebec Private Law*. Toronto: Emond Montgomery, 1993.

Canada. House of Commons. *House of Commons Debates*, vol. VI, 2nd Sess., 34th Parl., February 15, 1990, pp. 8375-77.

Canada. House of Commons. *House of Commons Debates*, vol. VIII, 2nd Sess., 34th Parl., May 4, 1990, pp. 11033-34.

Capell, Heather Lynn. "After the Glass Has Shattered: A Comparative Analysis of Orthodox Jewish Divorce in the United States and Israel" (1998), 33 *Tex. Int'l L.J.* 331.

Chigier, M. "Ruminations Over the Agunah Problem" (1981), 4 *Jewish L. Ann.* 207.

Comparato, Fábio Konder. *Essai d'analyse dualiste de l'obligation en droit privé*. Paris: Dalloz, 1964.

de Naurois, Louis. Observation sous Trib. civ. Metz, 27 avril 1955, Trib. civ. Grenoble, 7 mai 1958, Paris 1re, 4 février 1959, J.C.P. 1960.II.11632.

Einhorn, Talia. "Jewish Divorce in the International Arena", in Jürgen Basedow et al., eds., *Private Law in the International Arena: From National Conflict Rules Towards Harmonization and Unification: Liber Amicorum Kurt Siehr*. The Hague: T.M.C. Asser, 2000, 135.

Freeman, M. D. A. "Jews and the Law of Divorce in England" (1981), 4 *Jewish L. Ann.* 276.

Glenn, H. Patrick. "Where Heavens Meet: The Compelling of Religious Divorces" (1980), 28 *Am. J. Comp. L.* 1.

Greenawalt, Kent. "Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance" (1998), 71 *S. Cal. L. Rev.* 781.

Karim, Vincent. *Les obligations*, 2e éd. Montréal: Wilson & Lafleur, 2002.

Lapidoth, Ruth. "Freedom of Religion and of Conscience in Israel" (1998), 47 *Cath. U. L. Rev.* 441.

Larroumet, Christian. Note sous Civ. 2e, 13 décembre 1972, D. 1973.493.

Lluelles, Didier, et Benoît Moore. *Droit des obligations*. Montréal: Thémis, 2006.

Meislin, Bernard J. "Pursuit of the Wife's Right to a 'Get' in United States and Canadian Courts" (1981), 4 *Jewish L. Ann.* 250.

Ogilvie, M. H. *Religious Institutions and the Law in Canada*, 2nd ed. Toronto: Irwin Law, 2003.

Pineau, Jean. "Theory of Obligations", in *Reform of the Civil Code*, vol. 2A, *Obligations*.

Texts written for the Barreau du Québec and the Chambre des notaires du Québec. Translated by Susan Altschul. Montréal: Barreau du Québec, 1993.

Private Law Dictionary and Bilingual Lexicons: Obligations. Editorial Committee: France Allard et al. Cowansville, Qué.: Yvon Blais, 2003.

Québec. Assemblée nationale. *Journal des débats: Commissions parlementaires*, 3e sess., 32e lég., 16 décembre 1982, p. B-11609.

Québec. Ministère de la Justice. *Commentaires du ministre de la Justice — Le Code civil du Québec: Un mouvement de société*, t. I. Québec: Publications du Québec, 1993.

Riskin, Shlomo. *A Jewish Woman's Right to Divorce: A Halakhic History and a Solution for the Agunah.* Jersey City, New Jersey: KTAV Publishing, 2006.

Shachar, Ayelet. *Multicultural Jurisdictions: Cultural Differences and Women's Rights*. Cambridge: Cambridge University Press, 2001.

Shifman, Pinhas. "Family Law in Israel: The Struggle Between Religious and Secular Law" (1990), 24 *Isr. L. Rev.* 537.

Sossin, Lorne. *Boundaries of Judicial Review: The Law of Justiciability in Canada*. Scarborough, Ont.: Carswell, 1999.

Washofsky, Mark. "The Recalcitrant Husband: The Problem of Definition" (1981), 4 *Jewish L. Ann.* 144.

APPEAL from a judgment of the Quebec Court of Appeal (Hilton, Dutil and Bich JJ.A.), [2005] R.J.Q. 2482, 259 D.L.R. (4th) 55, [2005] R.D.F. 714, 36 C.C.L.T. (3d) 14, 31 R.F.L. (6th) 265, [2005] Q.J. No. 13563 (QL), 2005 QCCA 835, reversing a decision of Mass J., [2003] R.J.Q. 1189 (*sub nom. S.B.B. v. J.BE.M.*), [2003] R.D.F. 342, [2003] Q.J. No. 2896 (QL) (*sub nom. S.B.B. v. J.B.M.*). Appeal allowed, Deschamps and Charron JJ. dissenting.

Alan M. Stein, *William Brock*, *David Stolow* and *Brandon Wiener*, for the appellant.

Anne-France Goldwater and *Marie-Hélène Dubé*, for the respondent.

Andrew K. Lokan and *Jeff Larry*, for the intervener.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Rothstein JJ. was delivered by

[1] ABELLA J. — Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian Charter of Rights and Freedoms*, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.

[2] The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright- line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.

Background

[3] A *get* is a Jewish divorce. Only a husband can give one. A wife cannot obtain a *get* unless her husband agrees to give it. Under Jewish law, he does so by "releasing" his wife from the marriage and authorizing her to remarry. The process takes place before three rabbis in what is known as a *beth din*, or rabbinical court.

[4] The husband must voluntarily give the *get* and the wife consent to receive it. When he does not, she is without religious recourse, retaining the status of his wife and unable to remarry until he decides, in his absolute discretion, to divorce her. She is known as an *agunah* or "chained wife". Any children she would have on civil remarriage would be considered "illegitimate" under Jewish law.

[5] For an observant Jewish woman in Canada, this presents a dichotomous scenario: under Canadian law, she is free to divorce her husband regardless of his consent; under Jewish law, however, she remains married to him unless he gives his consent. This means that while she can remarry under Canadian law, she is prevented from remarrying in accordance with her religion. The inability to do so, for many Jewish women, results in the loss of their ability to remarry at all.

[6] The vast majority of Jewish husbands freely give their wives a *get*. Those who do not, however, represent a long-standing source of concern and frustration in Jewish communities (Talia Einhorn, "Jewish Divorce in the International Arena", in J. Basedow et

al., eds., *Private Law in the International Arena: From National Conflict Rules Towards Harmonization and Unification: Liber Amicorum Kurt Siehr* (2000), 135; H. Patrick Glenn, "Where Heavens Meet: The Compelling of Religious Divorces" (1980), 28 *Am. J. Comp. L.* 1; M. D. A. Freeman, "Jews and the Law of Divorce in England" (1981), 4 *Jewish L. Ann.* 276; Bernard J. Meislin, "Pursuit of the Wife's Right to a 'Get' in United States and Canadian Courts" (1981), 4 *Jewish L. Ann.* 250; Mark Washofsky, "The Recalcitrant Husband: The Problem of Definition" (1981), 4 *Jewish L. Ann.* 144; M. Chigier, "Ruminations Over the Agunah Problem" (1981), 4 *Jewish L. Ann.* 207; Shlomo Riskin, *A Jewish Woman's Right to Divorce: A Halakhic History and a Solution for the Agunah* (2006); Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001); and J. David Bleich, "Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement" (1984), 16 *Conn. L. Rev.* 201).

[7] In response to these concerns, after consultation with the leaders of 50 religious groups in Canada and with the specific agreement of the Roman Catholic, Presbyterian and Anglican churches, in 1990 the then Minister of Justice, Doug Lewis, introduced amendments to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), Bill C-61, giving a court discretionary authority to prevent a spouse from obtaining relief under the Act if that spouse refused to remove a barrier to religious remarriage (s. 21.1). At second reading, the Minister outlined the motivation for these amendments, explaining:

> The bill before us today is an amendment to the Divorce Act which would provide a court with discretionary powers to preclude a spouse from obtaining relief or proceeding under the Divorce Act where that spouse refuses to remove a barrier to religious remarriage and where the power to remove the barrier to

religious remarriage lies solely with that person. Where the court is satisfied that the spouse who refuses to remove the barrier has genuine grounds of a religious or conscientious nature for doing so, it need not exercise its discretion to grant the remedy provided for in this legislation.

. . . A spouse should not be able to refuse to participate in a Jewish religious divorce — called a Get — in order to obtain concessions in a civil divorce. The Get should not be used as a bargaining tool for child custody and access or monetary support.

. . . I am concerned about protecting the integrity of the Divorce Act and preventing persons from avoiding the application of the principles contained in the act. For example, a wife may feel compelled to agree to custody arrangements which are not truly in the best interests of a couple's child in order to obtain a Get.

I want to take a few minutes to describe briefly the dilemma certain Jewish persons face because of their religious divorce procedures. In the Jewish religion divorce is accomplished by the delivery of a Get from the husband and its acceptance by the wife in the presence of a Rabbinical Court. According to the Jewish religious traditions, the procedure cannot be changed. Without a Get, a Jewish woman cannot remarry in her own faith. Children of a subsequent civil marriage suffer religious disabilities. While difficult remarriage within the Jewish faith for a man in the same circumstances is not impossible.

. . .

. . . the government is moving where it can and where it is brought to the government's attention to eliminate sexism and gender bias in the law. . . .

. . .

It is the case that in some religions, the Roman Catholic, Greek Orthodox and Islam, annulment or divorce may proceed more easily and faster if the couple agree.

However, in all these cases, the authority to grant the annulment or divorce rests with the religious tribunal, not the couple.

An un-co-operative spouse may delay a decision, but ultimately he or she cannot prevent the religious tribunal from rendering its decision.

In these religions, the spouse initiating the action can ask the religious authorities to deal with this problem.

The Jewish spouse does not have that recourse.

(*House of Commons Debates*, vol. VI, 2nd Sess., 34th Parl., February 15, 1990, at pp. 8375-77)

[8] At third reading of these amendments, Kim Campbell, who succeeded Mr. Lewis as Minister of Justice, confirmed the policy rationale for this legislative initiative:

> The purpose of this bill is to assist Jewish citizens whose spouses are withholding a religious divorce, which is called a get, in order to obtain concessions in a civil divorce. . . .
>
> . . .
>
> The consequences to women deprived of a get and loyal to their faith are severe. They may not remarry within their faith, even though civilly divorced. If they do remarry, children from a second civil marriage are considered illegitimate and restricted from practising their religion. Such consequences to a religious person leave them open to blackmail from the spouse withholding the get. For example, the spouse could say, "Give up your claim for support or custody of the children and I will offer the get." Even those not contemplating a second marriage find it uncomfortable to be considered married within their religion to someone they have divorced civilly.
>
> The vast majority of adherents to the Jewish faith condemn as unfair this practice of bargaining with the get. Yet they are powerless to amend the situation. Persuasion by rabbis has often proved ineffective. Since the dispersion of the Jews there is no central Jewish authority to amend the Jewish legal code, . . . which governs the get. Nor is there any modern-day authority within rabbinical courts to enforce the offer and receipt of gets. Full support for Bill C-61 was expressed by major Jewish organizations who attended the hearings before the legislative committee. Representatives of the three Parties praised the bill and quickly passed two minor technical amendments.
>
> . . .
>
> As well, the Toronto Board of Orthodox Rabbis . . . endorsed the legislation and the two amendments.
>
> . . .
>
> [*Translation*]

> Bill C-61 will enable Canada's Jewish community to preserve its traditions without destabilizing models of family life. It also ensures that the principles of the Divorce Act with respect to alimony and custody are applied equally to all Canadians.
>
> (*House of Commons Debates*, vol. VIII, 2nd Sess., 34th Parl., May 4, 1990, at pp. 11033-34)

[9] For many years, civil courts have attempted to remedy, or compensate for, the husband's recalcitrance in refusing to provide a *get* to his wife. They are often faced with assertions by the husband that such interventions are a violation of his freedom of religion.

[10] This is one such case. The husband and wife, each represented by counsel, voluntarily negotiated and signed a "Consent to Corollary Relief" in order to settle their matrimonial disputes. One of the commitments made in the agreement was that they would attend before the rabbinical court to obtain a *get*.

[11] The husband refused to do so for 15 years, challenging the very validity of the agreement he freely made, claiming that its religious aspect rendered it unenforceable under Quebec law, and arguing that he was entitled to be shielded by his right to freedom of religion from the consequences of refusing to comply with his commitment.

[12] The wife, on the other hand, asserted that the agreement to attend and obtain a *get* was part of the trade-offs negotiated by the parties (they signed mutual releases) and was consistent with Quebec law and values. She sought a remedy in the form of damages to compensate her for the husband's extended non-compliance. She did not seek an order of

specific performance directing him to appear before the rabbis.

[13] There are, therefore, two issues raised by this case. The first is whether the agreement in the Consent to give a *get* is a valid and binding contractual obligation under Quebec law. This first question involves examining the relevant provisions and principles of the *Civil Code of Québec*, S.Q. 1991, c. 64.

[14] If the commitment is a legally binding one under Quebec law, we must determine whether the husband can rely on freedom of religion to avoid the legal consequences of failing to comply with a lawful agreement. This inquiry takes place within the boundaries set by the provisions and principles of the Quebec *Charter of human rights and freedoms*, R.S.Q., c. C-12, where the claim of the husband to religious freedom is balanced against the claim of the wife that acceding to the husband's argument is disproportionately harmful to her personally, and, more generally, to democratic values and Quebec's best interests.

[15] The judicial role in balancing and reconciling competing interests and values when freedom of religion is raised, is one that protects the tolerance Quebec endorsed in the Quebec *Charter*. Section 9.1 states that in exercising their fundamental freedoms and rights — including freedom of religion — persons "shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec". This provision is a legislative direction that the courts are to protect the rights of Quebec's citizens in a way that is balanced and reconciled with other public values.

[16] In my view, 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. As the comments of the former Ministers of Justice reveal, such agreements are consistent with public policy, our approach to marriage and divorce, and our commitment to eradicating gender discrimination.

[17] I am also persuaded that, applying the balancing mandated by s. 9.1 of the Quebec *Charter*, 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.

[18] This is not, as implied by the dissent, an unwarranted secular trespass into religious fields, nor does it amount to judicial sanction of the vagaries of an individual's religion. In deciding cases involving freedom of religion, the courts cannot ignore religion. To determine whether a particular claim to freedom of religion is entitled to protection, a court must take into account the particular religion, the particular religious right, and the particular personal and public consequences, including the religious consequences, of enforcing that right.

[19] Mediating these highly personal claims to religious rights with the wider public interest is a task that has been assigned to the courts by legislatures across the country. It is a well-accepted function carried out for decades by human rights commissions under

federal and provincial statutes and, for 25 years, by judges under the *Canadian Charter of Rights and Freedoms*, to ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion.

[20] This case fits comfortably in that tradition. It represents yet another case in which the claim to religious protection is balanced against competing interests. The Court is not asked to endorse or apply a religious norm. It is asked to exercise its responsibility, conferred by the Quebec *Charter*, to determine whether the husband is entitled to succeed in his argument that requiring him to pay damages for the breach of a legally binding agreement violates his freedom of religion. No new principle emerges from the result in this case. Courts are routinely asked whether a contract is valid. And the inquiry under the Quebec *Charter* is the application of a classic and cautious balancing that courts are required to undertake in determining whether a particular claim to religious freedom is sustainable, one case at a time, attempting always to be respectful of the complexity, sensitivity, and individuality inherent in these issues.

Prior Proceedings

[21] Stephanie Bruker married Jason Marcovitz on July 27, 1969. Although their degrees of observance differ, both consider themselves to be religious Jews.

[22] Mr. Marcovitz was previously married and had granted his first wife a *get.*

[23] Divorce proceedings were commenced by Ms. Bruker in 1980. She was 31 and Mr. Marcovitz was 48. An agreement on corollary matters was negotiated with the assistance of separate legal counsel and signed by both of them three months later. This "Consent to Corollary Relief" included terms regarding the custody of their two children, child support payments, and lump sum spousal support.

[24] Paragraph 12 of the Consent stated that the parties agreed to appear before the rabbinical authorities to obtain a *get* immediately upon the granting of the Decree Nisi. A Decree Nisi was granted on October 23, 1980. Among other provisions, it ordered the parties to comply with the Consent. A Decree Absolute was granted on February 9, 1981.

[25] Despite Ms. Bruker's repeated requests, both personally and through various rabbis, Mr. Marcovitz consistently refused to provide a *get* for 15 years.

[26] Not surprisingly, the relationship between the parties deteriorated as Mr. Marcovitz's refusals continued. In July 1989, nine years after the Decree Nisi, Ms. Bruker began proceedings for breach of the Consent, initially claiming damages in the amount of $500,000 for her inability to remarry and for being prevented from having children who would be considered "legitimate" under Jewish law.

[27] Mr. Marcovitz, in response, argued that Ms. Bruker had repudiated the Consent by continually seeking increases in child support payments, and complained that he saw his two daughters irregularly. He also questioned Ms. Bruker's devotion to the Jewish faith.

[28] In 1990, pursuant to s. 21.1 of the *Divorce Act*, Ms. Bruker filed an affidavit confirming that, despite her formal requests, Mr. Marcovitz had not given her a *get*. As a result, when Mr. Marcovitz brought motions in November 1995 seeking to quash the affidavit and to have his obligation to pay child support retroactively rescinded, Marcelin J. declined to hear the motions and ordered that the matters be put over to December 6, 1995.

[29] On December 5, 1995, Mr. Marcovitz appeared before the rabbinical court of Montréal and agreed to deliver the *get*. He was 63 and Ms. Bruker was almost 47. In 1996, Ms. Bruker substantially increased the amount of damages she was seeking.

[30] Ms. Bruker did not remarry or have any other children.

[31] At trial, Mass J. held that once Mr. Marcovitz signed a civil agreement, the obligation to appear before the rabbinical authorities for the purpose of obtaining a *get* "moved into the realm of the civil courts" ([2003] R.J.Q. 1189, at para. 19). He found that as a civil contract, notwithstanding that its purpose was partly to compel religious obligations, the Consent was valid and binding and that pursuant to Paragraph 12, Mr. Marcovitz had "a clear and unequivocal civil law obligation to appear 'immediately' before the Rabbinical authorities" (para. 19). As he noted:

> The pith and essence of what is being asked for in this case is not religious. . . . [T]he case is an assessment of damages stemming from a factual situation which involves Jewish parties and Jewish institutions — but principles of Jewish law do not have to be examined in depth. [para. 30]

[32] In his view, a claim for damages based on a breach of a civil obligation, even one with religious aspects, remains within the domain of the civil courts.

[33] Based on the expert evidence, Mass J. concluded that had Mr. Marcovitz sought the *get* immediately, as he had agreed to do, it would have been granted by the rabbinical court. This meant that the breach of the obligation to appear before the rabbinical authorities was the cause of the damages claimed by Ms. Bruker. Finding that the failure of Mr. Marcovitz to grant the *get* had direct consequences on Ms. Bruker's life by depriving her "of the opportunity to marry within her community during this period" (para. 35), Mass J. ordered a total of $47,500 in damages: $2,500 for each of the 15 years between the Decree Nisi and the *get*, and $10,000 for Ms. Bruker's inability to have children considered "legitimate" under Jewish law.

[34] I digress to address an issue raised in the dissent. Initially, Mr. Marcovitz challenged the constitutionality of s. 21.1 of the *Divorce Act*. In agreeing not to pursue his constitutional challenge, Mr. Marcovitz agreed to a court order which contained the following authorizations:

> [6] AUTHORIZES that [Mr. Marcovitz] may argue the question of justiciability in his case as if s. 21.1 of the Divorce Act did not exist.
>
> [7] AUTHORIZES that [Ms. Bruker] may argue the question of credibility as to the circumstances in which the ghet was given, with reference to s. 21.1 of the Divorce Act.

It is not the case, as suggested by the dissent, that the parties agreed not to refer to this

section. What they agreed to was that Mr. Marcovitz could argue "justiciability" without reference to this section. Ms. Bruker was explicitly authorized to refer to it when arguing about the circumstances surrounding the *get*. Moreover, Mr. Marcovitz's factum deals expressly with s. 21.1 in two paragraphs in which he argues that the provision is an inappropriate intervention by civil courts into religious matters:

> There is considerable social opprobrium within the Jewish community aimed at spouses who refuse to collaborate in the *ghet* process. This inspired Jewish jurists and community leaders to request, and obtain, the implementation of s. 21.1 of the *Divorce Act* . . . and ss. 2(4)-2(7) and 56(5)-(7) of the *Ontario Family Law Act*, R.S.O. 1990, c. F.3. The state purpose was to protect Jewish spouses from extortion in divorce negotiations.
>
> Section 21.1 of [the] *Divorce Act* operates whether the recalcitrant spouse is the Plaintiff or the Defendant: it prevents a spouse from exercising his civil rights if he refuses to remove the religious barrier, unless the spouse discloses valid reasons relating to religion or conscience, in a sworn affidavit. This necessarily entails a judge being called upon to examine the religious legitimacy of the refusal. . . .

And, in oral argument before this Court, Mr. Marcovitz's counsel stated:

> Not only that, we even have the additional remedy of section 21.1 of the *Divorce Act*, which specifically is a legislator's clear intention to remove the issue of religious divorce . . . [a]nd the barriers to religious divorce, from any negotiation or bargaining in contract. . . .

[35] Clearly the parties did not agree that s. 21.1 could not be used in analyzing the other issues in this case. They agreed not to dispute the constitutionality of the provision, an agreement that has been respected throughout these proceedings, including in this Court. Nothing in these reasons purports in any way to decide the constitutionality of s. 21.1, but

I have difficulty seeing how an agreement to abandon a constitutional argument about a statutory provision can be interpreted as an agreement to pretend that the provision, or the policy reasons behind it, do not exist.

[36] The Court of Appeal allowed Mr. Marcovitz's appeal ([2005] R.J.Q. 2482). Hilton J.A., writing for a unanimous court, found that because "the substance of the . . . obligation is religious in nature, irrespective of the form in which the obligation is stated" (para. 76), the obligation was a moral one. It was therefore unenforceable by the courts. Requiring Mr. Marcovitz 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.

[37] In so deciding, the Court of Appeal relied in part on this Court's direction in *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47, that

> the 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. . . . [para. 50]

[38] Ms. Bruker's cross-appeal for an increase in damages was dismissed.

Analysis

A. *Justiciability of the Agreement to Remove Religious Barriers to Remarriage*

[39] The provision at the heart of this dispute is Paragraph 12 of the parties' Consent to Corollary Relief, by which they agreed 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. [Emphasis added.]

[40] The issues in this appeal, as mentioned earlier, are whether this obligation constitutes a valid and binding civil obligation under Quebec law and, if it does, whether Mr. Marcovitz is exonerated from liability for failing to perform his obligation on the basis that it violated his freedom of religion.

[41] Unlike my colleague Justice Deschamps, with great respect, I see this case as one properly attracting judicial attention. The fact that a dispute has a religious aspect does not by itself make it non-justiciable. In *Boundaries of Judicial Review: The Law of Justiciability in Canada* (1999), Lorne Sossin defined what is meant by justiciability as

> a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable. . . . [p. 2]

[42] In *Religious Institutions and the Law in Canada* (2nd ed. 2003), M. H. Ogilvie

explained why issues with a religious aspect may be justiciable:

> Subject to any protections accorded to individuals and religious groups pursuant to the *Canadian Charter of Rights and Freedoms*, which have yet to be worked out in detail by the courts, religious institutions and persons in Canada are subject to the sovereignty of Parliament and the sanctioning powers of the state invoked by the courts when disputes concerning religion are brought for resolution.
>
> Nevertheless, the courts have expressed reluctance to consider issues relating to religious institutions, evidencing some embarrassment that internal church disputes should be determined by secular courts and doubting the appropriateness of judicial intervention. The courts have stated that they will not consider matters that are strictly spiritual or narrowly doctrinal in nature, but will intervene where civil rights or property rights have been invaded. [Emphasis added; pp. 217-18.]

[43] The approach is correctly stated by the Canadian Civil Liberties Association in its factum as follows:

> [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. [para. 26]

[44] This is reflected in *McCaw v. United Church of Canada* (1991), 4 O.R. (3d) 481, a case involving the dismissal of a minister from his church, where the religious aspect of the dispute did not deter the Ontario Court of Appeal from deciding that the dispute was justiciable. Even though the "law of the church as laid out in the provisions of the [church] Manual" was at issue (p. 485), the court accepted jurisdiction and awarded the minister damages for lost wages and benefits. (See also *Lindenburger v. United Church of Canada*

(1985), 10 O.A.C. 191; *Nathoo v. Nathoo*, [1996] B.C.J. No. 2720 (QL) (S.C.); *Amlani v. Hirani* (2000), 194 D.L.R. (4th) 543, 2000 BCSC 1653; *M. (N.M.) v. M. (N.S.)* (2004), 26 B.C.L.R. (4th) 80, 2004 BCSC 346.)

[45] Similarly, in *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, a Hutterite colony decided to expel some of its members from the community without giving them an opportunity to respond to the decision. When the members refused to leave, the colony asked the courts to enforce the expulsion and to order the members to return all colony property to the colony. The members claimed that they had a right to remain in the colony and that the courts could not enforce the expulsion. Gonthier J., writing for the majority, noted that while the courts may not intervene in strictly doctrinal or spiritual matters, they will when civil or property rights are engaged. Once the court takes jurisdiction over a dispute with religious components, he continued, it must try "to come to the best understanding possible of the applicable tradition and custom" (p. 191). Gonthier J. held that, in the absence of a timely and adequate opportunity to make a response, the members could not be expelled.

[46] In the case before us, I find the dissenting reasons in *Re Morris and Morris* (1973), 42 D.L.R. (3d) 550 (Man. C.A.), compelling. While the issue in that case was the enforceability of a provision of a *ketubah*, or Jewish marriage contract, an issue we are not called upon to consider, the language of Freedman C.J.M. is nonetheless helpful:

> That the [marriage] contract is deeply affected by religious considerations is not determinative of the issue. That is the beginning and not the end of the matter.

> Some contracts rooted in the religion of a particular faith may indeed be contrary to public policy. Others may not. Our task is to determine whether the rights and obligations flowing from the . . . contract — specifically, the husband's obligation to give and the wife's right to receive a *Get* — are contrary to public policy.
>
> I find difficulty in pin-pointing the precise aspect of public policy which the [agreement to provide a *get*] may be said to offend. The attack upon it is on more general grounds. It appears that the real basis on which enforcement of the contract is being resisted is simply that it rests on religion, and that on grounds of public policy the Court should keep out of that field. But the law reports contain many instances of Courts dealing with disputes having a religious origin or basis. . . . In each case some temporal right confronted the Court, and it did not hesitate to adjudicate thereon. [pp. 559-60]

[47] The fact that Paragraph 12 of the Consent had religious elements does not thereby immunize it from judicial scrutiny. We are not dealing with judicial review of doctrinal religious 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.

B. *Validity of the Agreement under Quebec Law*

[48] The next question is whether the obligation is valid and binding under Quebec law. I note at the outset that the parties litigated this case without any consideration of the impact of the coming into force of the *Civil Code of Québec* ("C.C.Q."), on January 1, 1994, and of the attendant issues of transitional law. Throughout these proceedings, neither the

parties nor the courts made any reference to the *Civil Code of Lower Canada*. Because Ms. Bruker's action was commenced in July 1989, the *Civil Code of Lower Canada*, especially arts. 982 to 984, technically governed the parties, as provided by s. 9 of the *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57. However, since the new C.C.Q. retained the key principles governing the formation of contracts under Quebec law while modifying and clarifying the relevant provisions of the *Civil Code of Lower Canada* (J. Pineau, "Theory of Obligations", in *Reform of the Civil Code* (1993), vol. 2A, at pp. 11-12), the parties' reliance on the C.C.Q. did not have a significant impact on this litigation. Under these circumstances, and without diminishing the significance of transitional law, these reasons refer, as did those of the trial judge and Court of Appeal, to the articles of the C.C.Q.

[49] The civil law of Quebec recognizes three kinds of obligations: moral, civil (or legal) and natural. Only the first two are engaged in this case. They are defined in *Private Law Dictionary and Bilingual Lexicons: Obligations* (2003), as follows:

> **MORAL OBLIGATION**
>
> Obligation binding only as a matter of conscience or honour, and which, unlike a juridical obligation, cannot be enforced by the State. For example, the duty of charity toward one's neighbour. . . .
>
> **CIVIL OBLIGATION**
>
> Obligation susceptible of compulsory performance. For example, the obligation of support between spouses. "Civil obligations are those which are fully enforceable by means of *an action, i.e.*, a right accorded to a creditor to obtain satisfaction by means of legal proceedings and under the protection of the state" (Aubry & Rau, *Civil Law*, vol. 4, n^{o} 297, p. 3).

[50] Jean-Louis Baudouin and Pierre-Gabriel Jobin explain the difference in enforceability between a moral and civil obligation in the following way:

> [TRANSLATION] A civil obligation is sanctioned by law, which means that the creditor may enforce it in court. In contrast, a moral obligation is outside the legal realm and is not sanctioned by law, and its binding force is based solely on conscience, that is, on remorse. The "creditor" of a moral obligation may not seek to enforce it in court, since it can only be performed voluntarily. Moral obligations include the duty to give to charity and the duty to help one's neighbour — which should be distinguished from the civil obligation to assist a person in danger.
>
> (*Baudouin et Jobin: Les obligations* (6th ed. 2005), at para. 26; see also John E. C. Brierley and Roderick A. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (1993), at p. 382.)

[51] I do not see the religious aspect of the obligation in Paragraph 12 of the Consent as a barrier to its civil validity. It is true that a party cannot be compelled to execute a moral duty, but there is nothing in the *Civil Code* preventing someone from transforming his or her moral obligations into legally valid and binding ones. Giving money to charity, for example, could be characterized as a moral and, therefore, legally unenforceable obligation. But if an individual enters into a contract with a particular charity agreeing to make a donation, the obligation may well become a valid and binding one if it complies with the requirements of a contract under the C.C.Q. If it does, it is transformed from a moral obligation to a civil one enforceable by the courts.

[52] A contract is defined in art. 1378, para. 1 C.C.Q. as

> an agreement of wills by which one or several persons obligate themselves to

one or several other persons to perform a prestation.

A contract's formation is governed by art. 1385 C.C.Q., which states:

> **1385.** A contract is formed by the sole exchange of consents between persons having capacity to contract, unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation, or unless the parties require the contract to take the form of a solemn agreement.
>
> It is also of the essence of a contract that it have a cause and an object.

[53] There is no dispute as to the capacity and consent of the parties in this case. Nor do I see anything objectionable in the "cause" of the contractual provision, namely, the mutual desire of the parties to be contemporaneously free to remarry in accordance with both their religious beliefs and secular rights.

[54] Mr. Marcovitz argues, however, that, contrary to arts. 1412 and 1413 C.C.Q., the "object" of the contractual provision — the attendance of the parties before the rabbinical court to obtain a divorce in accordance with Jewish law to permit remarriage under that law — is against public order because it is a violation of his right to freedom of religion. This was expressed in his factum as follows:

> Article 1413 *C.C.Q.* cautions that a contract whose object is contrary to public order is null. It is contrary to public order to consider one may contract to restrain the free exercise of one's fundamental freedoms, including freedom of religion and conscience.

[55] The C.C.Q. defines the object of a contract in art. 1412, which states that

> **1412.** The object of a contract is the juridical operation envisaged by the parties at the time of its formation, as it emerges from all the rights and obligations created by the contract.

According to the *Commentaires du ministre de la Justice* (1993), the definition in art. 1412 codifies the doctrine and jurisprudence on the object of contracts (vol. I, at pp. 857-58). The *Civil Code of Lower Canada* had not provided a specific definition.

[56] The C.C.Q. also defines the object of an obligation as follows:

> **1373.** The object of an obligation is the prestation that the debtor is bound to render to the creditor and which consists in doing or not doing something.
>
> The debtor is bound to render a prestation that is possible and determinate or determinable and that is neither forbidden by law nor contrary to public order.

The object of obligations may include a wide variety of prestations "in doing or not doing something" (V. Karim, *Les obligations* (2nd ed. 2002), vol. 1, at p. 19). The object, or prestation, need not be a material thing. It can consist, for example, of a positive action, a payment, or a delivery (Karim, at p. 19).

[57] The concept of the object of a contract is even broader than the object of obligations (Baudouin and Jobin, at paras. 19 and 367). It is the legal operation that is contemplated by the parties (D. Lluelles and B. Moore, *Droit des obligations* (2006), at para.

1051) and may include a number of specific obligations with, correlatively, specific objects.

[58] With great respect, I see the concept of "juridical operation" (or object of the contract) in art. 1412 as attracting a much broader interpretation than the one proposed by Deschamps J., based largely on my view that art. 1412 is limited only by art. 1413, which states:

> **1413.** A contract whose object is prohibited by law or contrary to public order is null.

[59] There are therefore only two limitations on the object of a contract: it cannot be prohibited by law or be contrary to public order. Consistent with the principle of freedom of contract, this offers a wide scope for what is a legally permissible object. As Baudouin and Jobin note:

> [TRANSLATION] Although every contract must have an object, what that object might be is infinitely varied, since by virtue of the principle of freedom of contract, the parties can perform any type of juridical operation that is within the limits imposed by law and by public order. [Emphasis added; para. 368.]

[60] Therefore, unless Mr. Marcovitz is correct in his assertion that the object of Paragraph 12 is contrary to public order, it is not excluded from the interpretive scope of "juridical operation" in art. 1412 and the contractual obligation is valid and binding.

[61] What constitutes public order, as Baudouin and Jobin explain, is variable:

> [TRANSLATION] [The content of public order] changes over time, since this concept basically represents certain values at a given point in the evolution of society.
>
> . . .
>
> Absent any clear indication in the statute, it is the court that assesses whether the provision in question is of public order and determines its concrete effect. [paras. 139 and 142]

[62] I accept that there may well be agreements with religious aspects that would be against public order. It will obviously depend in each case on the nature of the undertaking and, in particular, 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, or an agreement that violates our employment laws, for example, will likely be found to be contrary to public order.

[63] There is no doubt in my mind, however, about Mr. Marcovitz's agreement to provide a *get*. It is consistent with, not contrary to, public order. The 1990 *Divorce Act* amendments referred to earlier in these reasons contradict the argument that an agreement to grant a *get* breaches the principle of public order. On the contrary, Parliament manifested a clear intention to encourage the removal of religious barriers to remarriage. Moreover, as amplified later in these reasons, the enforceability of a promise by a husband to provide a *get* harmonizes with Canada's approach to religious freedom, to equality rights, to divorce and remarriage generally, and has been judicially recognized internationally.

[64] Accordingly, since the object is not contrary to public order, and since all the

other requirements for a valid contract in accordance with Quebec law exist, the contractual obligation contained in Paragraph 12 is valid and legally binding under Quebec law.

C. *Application of the Quebec Charter*

[65] There remains Mr. Marcovitz's argument that he is exonerated by s. 3 of the Quebec *Charter* from the consequences of breaching Paragraph 12 of the Consent. He asserts that an award of damages would be a violation of his freedom of religion because it would condemn him *ex post facto* "for abiding by his religion in the first place." Section 3 states:

> **3.** Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

[66] This Court's most recent decision examining the scope of this provision is *Amselem*. Orthodox Jews who owned units in a condominium building in Montréal sought to construct small enclosed structures known as "succahs" on their balconies for the Jewish festival of Succot. A by-law in the declaration of co-ownership prohibited them from doing so.

[67] The test applied by the majority in *Amselem* examines whether an individual's sincerely held and good faith religious belief is being unjustifiably limited to a non-trivial degree. Applying this test to the facts of this case, I see no *prima facie* infringement of Mr.

Marcovitz's religious freedom.

[68] I start by querying whether Mr. Marcovitz, in good faith, sincerely believed that granting a *get* was an act to which he objected as a matter of religious belief or conscience. It is not clear to me what aspect of his religious beliefs prevented him from providing a *get*. He never, in fact, offered a religious reason for refusing to provide a *get*. Rather, he said that his refusal was based on the fact that, in his words:

> Mrs. Bruker harassed me, she alienated my kids from me, she stole some money from me, she stole some silverware from my mother, she prevented my proper visitation with the kids. Those are the reasons . . . . [Appellant's Record, at p. 66]

[69] This concession confirms, in my view, that his refusal to provide the *get* was based less on religious conviction than on the fact that he was angry at Ms. Bruker. His religion does not require him to refuse to give Ms. Bruker a *get*. The contrary is true. There is no doubt that at Jewish law he *could* refuse to give one, but that is very different from Mr. Marcovitz being prevented by a tenet of his religious beliefs from complying with a legal obligation he voluntarily entered into and of which he took the negotiated benefits.

[70] Even if requiring him to comply with his agreement to give a *get* can be said to conflict with a sincerely held religious belief and to have non-trivial consequences for him, both of which I have difficulty discerning, such a *prima facie* infringement does not survive the balancing mandated by this Court's jurisprudence and the Quebec *Charter*.

[71] I start the balancing analysis with the provenance of this Court's robust interpretation of freedom of religion, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, where Dickson J. confirmed the broad contours of the right in the constitutional context as follows:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. [p. 336]

[72] Notably, he also confirmed that religious freedoms were nonetheless subject to limitations when they disproportionately collided with other significant public rights and interests:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> . . .
>
> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that <u>such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own</u>. [Emphasis added; pp. 337 and 346.]

(See also *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 121-22; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 182; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 226; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at

paras. 72 and 94; and *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6, at para. 26.)

[73] Other jurisdictions have similarly concluded that the invocation of freedom of religion does not, by itself, grant immunity from the need to weigh the assertion against competing values or harm. Two examples suffice. In H.C. 292/83, *Temple Mount Faithful v. Jerusalem District Police Commander*, 38(2) P.D. 449, the Israeli Supreme Court allowed a petition from some Jewish worshippers seeking to pray in a location where a clash with Muslim worshippers appeared inevitable. Barak J. warned:

> Freedom of conscience, belief, religion and worship is a relative one. It has to be balanced with other rights and interests which also deserve protection, like private and public property, and freedom of movement. One of the interests to be taken into consideration is public order and security.

[74] And in *Christian Education South Africa v. Minister of Education* (2000), 10 B. Const. L.R. 1051 (S. Afr. Const. Ct.), Sachs J., for a unanimous court, explored the limitations of religious freedom in a challenge to a law prohibiting corporal punishment of students in schools. Christian Education South Africa, an association of 196 independent Christian schools, claimed that corporal punishment was mandated by the Bible. In a decision upholding the prohibition against punishment, Sachs J. explained:

> The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all

> its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law. [para. 35]

[75] And in *Amselem*, the majority in this Court observed that

> [c]onduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. . . .
>
> Indeed, freedom of religion . . . may be made subject to overriding societal concerns. [paras. 62-63]

[76] In Quebec, the fact that rights and freedoms, including freedom of religion, are limited by the extent to which their exercise is harmful to others, finds expression in s. 9.1 of the Quebec *Charter*. Only the first paragraph of s. 9.1 is engaged. It states:

> **9.1.** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

[77] Section 9.1 confirms the principle that the assertion of a claim to religious freedom must be reconciled with countervailing rights, values, and harm. A balancing of competing rights and values appears to have been what was intended when s. 9.1 was introduced in 1982, as reflected in the following words of the then Quebec Minister of Justice, M^{e} Marc-André Bédard:

> [TRANSLATION] The purpose of s. 9.1 is to temper the absoluteness of the freedoms and rights set out in ss. 1 through 9 both by imposing limits, which are set out in the first paragraph, on the holders of those rights and freedoms in relation to other citizens . . . .
>
> (*Journal des débats: Commissions parlementaires*, 3rd Sess., 32nd Leg., December 16, 1982, at p. B-11609)

(See *Amselem*, at paras. 154-57, *per* Bastarache J., and para. 191, *per* Binnie J.; *Aubry v. Éditions Vice-Versa inc.*, [1998] 1 S.C.R. 591.)

[78] Mr. Marcovitz's claim must therefore be weighed against the "democratic values, public order and the general well-being of the citizens of Québec" stipulated by s. 9.1. We thereby enter the complex, nuanced, fact-specific territory referred to at the outset of these reasons.

[79] Mr. Marcovitz, it seems to me, has little to put on the scales. To begin, he freely entered into a valid and binding contractual obligation and now seeks to have it set aside based on *ex post facto* religious compunctions. In my view, it is this attempt to resile from his binding promise, not the enforcement of the obligation, that offends public order.

[80] But the public policy benefit of preventing individuals from avoiding the usual legal consequences of their contractual breaches, is only one of the factors that weighs against his claim. The significant intrusions into our constitutionally and statutorily articulated commitments to equality, religious freedom and autonomous choice in marriage and divorce that flow from the breach of his legal obligation are what weigh most heavily

against him.

[81] Section 21.1 of the *Divorce Act*, which gives a court discretionary authority to rebuff a spouse in civil proceedings who obstructs religious remarriage, is a clear indication that it is public policy in this country that such barriers are to be discouraged. As the comments of the then Ministers of Justice show, these amendments received overwhelming support from the Jewish community, including its more religious elements, reflecting a consensus that the refusal to provide a *get* was an unwarranted indignity imposed on Jewish women and, to the extent possible, one that should not be countenanced by Canada's legal system.3

[82] We also accept the right of Canadians to decide for themselves whether their marriage has irretrievably broken down and we attempt to facilitate, rather than impede, their ability to continue their lives, including with new families. Moreover, under Canadian law, marriage and divorce are available equally to men and women. A *get*, on the other hand, can only be given under Jewish law by a husband. For those Jewish women whose religious principles prevent them from considering remarriage unless they are able to do so in accordance with Jewish law, the denial of a *get* is the denial of the right to remarry. It is true that *get* also requires the consent of the wife, but as Ayelet Shachar points out in *Multicultural Jurisdictions*, the law has a disparate impact on women:

> The family law realm . . . vividly illustrates the troubling paradox of multicultural vulnerability, by demonstrating how well-meaning attempts to respect differences often translate into a license for subordination of a particular category of group members — in this instance, primarily women. [p. 62]

The refusal of a husband to provide a *get*, therefore, arbitrarily denies his wife access to a remedy she independently has under Canadian law and denies her the ability to remarry and get on with her life in accordance with her religious beliefs.

[83] There is also support internationally for courts protecting Jewish women from husbands who refuse to provide a religious divorce.

[84] The use of damages to compensate someone whose spouse has refused to provide a *get* was upheld by the European Commission of Human Rights. In *D. v. France*, Application No. 10180/82, December 6, 1983, D.R. 35, p. 199, the husband had been ordered by a French court to pay his ex-wife 25 000 francs to compensate her for his refusal to deliver a *get*. The husband applied to the Commission, arguing that his right to freedom of conscience and religion under the *European Convention on Human Rights* was violated by this award of damages. The Commission rejected his application, noting that "under Hebrew law it is customary to hand over the letter of repudiation after the civil divorce has been pronounced, and that no man with genuine religious convictions would contemplate delaying the remittance of this letter to his ex-wife" (p. 202). It further held that "in refusing to hand over the letter of repudiation establishing the religious divorce to his ex-wife, the applicant was not manifesting his religion in observance or practice, within the meaning of Article 9, para. 1 of the Convention" (p. 202).

[85] French courts have held that the refusal to provide the *get* is a delictual fault. The remedy provided is the payment of damages to compensate the wife. In Trib. civ. Seine,

February 22, 1957, *Gaz. Pal.* 1957.1.246, for example, the husband had divorced his wife under civil law but refused to deliver a *get* to her. The Tribunal civil de la Seine held:

> [TRANSLATION] Whereas the *get* is a purely religious act of repudiation that can have no effect — from a civil standpoint — on the breakdown of the marital relationship, to which effect has already been given by the divorce; and whereas it cannot therefore be properly maintained that the granting of a *get* is contrary to public order. [p. 246]

Finding that providing a *get* did not require any special form of worship, the Tribunal deemed that the husband's refusal to provide the *get* was a delictual fault and the wife was awarded substantial damages. (See also Civ. 2^{e}, December 13, 1972, D. 1973.493.)

[86] In the United Kingdom, courts have also been willing to attach civil consequences to a husband's refusal to provide a *get* and have recognized that the inability to remarry within one's religion represents a serious compensable injury. In *Brett v. Brett*, [1969] 1 All E.R. 1007, the English Court of Appeal ordered an additional lump sum spousal support payment by the husband if he refused to deliver a *get* by a certain date.

[87] Australian courts too have provided remedies for a husband's refusal to give his wife a *get*. In *In the Marriage of Shulsinger* (1977), 13 A.L.R. 537, the Family Court of Australia held that a husband's undertaking to a family court that he would obtain a *get* did not violate his freedom of religion, concluding:

> [The trial judge] was concerned with . . . the serious question of the injustice that would arise if the husband sought and obtained a divorce in Australia, but

> refused to relieve his wife of the obligations of the marriage. 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. [Emphasis added; p. 541.]

And in *In the Marriage of Steinmetz* (1980), 6 F.L.R. 554, the Family Court of Australia awarded the wife a greater amount of spousal maintenance in order to "encourage" the husband to give her a religious divorce.

[88] American courts, relying primarily on the rationale that obtaining a *get* is not solely a religious act but one that has the secular purpose of finalizing the dissolution of the marriage, have been willing to order parties to submit to the jurisdiction of the *beth din.* In *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (1983), the New York Court of Appeals found that a clause in a Jewish marriage contract, requiring both parties to appear before the *beth din* upon the breakdown of the marriage for the purposes of obtaining a *get* was enforceable and did not violate the constitutional prohibition against excessive entanglement between church and state. (See also *Waxstein v. Waxstein*, 395 N.Y.S.2d 877 (Sup. Ct. 1976) (aff'd 394 N.Y.S.2d 253 (App. Div. 1977)); *Rubin v. Rubin*, 348 N.Y.S.2d 61 (Fam. Ct. 1973); and *Minkin v. Minkin*, 434 A.2d 665 (N.J. Super. Ct. Ch. Div. 1981).) Unlike *Avitzur* and other American cases, this Court has not been asked either to order specific performance or, as previously noted, to determine the enforceability of a Jewish marriage contract, and the reference to these cases should not be taken as endorsing either remedy.

[89] Of particular interest is the judicial treatment of a husband's refusal to provide a *get* in Israel, where judges have awarded damages as compensation to a wife because of

her husband's refusal to give her a *get.* In *Jane Doe v. John Doe*, Jerusalem Fam. Ct., No. 19270/03, December 21, 2004, Hacohen J. recognized that "[t]he problem of *ghet* recalcitrance is one of the fundamental problems of Halakhic Judaism (Jewish Religious Law) and in Jewish family law" (para. 3). He observed that in H.C. 6751/04, *Sabag v. Supreme Rabbinical Court of Appeals*, 59(4) P.D. 817, the High Court of Justice stressed that it was imperative "to find effective solutions to this phenomenon . . . in order to free couples . . . and to allow them to begin new lives, and in that way to realize their right to independent lives in the area of personal status" (para. 3) (certified English translation). Noting the husband's argument that disputes of this nature should best be left to rabbinical courts because religious law applies to marriage and divorce in Israel, Hacohen J., who ordered the husband to pay 425,000 shekels in damages, including 100,000 shekels in aggravated damages, held:

> The rabbinical courts deal, at one tempo or another, with finding Halachic [religious law] solutions for the phenomenon of *get* recalcitrance and with the development of Halachic tools for exerting pressure on *get* withholders to consent to grant their wives the longed for *get.* However, in this suit the Court is not trespassing on this area. . . . The object of the relief applied for is to indemnify the wife for significant damages caused her by long years of *aginut*, loneliness and mental distress that were imposed on her by her husband. [Emphasis added; para. 19.]

[90] This international perspective reinforces the view that judicial enforcement of an agreement to provide a Jewish divorce is consistent with public policy values shared by other democracies.

[91] Mr. Marcovitz cannot, therefore, rely on the Quebec *Charter* to avoid the

consequences of failing to implement his legal commitment to provide the *get*.

[92] 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 Paragraph 12 of the Consent would interfere with his religious freedom.

[93] Despite the moribund state of her marriage, 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.

D. *Damages*

[94] That leaves Ms. Bruker's submission that the trial judge's award of damages was insufficient. On the other hand, Mr. Marcovitz argues that the quantum of damages awarded by the trial judge was overly generous and should be reduced.

[95] Damages are available for breach of contract. Under art. 1607 C.C.Q., the

creditor of an obligation is "entitled to damages for bodily, moral or material injury which is an immediate and direct consequence of the debtor's default". The trial judge concluded that Mr. Marcovitz's breach of his civil law obligation in Paragraph 12 of the Consent caused the damages claimed by Ms. Bruker. He exercised his discretion in awarding damages and I see no reason to interfere with that exercise.

[96] There is no doubt that Mr. Marcovitz's refusal to appear to obtain the *get* was the exclusive reason a *get* was not issued. The Consent was freely entered into and the only thing that changed between the time of granting the Consent and the Decree Nisi was Mr. Marcovitz's mind. He was entitled to change his legal position, but not without changing the legal consequences. It is his right to refuse to give a *get* if he is so inclined, but not without accepting responsibility for the consequences to Ms. Bruker of his decision to resile from this civil obligation.

[97] The trial judge considered all the evidence of the impact of the breach of Paragraph 12 of the Consent on Ms. Bruker's life. There is no evidence that he committed any palpable or overriding error, that he was proceeding on a mistaken or wrong principle, or that the assessment of damages is erroneous. Awarding damages in this case appropriately compensates Ms. Bruker for what she has lost by Mr. Marcovitz's refusal to perform his obligation under the contract — the ability for 15 years to marry or have children in accordance with her religious beliefs. I see no basis for disturbing the quantum of damages.

[98] Ms. Bruker also argued that the trial judge erred by awarding interest and additional indemnity only as of the date of her amended claim for additional damages in 1996, rather than from the date of the issuance of the Decree Nisi in 1980 or the date of her original action in 1989. Article 1618 C.C.Q. provides for interest on the kind of damages claimed by Ms. Bruker "from the date of default or from any other later date which the court considers appropriate". Under art. 1619 C.C.Q., "indemnity may be added to the amount of damages awarded for any reason".

[99] The trial judge found that Ms. Bruker's claim for damages became a real issue only after the granting of the *get*, when she issued her amended claim. As a result, he awarded interest and additional indemnity only as of the date of its service. I see no reason to interfere with this exercise of his discretion.

[100] The appeal is therefore allowed with costs throughout.

English version of the reasons of Deschamps and Charron JJ. delivered by

[101] DESCHAMPS J. (dissenting) — 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. Many would have thought it obvious that in the 21st century, the answer is no. However, the conclusion adopted by the majority amounts to saying yes. I cannot agree with this decision.

[102] Canada's adoption of multiculturalism and attachment to the fundamental values of freedom of conscience and religion and of the right to equality guarantee to all Canadians that the courts will remain neutral where religious precepts are concerned. This neutrality gives the courts the legitimacy they need to play their role as arbiters in relation to the cohabitation of different religions and enables them to decide how to reconcile conflicting rights. In thus protecting freedom of conscience and religion, the courts perform a task that is difficult and complex. It would be inappropriate to impose on them an additional burden of sanctioning religious precepts and undertakings.

[103] In the instant case, for a court to sanction the religious consequences of delaying consent for a *get* signifies that it endorses those consequences even if they are contrary to the hard-won gains (*acquis*) of Canadian society. This is a first, and it offends the norms of the positive law of Quebec and of Canada. It is not authorized under either public law or private law.

[104] I also have reservations regarding one of the majority's key arguments. The majority attach decisive importance to s. 21.1 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), thereby interpreting it in a way that exceeds its immediate scope. This provision was passed at the request of Canada's Jewish community and its purpose was to overcome the inability of rabbinical authorities to resolve the problem of Jewish religious divorce: ". . . the Jewish community led by B'nai Brith and the Canadian Jewish Congress, supported by major Jewish organizations, has requested such an amendment to remedy a situation it considers to be unfair" (*House of Commons Debates*, vol. VI, 2nd Sess., 34th

Parl., February 15, 1990, at p. 8375).

[105] The constitutionality of s. 21.1 was challenged in this case. The challenge was abandoned, however, as the respondent was expressly authorized to contest the justiciability of the claim for damages without regard for that provision (Appellant's Record, at p. 3). This authorization was granted by the trial judge. As a result, neither the trial judge nor the Court of Appeal had recourse to s. 21.1 to dispose of the issue of the justiciability of the *get*. Yet the majority invoke this provision in support of their conclusion on this issue. The authorization granted by the Superior Court would become meaningless and the debate would be transformed if the higher courts based their decisions on an argument that has been withdrawn. It is unfortunate that the majority is using an argument to which it attaches so much importance, especially since the Court's decision can be interpreted as deciding, albeit only in part, the issue of the validity of the provision, whereas that issue was not argued and was even expressly withdrawn from the debate by the parties.

[106] In this Court, the first issue raised by the appellant is that of the justiciability of the claim. But the majority deal with the case as one in which the parties' rights must be reconciled with their freedom of religion. In my view, the case turns on the issue of the justiciability of the appellant's claim. The respondent's arguments concerning the neutrality of the state's role in religious matters and the contract's want of an object are determinative. The argument based on his freedom of religion does not need to be discussed. No exercise of reconciliation or accommodation is necessary. The appellant's action lies neither in public law nor in the law of contracts.

1. Facts and Judicial History

[107] In April 1980, the appellant instituted a divorce proceeding after 11 years of marriage. On July 15, 1980, the parties entered into an agreement on corollary relief. The agreement provided for the partition of property, access, support for the couple's two children and a lump-sum payment for the appellant, and it also included a mutual release. The agreement also contained, and this is the source of the dispute before this Court, the parties' undertaking to appear before the rabbinical authorities to obtain a Jewish religious divorce, known as a *get*. The clause concerning the *get* reads as follows:

> 12. 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;

[108] Shortly after the agreement was signed, the parties' relationship deteriorated and became stormy. In October 1980, the divorce decree was granted, but the respondent did not appear for the purpose of the *get*. The appellant worked as an interior decorator and led an active life marked by unconventional behaviour.

[109] A judicial saga then began. The dispute related mainly to varying the corollary relief. A first judgment was rendered in 1983, and it was followed by many others. In 1989, the appellant brought an action claiming $500,000 for having been restrained from going on with her life, remarrying in accordance with the Jewish faith and having children (the two

children of the marriage were adopted), all because the respondent had not fulfilled his undertaking to appear before the rabbinical authorities for the purpose of the *get*. She moved to New York, also in 1989, to start a new life. She went there with the couple's two children. Her relationship with her daughters was as difficult as her relationship with the respondent. In 1992, a placement order was made in respect of one of them; when this daughter came of age, she asked to continue living with her foster family. The other daughter lived with her mother only from time to time, as she went from one boarding school to another.

[110] On December 5, 1995, contemporaneously with the hearing of several motions made by both the respondent and the appellant concerning the corollary relief, the respondent consented to the *get*; a religious divorce was then granted. The respondent testified that, at that time, he was satisfied with the arrangement he had with his daughters. Since he was supporting them directly, he felt liberated from the appellant. However, the action in damages continued, and the appellant changed the amount she was claiming to $1,350,000.

[111] The Superior Court rendered judgment in that action in 2003 ([2003] R.J.Q. 1189). The judge found that once the religious obligation was incorporated into the corollary relief agreement, it "moved into the realm of the civil courts, and the religious obligation became embodied in a secular agreement. . . . Once there is a civil contract, even if its object relates to religious obligations, it is justiciable and within the jurisdiction of the civil court. . . . Since in this case there are no public order issues, the contract is valid. Simply put, a

valid civil obligation with religious undertones was created." (paras. 19-20)

[112] The judge found that the refusal to consent to the *get* was not justified in law. He noted that the respondent's attitude was a form of punishment or constraint in light of his claim that the appellant had alienated the children and harassed him with demands for money (paras. 9 and 12).

[113] Making a connection with what he saw as the appellant's adherence to the precepts of the Orthodox Jewish community, the judge awarded $2,500 for each of the 15 years during which she had been unable to remarry:

> While there is no evidence that any suitor broke off his relationship with Plaintiff because of her inability to marry him before a Rabbi of the Orthodox Community — indeed there is no evidence of any offer to marry at all — Plaintiff was nevertheless entitled to exercise her freedom of religious choice as she alone determined it. It is not for Defendant to impose on her a degree of "religiosity", to say that she could have remarried in the Reform Synagogue or sought an annulment, etc.
>
> Matters of religious conscience must be left to the adult parties invoking them and not be imposed by others. Plaintiff has satisfied the Court that despite her many deviations from the doctrines and precepts of the Orthodox Jewish Community — her abortion, extra-marital affairs, use of contraceptives, etc. — Plaintiff was and remained a member of the Orthodox branch of the Jewish community, that she therefore had the right to remarry before a rabbi of that community and to do so, would have needed a Get from a Beth Din recognised by such community. [paras. 46-47]

[114] The judge also awarded the appellant $10,000 on the basis that had she had any children during that period, they would not have been legitimate according to the precepts of the Orthodox Jewish community:

> The Court presumes that any reference by Plaintiff to having children would necessarily mean "legitimate" ones under the precept of the Orthodox Jewish community to which she belonged.
>
> Since Plaintiff failed to adduce any evidence that any relationship which could have led to marriage had foundered on her not having a Get, she was not prevented from having such a child with such a partner.
>
> However, since she was generally unable to have such a legitimate child and she alleges that this affected her choice of male companions and lovers, the Court awards her a nominal sum of $10,000 under this head. [paras. 50-52]

[115] The respondent appealed that judgment.

[116] The Court of Appeal began by noting that although support and the partition of financial interests are within the jurisdiction of a judge hearing a divorce action, the same could not be said of the undertaking in clause 12 of the agreement on corollary relief. Hilton J.A., writing for the court, stated:

> The appearance before rabbinical authorities for the purpose of obtaining a *ghet*, as mentioned in paragraph 12 of the Consent, however, is not one that could be properly obtained as an order of corollary relief at the initiative of a party to a divorce. Even now, the most that could ever be sought is the relief contemplated by section 21.1 of the *Divorce Act*, which, as we have seen, is imperfect, since its implementation is dependent on the presentation of an unrelated motion by a spouse who has it within his or her power to remove a barrier to obtaining a religious divorce by effectively subjecting the court's consideration of the unrelated motion to the removal of the religious barrier.
>
> ([2005] R.J.Q. 2482, at para. 41)

[117] Hilton J.A. also found that the Superior Court judge had erred in giving the form

of the obligation precedence over its substance:

> Although one cannot help but be sympathetic to the plight of a Jewish woman whose former husband delays or denies her a *ghet*, whether or not he has entered into a premarital agreement to do so or in the context of a consent to corollary relief, I have concluded that 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. 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 contexts, the fate reserved for same-sex couples being denied the right to marry in religious ceremonies of some religious faiths. [para. 76]

[118] Finally, Hilton J.A. disagreed with the trial judge's conclusion that because the *get* was issued in 1995, one could have been issued in 1980. Hilton J.A. pointed out that the situation had changed between the time the agreement was signed and the time the divorce was granted and that according to undisputed evidence, the rabbinical authorities consider not prior consent, but only consent that is given freely before the Jewish court. In Hilton J.A.'s view, it was clear that consent could not have been freely given between the time the divorce was granted and the time when consent was in fact given. The judge stated that the only way he could have reconciled what he understood to be the exercise of the respondent's religious conscience with the appellant's position was to find that the respondent should have been untruthful as to the voluntary nature of his presence before the *beth din* and his consent to the *get*. As Hilton J.A. saw it, the clause in the corollary relief agreement contained at most a moral obligation that could not be enforced in the civil courts.

[119] The appellant asks this Court to recognize that the obligation is civil in nature and to award her $400,000 in damages, plus interest since the date of the divorce decree in 1980. The respondent submits that it is not possible under the law of contracts to sanction religious undertakings and that the object of the undertaking in clause 12 is a religious act. He argues that s. 3 of the *Charter of human rights and freedoms*, R.S.Q., c. C-12, guarantees the right to perform or not to perform a religious act and that religious undertakings are not actionable.

2. Analysis

2.1 *The get from the public law standpoint: judicial consideration of claims with a religious basis*

[120] Despite the religious foundations of Roman law and French civil law, from which Quebec civil law is derived, there should be no doubt today that in Quebec, the state is neutral where religion is concerned. A first break occurred at the time of the *Royal Proclamation* of 1763. Another step took place in the 20th century when Quebec opened up to the world and in the early 1960s, during the Quiet Revolution, when the state took charge of institutions controlled by religious communities. A more complete break occurred with the adoption by Canada of the policy of multiculturalism. (F. K. Comparato, *Essai d'analyse dualiste de l'obligation en droit privé* (1964), at pp. 135-36; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, 2004 SCC 48, at paras. 66-68; and *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.).)

[121] This neutrality does not mean that the state never considers questions relating to religion. On the contrary, s. 2 of the *Canadian Charter of Rights and Freedoms* requires that the state respect freedom of religion. Thus, in *Congrégation des témoins de Jéhovah*, it was precisely because of an argument that freedom of religion had been violated that the courts had to consider the municipality's refusal to grant a zoning variance. This reflects a "negative" view of freedom of religion according to which the state must not infringe a fundamental right any more than is necessary. As in the case of freedom of expression, the state does not have to provide preachers with megaphones (*Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995).

[122] In Canadian law, a court is thus not barred from considering a question of a religious nature, provided that the claim is based on the violation of a rule recognized in positive law. In this regard, there have already been cases in which Canadian courts have been asked to give effect to obligations related to a *get* or a religious marriage contract. The requirement that there be a rule of positive law before an action will lie is a neutral basis for distinguishing cases in which intervention is appropriate from cases in which it is not. In *Re Morris and Morris* (1973), 42 D.L.R. (3d) 550, a majority of the Manitoba Court of Appeal held that *gets* were within the jurisdiction of the religious court, not the secular courts. The Court of Appeal quashed an order requiring a husband to consent to a *get* on the basis that the religious marriage contract, the *ketubah*, did not contain a civil obligation.

[123] However, if a spouse can show that the religious marriage contract meets all the

requirements for a civil contract under provincial legislation, then the courts may order the fulfilment of undertakings to pay the amounts provided for in the contract. This legal basis has been recognized in British Columbia for Muslim marriage contracts (*mahr*) in *Nathoo v. Nathoo*, [1996] B.C.J. No. 2720 (QL) (S.C.), *Amlani v. Hirani* (2000), 194 D.L.R. (4th) 543, 2000 BCSC 1653, and *M. (N.M.) v. M. (N.S.)* (2004), 26 B.C.L.R. (4th) 80, 2004 BCSC 346. In Ontario, on the other hand, it has been held that a marriage contract of this type did not meet the requirements of the applicable provincial legislation (*Kaddoura v. Hammoud* (1998), 168 D.L.R. (4th) 503 (Ont. Ct. (Gen. Div.))).

[124] In every case, the parties and the court must refer to the relevant civil rules to determine whether the undertaking is binding. In the case at bar, the appellant is not questioning recourses that have already been recognized in order to find a solution to the problem of the *get*, but is seeking to create a new one.

[125] The appellant asks the courts to assess the impact the respondent's failure to consent to the *get* has had on her life. No civil rules provide for the consequences of the absence of a *get*. These consequences flow from religious rules. A wife who is not granted a *get* upon the dissolution of the civil marriage is considered an *agunah*, or "chained wife", and in the eyes of her religion, any children she has in the future will be *mamzerim*, or illegitimate children.

[126] The courts have long refused to intervene in the manner proposed by the appellant. The courts' role in matters of religion is neutral. It is limited to ensuring that laws are constitutional and, in the case of a private dispute, to identifying the point at which rights

converge so as to ensure respect for freedom of religion.

[127] To be certain that these limitations are now deeply rooted, one need only recall the comment made by Lord Moulton in *Despatie v. Tremblay* (1921), 47 B.R. 305 (P.C.), with respect to the law as it stood at the time of the coming into force of the *Quebec Act* (U.K.), 14 Geo. 3, c. 83:

> The law did not interfere in any way with the jurisdiction of any ecclesiastical courts of the Roman Catholic religion over the members of that communion so far as questions of conscience were concerned. But it gave to them no civil operation. Whether the persons affected chose to recognize those decrees or not was a matter of individual choice which might, or might not, affect their continuance as members of that religious communion. But that was a matter which concerned themselves alone. [p. 316]

The Law Lords accordingly refused to apply the religious rule to determine the validity of the marriage in issue.

[128] This Court's decision in *Ukrainian Greek Orthodox Church of Canada v. Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress*, [1940] S.C.R. 586, is just as clear. Crocket J. wrote the following:

> . . . for it is well settled that, unless some property or civil right is affected thereby, the civil courts of this country will not allow their process to be used for the enforcement of a purely ecclesiastical decree or order. [Emphasis added; p. 591.]

He concluded, at p. 594, that "[t]he manifest and sole purpose of this claim, as that of the

whole action, is to enforce obedience to a purely ecclesiastical sentence or decree. For that reason I am of opinion that the Court of Appeal was fully justified in dismissing the plaintiff's action."

[129] The requirements for issuing a *get* and the consequences of not having a religious divorce are governed by the rules of the Jewish religion. The state does not interfere in this area. For instance, the Quebec Superior Court has, in refusing to order a husband to grant his former wife a *get*, invoked not only the separation of religious institutions and the state, but also freedom of conscience. On the issue of freedom of conscience, Hurtubise J. wrote the following in *Ouaknine v. Elbilia*, [1981] C.S. 32, at p. 35:

> [TRANSLATION] From this standpoint, the question that arises is as follows: must the Court compel the respondent to appear before a rabbinical court and grant a religious divorce? Absent any evidence, must we assume that such an order would not be contrary to the precepts of the Jewish religion? And beyond the institution, the church, is it possible, in compelling an individual to do something like this, to avoid interfering with and limiting the free exercise of his or her own freedom of religion and conscience without determining the individual's deeply held beliefs or making assumptions about what the individual intends? We do not think so.

[130] I do not feel that the courts have reversed or qualified their approach to sanctioning purely religious obligations. Whether a court is asked to compel a party to appear before rabbinical authorities or to order the payment of money, the same principle is in issue: can the authority of the courts be based on a purely religious rule? I do not think it can. In *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, this Court reiterated the principle enunciated by Crocket J. in *Ukrainian Greek Orthodox Church*. Its

decision was based on the fact that, for members of the Hutterite colony, a voluntary association, the right to remain on land owned by the Lakeside Holding Co. was a contractual right (p. 174). That case, unlike the case at bar, concerned a validly formed contract between the parties. It cannot therefore be relied on to support an argument that the courts now intervene in religious disputes.

[131] Furthermore, this principle of non-intervention in religious practices was one of the most important bases for adoption of the subjective standard of sincere belief (*Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47). The principle is an important one, since the circumstances in which the courts might be asked to intervene in religious disputes are manifold. The principle of non-intervention makes it possible to avoid situations in which the courts have to decide between various religious rules or between rules of secular law and religious rules. In the instant case, the appellant has not argued that her civil rights were infringed by a civil standard derived from positive law. Only her religious rights are in issue, and only as a result of religious rules. Thus, she is not asking to be compensated because she could not remarry as a result of a civil rule. It was a rule of her religion that prevented her from doing so. She is not asking to be compensated because any children she might have given birth to would not have had the same civil rights as "legitimate" children. In Canadian law and in Quebec law, all children are equal whether they are born of a marriage or not. The ground for the appellant's claim for compensation conflicts with gains that are dear to civil society. Allowing the appellant's claim places the courts in conflict with the laws they are responsible for enforcing.

[132] It should be noted that the religious consequences of not having a *get* do not override secular law rules. Neither the *Divorce Act* nor the civil law has exclusionary rules like those related to *agunot* and *mamzerim*. Mosaic law — like canon law — has no influence on secular law. The reverse is also true: secular law has no effect in matters of religious law (*Ouellette v. Gingras*, [1972] C.A. 247; *Despatie*; *Curé et marguilliers de l'œuvre et fabrique de la paroisse de St-Zacharie v. Morin*, [1968] C.S. 615; *Mathys v. Demers*, [1968] C.S. 172; *Bergeron v. Proulx*, [1967] C.S. 579). Where religion is concerned, the state leaves it to individuals to make their own choices. It is not up to the state to promote a religious norm. This is left to religious authorities.

[133] It has been argued that other countries sanction the conduct of a husband who fails to consent to a Jewish religious divorce. It will therefore be necessary to review, at least summarily, the general approach taken by foreign courts with respect to religion and the legal mechanisms used in those other countries to deal with *gets*.

2.2 *Comparative law*

[134] The relationship between religious and secular rules varies a great deal from one country to another, which means that where the *get* is concerned, the solutions adopted are not uniform. In my opinion, there are four countries whose approaches are relevant to the situation in Quebec and in Canada. France comes immediately to mind, since Quebec civil law has been strongly influenced by French law; it is therefore worth looking at the French approach to *gets* as well as at commentary on the decisions of the Court of Cassation. I will

also look at the situation in England. Quebec inherited English public law at the time of the Conquest, and English cases are of definite interest. Next, I will summarily review a few decisions from the United States, since our countries have similar realities and several of this Court's decisions have been based on solutions developed by U.S. courts. I will then briefly examine the situation in Israel, since it seems difficult to talk about the Jewish religion without at least referring to the rules that are applied in that country.

2.2.1 France

[135] Despite the secular ideals on which the French Revolution was based, France did not formally incorporate the principle of the separation of the state and religious institutions into its legislation until the early 20th century with the December 9, 1905 law on the separation of church and state (published in the *Journal officiel* on December 11, 1905). That law established the principle of freedom of religion and worship for individuals and communities; the state relinquished its power over religious institutions, and religious institutions could no longer intervene in the functioning of state institutions.

[136] The earliest cases recognizing the right to compensation for refusal to consent to a *get* were based on the theory of an abuse of rights resulting from malicious intent on the husband's part (L. de Naurois, obs. under Trib. civ. Metz, April 27, 1955, Trib. civ. Grenoble, May 7, 1958, Paris 1re, February 4, 1959, J.C.P. 1960.II.11632; Civ. 2e, December 13, 1972, D. 1973.493). The Court of Cassation subsequently stated that for the husband, a *get* is merely an option that is a matter for his freedom of conscience and in

respect of which an improper decision can give rise only to damages; however, the court noted the malicious purpose behind the husband's actions (Civ. 2e, April 21, 1982, *Bull. civ.* II, No. 62). Intent to harm was no longer found to be a requirement in two subsequent cases, though (Civ. 2e, June 5, 1985, J.C.P. 1987.II.20728, and Civ. 2e, June 15, 1988, *Bull. civ.* II, No. 146). Finally, in a later decision, the court reiterated that, for the husband, giving a *get* is merely an option that is a matter for his conscience and in respect of which an improper decision can give rise only to damages (Civ. 2e, November 21, 1990, D. 1991.434).

[137] The developments in French law have not been immune to criticism. Some have said that it is not true that giving a *get* is merely an option. These critics maintain that improper conduct on the husband's part constitutes delictual fault and that there is no reason why a court should not order the husband to grant the *get*, or even that it would be "hypocritical" to deny a penalty (*astreinte*) and that awarding damages to the aggrieved spouse basically amounts to giving effect to religious law: É. Agostini, obs. under Civ. 2e, November 21, 1990, D. 1991.434; É. Agostini, obs. under Civ. 2e, June 5, 1985, J.C.P. 1987.II.20728; C. Larroumet, Annot. under Civ. 2e, December 13, 1972, D. 973.493. Others have said that denying the religious nature of the *get* amounts to disregarding the text that requires one to be granted, that assessing cases in which a *get* must be issued is beyond the jurisdiction of the secular courts and that it must be asked whether the obligation is not a purely personal one tied to the performance of a religious act: P. Barbier, "Le problème du 'Gueth'", *Gaz. Pal.* 1987.484.

[138] Thus, although in French law the right to compensation is not based on contract,

the conceptual basis of and prerequisites for the remedy are far from clear. In short, some believe that the court has not gone far enough, while others believe it has gone too far; regardless of which position is taken, however, what is involved is not merely the imposition of an objective sanction relating to the time taken to consent to the *get*. The legal basis for the action in damages is sometimes fault, and sometimes abuse of rights: G. Atlan, *Les Juifs et le divorce: Droit, histoire et sociologie du divorce religieux* (2002), at p. 231.

2.2.2 England

[139] In England, the main source of protection for freedom of religion is art. 9 of the *European Convention on Human Rights*, 213 U.N.T.S. 221. Religious debates in England often concern interference with or restrictions on the practice of religion or on religious expression. The threshold for interference with the freedom of religious practice is quite high. Thus, in a recent House of Lords case, *R. (S.B.) v. Governors of Denbigh High School*, [2007] 1 A.C. 100, [2006] UKHL 15, Lord Bingham noted that "there remains a coherent and remarkably consistent body of authority [from the Strasbourg institutions] which our domestic courts must take into account and which shows that interference is not easily established" (para. 24). In his view, the educational institution's decision to exclude a student who insisted on wearing the *jilbab* had to be upheld. Lord Bingham found that the dress code was very clear and that it was open to the complainant to attend another school. In his opinion, there was no interference with the freedom of religious practice in the case. He added that, even if there had been interference, it would have been justified under art. 9(2) of the *European Convention on Human Rights*. In this regard, he observed that the

dress code had been developed in co-operation with and been approved by several institutions in Muslim communities.

[140] A husband's failure to consent to a *get* does not seem to lead to sanctions other than those available in family law. Rather, it gives rise to an assessment of its impact on the wife's financial independence. In *Brett v. Brett*, [1969] 1 All E.R. 1007, the Court of Appeal considered a Jewish wife's application for support against her husband, who was disinclined to give her a *get*. In deciding on the amount of support the husband would have to pay the wife, the court stated that he could pay less support if he gave her a *get* within three months. The following comment on this point by Professor Adrienne Barnett should be noted, however: "[a]lthough the ruling in *Brett v. Brett* was acceptable to the rabbinical authorities in 1969, they no longer accept it, and regard it as a coerced get": "Getting a 'Get' — The Limits of Law's Authority?" (2000), 8 *Fem. Legal Stud.* 241, at p. 252.

[141] The English approach seems to me to be consistent with our family law. If one spouse becomes dependent because of the other spouse's conduct, the court can have regard to all the circumstances, including that state of dependence, and award support based on the parties' resources and needs: *Leskun v. Leskun*, [2006] 1 S.C.R. 920, 2006 SCC 25, at paras. 20-21.

2.2.3 United States

[142] In the United States, freedom of religion is protected by the First Amendment to the Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The First Amendment has two components: the first prohibits the promotion of a religion, while the second grants every individual the free exercise of freedom of belief and conscience. In the United States, the courts may not interpret religious laws or interfere with the practice of religion: *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976).

[143] Courts in the state of New York have decided cases relating to the *get*. Since that state has a large Orthodox Jewish community, the situation of the *agunah* seems to be a serious social problem: K. Greenawalt, "Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance" (1998), 71 *S. Cal. L. Rev.* 781, at p. 812. In New York, there are a number of legislative provisions that apply specifically to the *get*. For example, s. 253 of the *Domestic Relations Law* (Consol. 1990) requires a party who commences divorce proceedings to certify that there are no barriers to remarriage. Since 1993, judges can also take account of any barriers to remarriage when dividing up assets and determining support. At the time of the 1993 amendments, the Governor of New York stated that "[t]his bill was overwhelmingly adopted by the state legislature because it deals with a tragically unfair condition that is almost universally acknowledged": B. Benjamin, "Judaism and the Laws of Divorce", [2001] *UCL Jurisprudence Rev.* 177, at p. 188.

[144] The New York courts have drawn on the principles underlying those provisions to invoke equity and prevent husbands from using the *get* to force their wives to give them advantages. Thus, in *Schwartz v. Schwartz*, 583 N.Y.S.2d 716 (1992), the Supreme Court applied the "clean hands" doctrine to deny a husband an equal division of property on the basis that his refusal to grant a *get* was unacceptable (see Greenawalt).

[145] In *Giahn v. Giahn*, April 13, 2000 (cited in Benjamin, at p. 188), the New York Supreme Court penalized a husband's use of the *get* to force his wife to make concessions. The court relied on *Schwartz* to hold that the husband's refusal to grant a *get* was unacceptable. To compensate for that abuse, all the assets of the marriage were awarded to the wife.

[146] A New York court has also enforced a separation agreement and the Jewish marriage contract (*ketubah*) in the same way as it would have done in the case of a secular marriage contract. In *Avitzur v. Avitzur*, 459 N.Y.S.2d 572 (1983), the court enforced the spouses' agreements to appear before the *beth din*. In interpreting the *ketubah* signed by the parties, the New York Court of Appeals noted that the case "can be decided solely upon the application of neutral principles of contract law, without reference to any religious principle" (pp. 574-75). The approach taken by this court is based on the fact that the decision to grant a *get* is not a religious act. According to the court, granting a *get* is a secular act, since "the provisions of the Ketubah relied upon by plaintiff constitute nothing more than an agreement to refer the matter of a religious divorce to a nonjudicial forum" (*Avitzur*, at p. 574).

[147] In a more recent New Jersey case, *Segal v. Segal*, 650 A.2d 996 (1994), the Superior Court invalidated a separation agreement signed by both parties, because the wife had signed it under the threat of not being given a *get*.

[148] The approach of the New York courts cannot be adopted in Canada without qualification. First of all, that state's legislative provisions go further than s. 21.1 of our *Divorce Act*, which only authorizes striking out the pleadings of a spouse who has failed to remove a barrier to religious remarriage. As well, the parties in the case at bar agreed not to use s. 21.1 in relation to the issue of the justiciability of the claim. It seems to me that to use the New York case law would have the effect of reintroducing an argument the parties have agreed not to use for this purpose. Moreover, the New York legislative provisions are recognized, on the basis of rules that are broader in scope than ours, as having a broad equitable nature, and this characteristic cannot be imported into Canada. More specifically, our divorce legislation has since 1985 excluded the concept of misconduct from the assessment of the spouses' resources and needs for the purposes of support, which means that the clean hands doctrine cannot be invoked. In addition, the cases in which undertakings to appear before a rabbinical court have been enforced seem to have been based on the premise accepted in *Avitzur*, namely that a *get* is a secular act. The evidence in the record in the instant case indicates the contrary. In cases involving decisions based on lack of informed consent or on the dependence of one party, however, a parallel can be drawn with Canadian law.

2.2.4 Israel

[149] The case of Israel is unique because of the fundamental role played by the Jewish religion in that country. Freedom of conscience, faith, religion and worship is guaranteed to every individual in Israel: H.C. 292/83, *Temple Mount Faithful v. Jerusalem District Police Commander*, 38(2) P.D. 449. In addition, the *Foundations of Law Act, 1980*, 5740-1980, 34 L.S.I. 181 (1979-80), explicitly authorizes the courts to use Jewish religious law to fill in gaps in legislation:

> Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel's heritage.

In the context of that statute, the word "Israel" refers to Judaism and the Jewish people: R. Lapidoth, "Freedom of Religion and of Conscience in Israel" (1998), 47 *Cath. U. L. Rev.* 441, at p. 444. The courts can also determine the limits of the Jewish religion itself. For example, in Cr. A. 112/50, *Yosifof v. Attorney-General*, 5 P.D. 481, the court held that a legal prohibition on the practice of bigamy did not infringe the freedom of religion of a Jewish man who was a member of a particular community, because that practice was not mandatory according to the Jewish religion.

[150] In Israel, the rules of family law are different from those of other jurisdictions. Although their decisions are subject to review by the Israeli High Court of Justice, the rabbinical courts have exclusive jurisdiction over marriage and divorce cases: P. Shifman,

"Family Law in Israel: The Struggle Between Religious and Secular Law" (1990), 24 *Isr. L. Rev.* 537, at p. 543.

[151] The rabbinical courts are often reluctant to order a husband to grant his wife a *get*. Some of them say they are powerless to force a husband to give a *get* even where he has clearly transgressed Jewish law: H. L. Capell, "After the Glass Has Shattered: A Comparative Analysis of Orthodox Jewish Divorce in the United States and Israel" (1998), 33 *Tex. Int'l L.J.* 331, at p. 342.

[152] However, in a more recent case, *Jane Doe v. John Doe*, a family court (Jerusalem, No. 19270/03, December 21, 2004) accepted that a wife aggrieved by her husband's failure to consent to a *get* could receive financial compensation.

[153] In my opinion, the close relationship between religion, civil society and the courts' jurisdiction over religious matters clearly distinguishes Israel from Canada. As a result of that jurisdiction, the solutions adopted in Israel cannot be imported into Canada without taking account of Canadian legislation and the Canadian context.

2.2.5 Conclusion on Comparative Law

[154] It can be seen from this overview of the solutions adopted in the four countries in question that some of these solutions are already available to Quebec and Canadian litigants. Others are not, however, because the rules are different in Canada. For example,

the French solution based on fault or abuse of rights is not precluded but, first, this is not what the appellant's action is based on and, second, the conditions for application of the doctrine of abuse of rights are not necessarily the same in Quebec as in France. In my opinion, it is impossible in the circumstances of the case at bar to draw any inspiration from the situation in France. As for the solution adopted in England in *Brett*, although it is compatible with our law, it is not applicable in the instant case because the appellant claims to have suffered moral injury and not to have been placed in a situation of financial dependence. The U.S. cases in which the wife's dependence was taken into account may also be helpful, but those based on a punitive objective must be disregarded. The situation in Israel is unique, but it is relevant simply in that it shows that, even in a context in which a close interrelationship exists between the state and religion, the possibility of a civil court awarding financial compensation for failure to consent to a *get* has been recognized in only one decision.

[155] This review leads me to conclude that, in the countries whose law is most similar to ours, the *get* issue is governed by internal private law rules. The solutions that have been adopted are quite varied. The decisions of each country's courts are based on mechanisms proper to that country. They establish no principle of public law that is so persuasive that Canadian courts should alter their approach. The Canadian solutions discussed above are both sensible and sufficient.

[156] This being said, the appellant's claim is based on contract law. Furthermore, it was on the basis of contract law that the case was decided both at trial and on appeal. This

question must now be considered.

2.3 *Private law: the contractual claim*

[157] The clause in issue is found in a corollary relief agreement incorporated into a decree that orders the parties to comply with their undertakings. Orders concerning relief corollary to divorce and the separation of the parties' property are governed by the *Divorce Act* and, in Quebec, by the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*Civil Code*" or "C.C.Q."). Before considering the rules governing contracts in Quebec civil law, I will examine the general nature of corollary relief agreements.

2.3.1 Corollary Relief Agreements

[158] Under ss. 15.1 and 15.2 of the *Divorce Act*, a court of competent jurisdiction — the Superior Court in the case at bar — may make an order requiring one spouse to pay for the support of the other spouse or of the children of the marriage. Section 16 of the *Divorce Act* authorizes the court to make an order respecting custody of or access to the children. As well, under Quebec family law, when a couple separates or divorces, the court partitions the rights resulting from the family patrimony, awards a compensatory allowance if appropriate and sorts out the rights resulting from the matrimonial regime and the marriage contract. The court's task is facilitated when the parties enter into an agreement setting out the terms on which they agree. Before making its order, the court ensures that the parties' undertakings are consistent with the principles of the *Divorce Act* and Quebec family law.

It may happen that the parties incorporate into a corollary relief agreement undertakings that are not related to their family obligations under the *Divorce Act* or Quebec family law. In such a case, the undertakings are not, strictly speaking, relief corollary to divorce and separation.

[159] Where relief corollary to divorce or separation is incorporated into an order of the Superior Court, the creditor of such an obligation has no other formalities to observe before being able to enforce the obligation. In other words, a separate action is not necessary to enforce a support agreement that is incorporated into a Superior Court judgment in which the debtor is ordered to comply with his or her undertaking. As well, a debtor who fails to comply with a non-pecuniary undertaking under the *Divorce Act* or Quebec family law may be cited for contempt of court.

[160] Furthermore, bringing a separate action to sanction non-compliance with an order concerning relief corollary to a divorce is prohibited. Thus, a custodial parent's violation of an undertaking to facilitate access by the non-custodial parent cannot give rise to an action in damages. In *Frame v. Smith*, [1987] 2 S.C.R. 99, the father claimed damages, alleging that he had been forced to incur considerable expense and had suffered emotional distress because the mother and her new spouse had interfered with the relationship he wanted to have with his children. Among other things, the mother had changed the children's surname and their religion and had denied that her former husband was their father. The Court nonetheless held that, for rights arising under the *Divorce Act* and under provincial legislation governing the consequences of separation and divorce, remedies are

limited to the schemes adopted by Parliament and the provincial legislatures (p. 112). If clause 12 were considered relief corollary to the divorce, neither party could rely on it to bring a separate action in the civil courts.

[161] However, the undertaking to appear before the rabbinical authorities is unrelated to the rights and obligations arising under the *Divorce Act* or the *Civil Code*. The incorporation of this undertaking into the corollary relief agreement does not have the effect of making it a right or obligation provided for in the *Divorce Act* or the *Civil Code*, nor does the undertaking, as a result of this incorporation alone, constitute relief corollary to the divorce. If clause 12 can serve as the basis for a separate action, that action cannot be based on the fact that the clause is incorporated into the corollary relief agreement. It must be regarded as an autonomous clause. To form the basis of a separate civil action, the clause must satisfy the requirements of the civil law. Since the case originates in the province of Quebec, the applicable law is the law of contracts in the civil law, not at common law.

2.3.2 Conditions of Contract Formation

[162] In 1989, when the action in damages was instituted, Quebec civil law was governed by the *Civil Code of Lower Canada* ("C.C.L.C."). According to the transitional law rules, pending proceedings continue to be governed by the C.C.L.C. (s. 9 of the *Act respecting the implementation of the reform of the Civil Code*, S.Q. 1992, c. 57). I will therefore refer primarily to the provisions of the C.C.L.C. in assessing the appellant's position. I will also refer to the C.C.Q. when the new rules clarify the law without changing

the substance of the C.C.L.C. rules, which is the case for most of the rules of contract formation, particularly those relating to the object of a contract.

[163] In the instant case, the appellant argues that the respondent must pay damages because he breached an *obligation* resulting from clause 12. Article 982 C.C.L.C. says the following about the *obligation*:

> **982.** It is essential to an obligation that it should have a cause from which it arises, persons between whom it exists, and an object.

[164] This provision is supplemented by art. 983 C.C.L.C., which specifies the legal situations that give rise to *obligations*:

> **983.** Obligations arise from contracts, quasi-contracts, offences, quasi-offences, and from the operation of the law solely.

[165] The appellant submits that the obligation in issue arises from a *contract*. No other legal situation has been invoked, or even discussed. It must therefore be determined whether clause 12 constitutes a contract in Quebec law. For this purpose, it is necessary to consider the requirements for "validity" of a contract. According to art. 984 C.C.L.C., a contract must meet four conditions:

> **984.** There are four requisites to the validity of a contract:
>
> Parties legally capable of contracting;

Their consent legally given;

Something which forms the object of the contract;

A lawful cause or consideration.

[166] There is no doubt that the undertaking was agreed to by both parties. They were legally capable of contracting and they gave their consent. The other two conditions of formation — cause and object — require more detailed consideration.

[167] Cause is not defined in the C.C.L.C., but it is defined in the *Civil Code*. According to the Minister's commentaries that were published when the *Civil Code* was enacted, the definition in art. 1410 C.C.Q. is the one that was accepted by commentators and the courts at the time of the reform. Article 1410 C.C.Q. reads as follows:

> **1410.** The cause of a contract is the reason that determines each of the parties to enter into the contract.

[168] According to the commentators, the cause of a contract has an objective aspect. It is the element that justifies the contract's existence. For each party, the objective cause of the contract is the other party's undertaking. But this information is not very helpful. Where a synallagmatic contract is concerned, the cause, defined as the other party's undertaking, is of no assistance in determining whether the contract is valid. What is relevant above all is the subjective aspect, namely the reason why a party enters into the contract. Whether considered in light of its objective aspect or its subjective aspect, the cause need not be mentioned in the contract. In view of the words of art. 984 C.C.L.C. ("[a]

lawful cause or consideration"), the courts concern themselves with the cause of a contract only when its lawfulness is contested. If consenting parties who are capable of contracting agree to a juridical operation, it can be inferred from this that they have a reason for doing so. Only the lawfulness of this reason is subject to review. (D. Lluelles and B. Moore, *Droit des obligations* (2006), at paras. 1066 *et seq*.)

[169] The fact that the cause of a contract is connected with a religion does not affect the validity of the contract. For example, a person may have various reasons for undertaking to pay his or her religious community a specific sum of money, the most basic being a desire to contribute to an institution's financial health. In this sense, it is correct to say that a contract with a religious cause may be valid. There is nothing unlawful about having a religious reason for entering into a contract. However, the cause of the contract must not be confused with its object, as the trial judge has done and as, with respect, the majority are doing.

[170] The fourth condition of contract formation is the existence of an object. This, according to the respondent, is the condition that is not met in the instant case. The *Civil Code* restates and clarifies the former law. Article 1412 reads as follows:

> **1412.** The object of a contract is the juridical operation envisaged by the parties at the time of its formation, as it emerges from all the rights and obligations created by the contract.

[171] Article 1412 specifies that the object of a contract is the *juridical operation*

envisaged by the parties at the time of its formation. At this stage, the operation as a whole must be considered, and not just the obligations the parties are bound to perform. Identifying the object of the contract is important, because only the object makes it possible to determine the nature of the juridical operation the parties have agreed on. Contrary to what the majority assert, the review of the object is not limited to determining whether it is contrary to public order (art. 1413 C.C.Q.). Indeed, Lluelles and Moore, in their treatise on the law of obligations, state that the principal use of the object of the contract is to ensure that the contract in fact exists:

> [TRANSLATION] The 1987 draft bill on obligations was quite clear in this respect, as article 1455 thereof provided that "[a] contract *which does not have as its object a juridical act envisaged* by the parties at the time of its conclusion . . ." was null. Even though article 1413 C.C.Q. does not include this clarification, being limited to nullifying a contract whose object is unlawful, the solution is, strictly speaking, the same: it is clear from the second paragraph of article 1385 that the object of a contract is one of the *elements of the formation* of contracts in the same way as consent by and capacity of the contracting parties. Conformity of the object of the contract with public order is not, therefore, the only source of contention with respect to the object: the very non-existence of this object, as an element of the agreement, may bring the formation of a contract into question. [Emphasis in original; para. 1054.]

See also V. Karim, *Les obligations* (2nd ed. 2002), vol. 1, at p. 279, art. 1412.

[172] Furthermore, the respondent did not raise the issue of whether the object is contrary to public order in support of his argument that there was no contract. It was raised only in the context of the public law argument. He maintained that to award damages against him solely because he exercised his right to freedom of religion would be contrary to public order (Respondent's Factum, at para. 123). Thus, in his view, the concept of public

order would be relevant only to an analysis of that argument, which is unnecessary in the case at bar.

[173] Identifying the object of a contract is not, therefore, limited to identifying the object of each of the obligations or to determining whether the juridical operation is lawful. The judge must be able to determine whether the parties have agreed to a mechanism that corresponds to a juridical operation. Thus, in *Christiaenssens v. Rigault*, [2006] Q.J. No. 5765 (QL), 2006 QCCA 853, at para. 46, the Quebec Court of Appeal could only find that there was no contract, since it was unable to identify a juridical operation envisaged by the parties.

[174] What operation was envisaged in the instant case? The parties envisaged the obtaining of a religious divorce. Considered as a whole, the purpose of the mutual undertakings to appear before the rabbinical authorities in order to obtain a religious divorce was to obtain a religious divorce. Is this a juridical operation? A juridical operation implies a mechanism capable of legal characterization; it must be capable of juridical consequences. Sale, service, lease and loan are some examples of juridical operations. Is the operation in the case at bar a juridical operation? 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 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. I must therefore infer that, in clause 12 of the corollary relief agreement, the parties did not agree on an operation

recognized in civil law. Since the parties did not envisage a juridical operation, it must be concluded that one of the essential elements of contract formation is missing.

[175] The undertaking to appear before the religious authorities is therefore not a contract as the appellant argues, and as the majority accept. But if the undertaking does not flow from a contract, what did the parties do in agreeing to clause 12? What is the juridical nature of this undertaking? In the instant case, the undertaking to appear before the rabbinical authorities for a religious divorce, like an undertaking to go regularly to church, to synagogue or to a mosque, is based on a duty of conscience alone. The Court of Appeal was therefore right to view the undertaking in clause 12 as a purely moral obligation that may not be enforced civilly.

[176] Accordingly, as the Court of Appeal rightly noted, the undertaking to appear before the rabbinical authorities as incorporated into the corollary relief agreement could at most be considered a moral undertaking. Moreover, even if this moral undertaking had been actionable, determining the appropriate remedy would have been problematic. This is the issue to which I will now turn.

2.3.3 Damages

[177] In this Court, the appellant is asking, without specifying under which heads, that the damages awarded by the trial judge be increased to $400,000. The remedy she seeks causes problems. Since I have already discussed these problems from a different

perspective, I will return to them only briefly.

[178] First, the damages claimed by the appellant are based on her observance of specific religious precepts. In both Canadian and Quebec law, freedom of religion is recognized as a fundamental value. It can serve as a basis for claiming equal treatment in civil society. However, it has not yet been recognized 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.

[179] Second, the argument on which the appellant's position is based requires recognition of a legal situation that is contrary to the rules of Canadian and Quebec family law. It is clear from the evidence that, unless a religious divorce is granted, an Orthodox Jewish woman may not date other men with a view to marriage or have sexual relations outside the marriage, and that any child born of such sexual relations is considered to be illegitimate (*mamzer*) (testimony of Rabbi Mendel Epstein, Respondent's Record, at pp. 904-5 and 930). In Canadian and Quebec family law, a woman is free to remarry without her former husband's consent. Children are treated equally whether they are born of a marriage or not. To sanction the religious law by, for example, ordering the payment of damages because children would be regarded as *mamzerim* or because the appellant was not released from her marriage despite the granting of a divorce would be to impose a rule that is inconsistent with the rights the secular courts are otherwise responsible for enforcing.

[180] In short, contract law cannot be relied on to enforce religious undertakings.

Neither the rules of contract formation nor the rules governing the consequences of breaching an obligation may be used as a vehicle for sanctioning the violation of a religious precept. Such undertakings do not constitute a juridical operation. Clause 12 cannot, legally, be characterized as a contract. It is a purely moral undertaking. In addition, the assessment of damages would require the court to implement a rule of religious law that is not within its jurisdiction and that violates the secular law it is constitutionally responsible for applying.

3. Conclusion

[181] The restraint shown by Canadian civil courts with respect to religious questions enables them not only to limit their action to rules they are explicitly responsible for applying, but also to maintain a neutrality that is indispensable in a pluralistic and multicultural society. It allows them to focus on conformity to the civil standard without having to decide between various customs or practices.

[182] It has taken the Canadian state centuries to reach the still-precarious balance we now have. In Quebec, the transition to state neutrality is referred to as the Quiet Revolution. Would attaching opprobrium to a child born to unmarried parents not be to slip into a sort of "Quiet Regression"? The role of the courts cannot be altered without calling into question the foundations of the relationship between the state and religion. The majority suggest proceeding on a case-by-case basis. In my opinion, that is a short-sighted approach. Canada opens its doors to all religions. All of them are entitled to receive the same protection, but

not, I believe, to be provided with weapons.

[183] Although, like the Court of Appeal, I am sensitive to how difficult it is for the Jewish community to modify the rules of religious divorce, the fact remains that the courts are limited to deciding cases that originate in positive law. The instant case is one in which the religious and civil worlds collide. In my opinion, the problem is a matter for Hebrew law. I see no reason to change, for this case, the clear rule that religion is not an autonomous source of law in Canada.

[184] I will conclude by noting that the reserved approach taken by the Canadian courts to religious precepts is in my view a sound one. 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. Gandhi is credited with saying that each person is responsible for his or her own religion. That responsibility goes hand in hand with the neutrality of the state toward religious precepts and, in the case at bar, favours dismissing the appellant's action.

[185] For these reasons, I would have dismissed the appeal.

Appeal allowed with costs, DESCHAMPS *and* CHARRON JJ. *dissenting.*

Solicitors for the appellant: Stein & Stein, Montréal; Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the respondent: Goldwater, Dubé, Westmount.

Solicitors for the intervener: Paliare, Roland, Rosenberg, Rothstein, Toronto.