

# INTERNATIONAL CHILD ABDUCTION & THE HAGUE CONVENTION: CANADIAN CONTEXT, LAW & PRACTICE

Prof. Nicholas Bala [bala@queensu.ca](mailto:bala@queensu.ca)  
Queen's University, Kingston, Canada

Max Blitt, K.C. [mblitt@spierharben.com](mailto:mblitt@spierharben.com)  
Spier Harben, Calgary, Canada

January 24, 2023  
International Cross-Border Mediation Certificate Program

# OUTLINE: THE LEGAL CONTEXT

- ◉ Introduction to International Child Abduction
- ◉ Hague Convention: Background
- ◉ Key Concepts of the Hague Convention
- ◉ Exceptions to Mandatory Return
- ◉ Using the Convention in Canada (Incoming)
- ◉ Facilitating Return
- ◉ Removal to Non-Hague Countries (Incoming)
- ◉ Prevention and Response (Outgoing)
  - Non-Hague Countries (Outgoing)
- ◉ Conclusions: The Role of Mediation

# INTRODUCTION TO INTERNATIONAL CHILD ABDUCTION

# WHAT IS INTERNATIONAL PARENTAL CHILD ABDUCTION?

- ⊙ **wrongful removal (or retention after visit)** of a child from a country by one parent in violation of rights of the other parent
- ⊙ Different issues if removal
  - Removal/retention by primary caregiver (often mother) vs secondary caregiver (often father)
  - Within Canada
  - To a Hague Convention signatory
    - Variations in responsiveness
  - To non-Hague country with co-operative government & courts
  - To non-Hague country without co-operative government & courts
  - Wrongful Removal/retention vs abduction with location unknown
- ⊙ concepts and **removal to** Canada (incoming)
- ⊙ prevention/response to **removal from** Canada (outgoing)

# CONCERNS

- ◉ Wrongful removal/retention is disruptive to administration of justice and can promote forum shopping (with one parent seeking most sympathetic jurisdiction - especially one of his/her own vs “foreign” parent)
- ◉ Wrongful removal/retention may be highly disruptive to children, and may be contrary to their best interests, but not always
- ◉ Legal focus on jurisdiction and possible return of child to original jurisdiction, not best interests

# JURISDICTION VS. BEST INTERESTS

- ◉ Legal focus in HCCA proceeding

1. whether wrongful removal & which court system has jurisdiction, (for incoming cases) Canada or place where children were before
2. whether children to be ordered to return
  - if child remain in Canada, taking parent usually has a very strong claim for primary parenting (custody)
  - if other jurisdiction, children to go back and taking parent will have to return (or give up children) and outcome much less certain.

- ◉ In mediation, with consent of parties might be possible to deal with both jurisdiction and final parenting arrangements (best interests)

# INCREASE IN INTERNATIONAL FAMILY ISSUES & CHILD REMOVAL

- ⊙ Globalization has led to an increasing number of international marriages, where one spouse moves to another country either due to the other spouse's work, family or other reasons.
- ⊙ Easier international travel, dual citizenships, more international marriages etc., have resulted in more international child abduction by parents

# CRIMINAL PROSECUTION

- ◉ Wrongful removal by one parent is a criminal offence if it deprives other parent of custody right (See Canada Criminal Code ss. 282, 283)
- ◉ Police can be very important resource for prevention, location (Interpol) etc.
- ◉ Canadian police, prosecutors & courts are taking international child abduction more seriously, especially if removal to state that does not allow for civil process for return and in violation of Canadian court orders : *R v Al Aazawi*, 2022 ABCA 361
- ◉ But threat of prosecution of abducting primary care parent can make court in requested state more reluctant to return
  - Extradition of abducting parent is possible, even if it means children end up in foster care due to prosecution for abduction, but this is a factor
    - *M.M. v United States*, 2015 SCC 62

# HAGUE CONVENTION: BACKGROUND

# THE HAGUE: PEACE PALACE



# HAGUE: PERMANENT BUREAU (LIMITED RESOURCES)



# HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH)

- ◉ The Hague Conference on Private International Law is a global inter-governmental organization with more than 100 member states. It develops and services multilateral legal instruments, which respond to global needs, in private law areas, including for commercial transactions, administration of civil justice, personal status and family law. Each country must decide whether to sign and ratify a specific Convention.
- ◉ The Conference held its first meeting in 1893, and the Permanent Bureau (Secretariat) was established in 1955. The Special Commissions are also organized to review the operation of the Conventions and adopt recommendations with the object of improving the effectiveness of the Conventions and promoting consistent practices and interpretation
- ◉ There are more than 40 Conventions. Canada has implemented the *Convention on International Adoption* and the *Convention on International Child Abduction*, and is in the process of implementing
- ◉ The Organization is funded principally by its Members, and has a budget of about €4.4m. The Secretariat engages in various activities to support the effective implementation and operation of the Conventions, like helping to draft a *Guides to Good Practice*.
- ◉ The Bureau has NO powers of enforcement, other than education and persuasion, and implementation of *Conventions* is left to national courts, which do not always interpret and apply it in the same way. It has no resources to assist in individual cases (but refers to Central Authorities

# HAGUE NETWORK OF JUDGES & DIRECT JUDICIAL COMMUNICATION

- ◉ a network to facilitate communications and co-operation between judges in different signatory countries who assist in the operation of the 1980 Hague Child Abduction Convention
- ◉ information sharing about HCCA for judges
- ◉ *Emerging Guidance on Direct Judicial Communications* (2013)
- ◉ <https://assets.hcch.net/docs/62d073ca-eda0-494e-af66-2ddd368b7379.pdf>
- ◉ the network may assist judges with co-ordination for specific cases
- ◉ improvements in communication (Zoom) have greatly facilitated co-ordination case management
- ◉ communication should generally be “on the record” and involve parties and counsel

→ **Direct  
Judicial** ←

Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges

**Communications**

# CONVENTION ON INTERNATIONAL CHILD ABDUCTION

- ◉ international treaty, drafted by the Hague Conference on Private International Law & adopted by the Conference in 1980
- ◉ Officially “*Convention on the Civil Aspects of International Child Abduction*”
- ◉ Signed by Canada in 1980 & in force 1983
- ◉ Became Canadian law by way of adoption by into the legislation of each province & territory
- ◉ Schedule to Ontario *CLRA* s. 46

# ACCESSION

- ◉ As new countries sign and ratify the Convention, Canada has a choice as to whether to allow their “accession” for purposes of Canada and proceedings in this country
- ◉ Canada often accepts accession of as new countries sign the *Convention on Child Abduction*, but not always: not Russia or China (but HK and Macau are accepted). Canada has accepted 84/101 countries

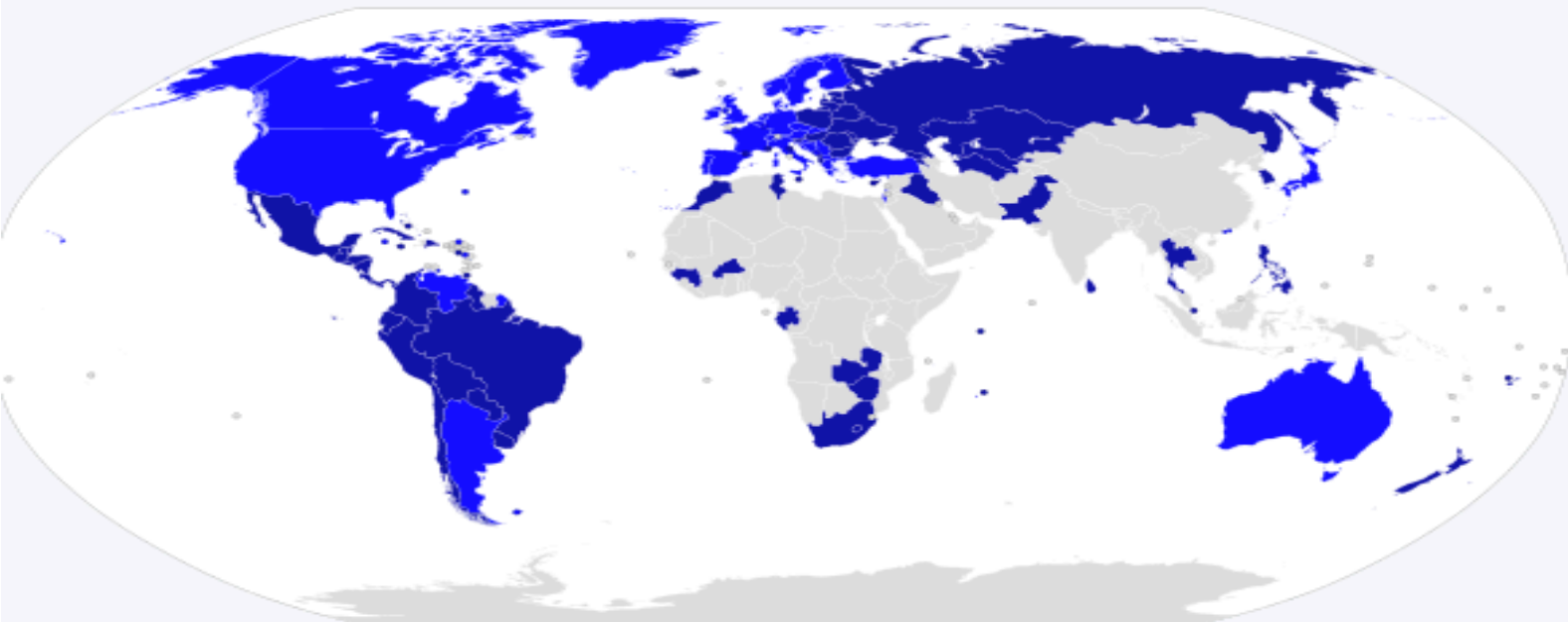
[https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/fr\\_hague](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/fr_hague)

## EXAMPLE

- ◉ Pakistan acceded to HCCA in 2017. USA and some other countries accepted this
- ◉ But Canada has not acceded to Pakistan’s signing because of concerns about possible effects of Sharia law in that country (and e.g. poor experience with Morocco)
- ◉ So HCCA does not apply if abduction from Pakistan to Canada (or vice versa), but it does between Pakistan & USA

# HCCA SIGNATORIES

## Convention on the civil Aspects of International Child Abduction



State parties to the convention



states that signed and ratified the convention



states that acceded to the convention

# HISTORICAL CONTEXT OF HCCA

- ◉ The drafters “primary concern was to remedy abuses by non-custodial parents who attempt to circumvent adverse custodial decrees” (see *Abbott v Abbott*, 2010, USSC)
- ◉ ie mainly intended for use by custodial mothers to address abduction by non-custodial fathers
- ◉ This type of abduction not only violated rights of custodial parents, but was often highly emotionally damaging, hence rhetoric about harm to children

# PRESENT CONTEXT

- ◉ HCCA most often used by fathers with joint legal custody or similar rights invoke HCCA to require return by primary care mothers (over 2/3 of cases)
- ◉ Are women and children being forced to return to live close to abusive fathers?
- ◉ What role for rights and wishes of children?
  - in 1980 not much appreciation of children's rights. UN Convention on Rights of Child in 1989
- ◉ New context gives “rise to issues which had not been foreseen by the drafters of the Convention.” (2006 Special Commission)

# CHANGING TREATY OR INTERPRETATION?

- ◉ Query: Would the HCCA be adopted in present form today?
- ◉ Practically impossible to change a treaty like this
- ◉ Case law and practice in different countries evolves and not always consistent
- ◉ Permanent Bureau tries helps shape practice (but cannot direct it) through:
  - Special Commissions (every 4- 6 years)
  - Reflection Papers
  - Protocols
  - Good Practice Guides
  - Support for Judicial and Professional Education

# CONCEPTUAL & PRACTICAL CHALLENGES

- How to interpret & understand international law & understand foreign legal concepts, especially “rights of custody”?
  - HCCA Art 14 - court may take “direct notice” of foreign law
  - HCCA Art 15 - may get decree explaining foreign law from foreign court
  - Have evidence (often affidavit) of foreign lawyer
- Most judges & lawyers deal with Hague cases rarely (or only once)
  - in USA 13,000 judges have Hague jurisdiction
  - In Ontario, informal moves to have a small number of judges deal with HCCA cases
  - Some lawyers are members of organizations like International Bar Association and have degree of expertise
- How to assess degree of protection that will be afforded in other jurisdictions?
- How to resolve complex factual disputes in an expeditious way when much evidence is about events in another country?

# CHALLENGES OF INTERPRETATION & APPLICATION

- ◉ Philosophy is very different from most child-related statutes
- ◉ Need for speed
- ◉ Expense - including for travel
  - Zoom has helped
- ◉ Complexity eg tied in immigration issues

# SOURCES FOR INTERPRETATION (SEE ABBOTT vs ABBOTT, USSC)

- ◉ Case law of jurisdiction and “opinions of our sister signatories”
  - desire for consistency but not always followed
- ◉ Views of foreign government making submissions through its Central Authority
- ◉ HC Permanent Bureau
  - Perez-Vera, *Explanatory Report* (1982)
  - Special Commissions
  - Permanent Bureau Guides
- ◉ Opinions of Scholars
  - Articles & Books

# INCADAT:

## AN OFFICIAL SOURCE & CONTROVERSY

- ◉ **The International Child Abduction Database (INCADAT)** is maintained by the Permanent Bureau of the Hague Conference on International Law and has extensive materials, including
  - a database of cases from signatory countries
  - information about Central Authorities in signatory countries
  - *Guides to Good Practice*
  - <http://www.incadat.com>
- ◉ Controversy over adequacy of this website: see Carol Bruch & Margaret Durkin, “The Hague’s online child abduction materials: A trap for the unwary” (2010) 44 Family Law Quarterly 65

## ○ US State Department

- Annual Compliance Report
- <https://travel.state.gov/content/dam/NEWIPCAAssets/pdfs/2022%20ICAPRA%20Annual%20Report.pdf>

## ○ Guides to Good Practice of Permanent Bureau

- [Guide to Good Practice Child Abduction Convention: Part V - Mediation \(2012\)](#)
- <https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf>
- [Guide to Good Practice Child Abduction Convention: Part VI - Article 13\(b\) \(2020\)](#)
- <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>

Guide to Good Practice  
under the Hague  
Convention of  
25 October 1980 on  
the Civil Aspects of  
International Child  
Abduction

Mediation

# HCCA: KEY CONCEPTS

# EVERY CONTRACTING STATE HAS A CENTRAL AUTHORITY

- ◉ Federal states, like Canada, each province/state/territory has one **Central Authority (C.A.)** responsible to assist with enforcement of individual cases (in and outgoing)
- ◉ In some jurisdictions, the C.A. will make the Convention application in court on behalf of left behind parent(NB & Man), or even pay travel expenses of left behind parent to come and testify (Germany)
- ◉ But in Ontario, MAG will only help locate child & provide limited advice & will not appear in court
- ◉ MAG and federal Department of Justice will assist in out-of-Canada abductions to contact CA in other jurisdiction, which may be very helpful
- ◉ Left behind parent may be eligible for Legal Aid
- ◉ See Bureau website for what each Central Authority will do:

[http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=42&cid=24](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=42&cid=24)

## ART. 3: WRONGFUL REMOVAL OR RETENTION

### Article 3

The **removal or the retention** of a child is to be considered **wrongful** where -

- a) it is in **breach of rights of custody** attributed to a person... either jointly or alone, under the law of the State in which the child was **habitually resident** immediately before the removal or retention; and <sup>[L]</sup><sub>[SEP]</sub> b) at the time of removal or retention those rights were **actually exercised**, either jointly or alone, or would have been so exercised but for the removal or retention.

The **rights of custody** mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a **judicial or administrative decision**, or by reason of an agreement having legal effect under the law of that State.

# WHAT DOES THE CONVENTION PROTECT?

- ◉ “Right of custody” has particular meanings different from domestic meanings;
- ◉ The Convention recognizes “right of access,” but does not protect directly protect it;
  - though Central Authorities are expected to assist in access enforcement, very limited practical assistance.
- ◉ However, “rights of custody” are broad and may protect rights of parents with joint legal custody or even orders preventing removal of child from jurisdiction (*ne exeat*)

# WHAT DOES THE CONVENTION PROTECT?

- Public policy perspective:
  - supports resolution of “best interests” custody and access disputes by courts in jurisdiction where children are “habitually resident”
  - deters “child abduction”
  - promotes stability, comity etc.
- Parents’ perspective: protects “rights of custody” that were “actually being exercised” in cases in which children have been “wrongfully removed” or “wrongfully retained”

# THE MAIN IDEA:

## “PROTECTS RIGHTS OF CUSTODY”

- ◉ To enforce pre-existing “rights of custody”
- ◉ To return children to their place of habitual residence, so that the issues of custody and access (parenting) can be dealt with there
- ◉ The child must be returned, unless one of the exceptions in the Convention applies (Art 13)

# “INTERESTS OF CHILDREN” vs. “BEST INTERESTS OF THIS CHILD”

- "Other than in exceptional circumstances, the best interests of children in custody matters should be entrusted to the courts in the place of the child's habitual residence" and the interests of children who have been wrongfully removed are "ordinarily better served by immediately repatriating them to their original jurisdiction." *JEA v CLM* (NSCA 2002)
- "Adhering to this philosophy ultimately discourages child abduction, renders forum shopping ineffective, and provides children with the greatest possible stability in the instance of a family breakdown." *Cannock v. Fleguel* (Ont CA 2008)

# HCCA: NOT BEST INTERESTS OF CHILD

- ◉ A child's "best interests" are NOT at issue in Convention cases, and the Convention itself limits scope for courts in contracting states from deciding on "best interests"
- ◉ The idea is that contracting states "have each other's back" when it comes to custody and access issues. This is to prevent forum shopping and discourage removal.
- ◉ Promotes the interests of children in general, not necessarily best interests of specific child before the court
- ◉ Query: Do judges (prompted by litigants) find it hard to ignore best interests?

# PRESUMPTION OF ADEQUACY OF LAWS OF HABITUAL RESIDENCE

- ◉ In general, contracting states presume that every other contracting state can adequately protect parents and children, and will make decisions about custody and access in a child's best interest. This presumption is rebuttable.
- ◉ HCCA is intended to “avoid the common tendency [of judges] to prefer their own society and culture.”
  - Kennedy J. in *Abbott v Abbott* (USSC 2010)

# HABITUAL RESIDENCE IS NOT CITIZENSHIP

- ◎ Citizenship does not determine the outcome. A child can be a citizen of a different state than the state of his or her habitual residence. The Convention returns children to their “habitual residence”, and not to their place of citizenship.
- ◎ This goes for parents as well. They do not have to be citizens of the place of habitual residence in order for the child to be returned there.
- ◎ Immigration status can complicate practice & returns.
  - Abducting primary caregiver may not be able to return with child.
  - Child may be permitted to return under immigration law
  - Central authorities and left behind parents may be expected to facilitate immigration return, but not absolute condition of return; see *Brown v Pulley*, 2015 ONSC 186

## “RIGHTS OF CUSTODY”

- ◉ More broadly defined than domestically
- ◉ Article 5a:

“‘rights of custody’ shall include rights relating to the care of the person of the child and, *in particular*, the right to determine the child’s place of residence.”

As determined under law of habitual residence

## “RIGHTS OF CUSTODY” CONT’D

- ◉ May be established even if there is no formal agreement or order on basis of *de facto* custody or common law or statutory rights of habitual residence
  - *Kirby v. Thuns*, [2008] OJ 3586 (SCJ)
- ◉ includes a right of joint legal custody, even with limited access

# HABITUAL RESIDENCE OF CHILD

# SIGNIFICANCE OF HABITUAL RESIDENCE



## HCCA:

- Presumptive return to jurisdiction of habitual residence if wrongful removal or retention
- Law of the habitual residence determines whether the left behind parent was exercising “rights of custody” and hence wrongful removal or retention
- About 25% of HCCA cases raise this issue

# HABITUAL RESIDENCE: RELEVANT DATE (ART 3)

- Assessed “at the time **immediately before** the alleged wrongful” retention or removal:
  - *O.C.L. v Balev*, 2018 SCC 16, at para 36
- Evidence about events and child adjustment subsequent to removal/retention is **not** admissible on issue of “habitual residence,” but may be relevant to HCCA Art. 12 & 13 exceptions to return such as acquiescence, grave risk, child’s objections

## “HABITUAL RESIDENCE”

- The parties need not intend to be resident in the “habitual residence” on a permanent basis;
  - *Korutowska-Wooff v. Wooff*, [2004] OJ 3256 (OCA)
- In applying Article 3, the court must assess **habitual residence of the children as of the date of removal**, and not as of any time thereafter;

# HABITUAL RESIDENCE:

- Place where the child last “resided” with:
  - a) both parents;
  - b) if parents separated, resided with one parent under court order, separation agreement or with consent or acquiescence of the other; or
  - c) lived with person other than parent “on a permanent basis for a significant period of time”
- Residing is more than visiting, but need not have intent to live permanently. School/day care attendance is often determinative
- Erroneous belief of removing parent that they have “sole custody” or right to move without consent of the other is NOT relevant
  - *Andegiorgis v. Giorgis*, 2018 ONCJ 965

# HABITUAL RESIDENCE CONT'D

In determining habitual residence, the following principles apply:

- A child's habitual residence is tied to that of the child's custodian(s).
- The issue of habitual residence is a question of fact to be decided based on all of the circumstances;
- The habitual residence is the place where the person resides for an appreciable period of time with a "settled intention";
- A "settled intention" or "purpose" is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.;

# OFFICE OF THE CHILDREN'S LAWYER v. BALEV, 2018 SCC 16

## FACTS IN *BALEV*

Children aged 11 & 14 years lived in Germany but in Canada with consent of both parents

- Parents were Canadian citizens, married in Canada and moved to Germany where they had two children (dual citizens). Marital stress and children were struggling in school in Germany, so father agrees Mom to take them to school for a year in Ontario where grandparents live - written consent.

Dad revokes consent and brings Hague application in Ontario

- Dad visits children in Canada a couple of times, and has regular Skype contact. 11 mos after he consented, Dad withdraws consent and brings proceedings in Germany and Canada. Ontario trial judge accepts children “integrated” in community in Canada but still “habitually resident” in Germany, so orders return. Decision of trial judge reversed by Ont Div Ct, but upheld by OCA which finds “wrongful retention” in Canada and orders return.

SCC acknowledges “moot” but grants leave to appeal

- Office of Children’s Lawyer seeks to appeal to SCC, but no stay so Mom and children return to Germany where court gives mother custody and right to move them to Canada. By time of SCC hearing, kids living in Ontario for 3.5 years and had expressed wish to OCL to remain there. SCC wanted to address contentious issue of interpreting Art 3 as conflicting CA decisions, so renders judgement even though moot

## SCC: ADOPTS “HYBRID APPROACH” TO CHILD’S HABITUAL RESIDENCE:

**McLachlin CJC for 6:3 majority:** Noted that there were three approaches to determining the habitual residence of the children: the parental intention approach, the child-centric approach and the hybrid approach.

The majority adopted the **hybrid approach** to determining habitual residence under Art 3 of HCCA. SCC holds that the hybrid approach best conforms to the text, structure and purpose of the Hague Convention. The **hybrid approach recognizes that a child may develop genuine links to a new jurisdiction**, though habitual residence is to be determined immediately prior to the wrongful removal or retention.

A non-technical approach should be adopted to considering a child's objection to removal under Art 13(2). The object of Art. 13(2) can be achieved by a single process in which the judge decides if the child possesses sufficient age and maturity to make her evidence useful, decides if the child object to return and, if so, exercises judicial discretion as to whether to return the child.

# SCC (MCLACHLIN CJ) ON HABITUAL RESIDENCE

- ◉ [The] hybrid approach holds that instead of focusing primarily or exclusively on the either parental intention or the child's acclimatization, the judge determining habitual residence under Article 3 must look to **all relevant considerations** arising from the facts of the case.
- ◉ [The] application judge determines the focal point of the child's life "the family and social environment in which its life has developed" – immediately prior to the removal or retention . . .
- ◉ Considerations include "the duration, regularity, conditions and reason for the [child's] stay in the territory of [a] Member State" and the child's nationality . . . **No single factor dominates** the analysis, rather, the application judge should consider the entirety of the circumstances . . . Relevant considerations may vary according to the age of the child concerned: where the child is an infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of".
- ◉ The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children . . . However, recent cases **caution against over-reliance on parental intention** . . . parental intention "can also be taken into account, where that intention is manifested by certain tangible steps such as the purchase or lease of a residence" . . .

## *O.C.L. v BALEV*: “MOST APPROPRIATE FORUM”

- ◉ The hybrid approach [to establishing habitual residence] favours choice of **the most appropriate forum**. It focuses on the factual connection between the child and the countries in question, as well as the circumstances of the move – considerations that “mirror the closest connection test often used in determining the *forum conveniens*” . . . This allows for **custody and access disputes to be adjudicated in the most convenient forum with the best available evidence** . . . The hybrid approach thus avoids the problem that a child may be found to be habitually resident in a country with which the child has little or no connection (para. 64).
- ◉ There is no conflict between the hybrid approach and the “settled in” exception under Article 12 . . . [which] comes into play only after habitual residence is determined, and functions to provide a limited exception to the requirement that a child wrongfully removed or retained be returned to his or her habitual residence. It may be that the hybrid approach habitual residence favours returning the child, but that the one year period and settling in indicate that the child should not be uprooted and returned to his or her place of habitual residence (para. 66).
- ◉ For recent application of hybrid approach, see *K.F. v. J.F.*, 2022 NLCA 33, leave to appeal to SCC dismissed
- ◉ The hybrid approach is adopted in many countries e.g. USA & Australia, but it provides less predictability than the parental intentional or child-centric approaches

# FACT BASED CONNECTING FACTORS

- ◉ length of time in different jurisdictions
- ◉ circumstances of removal/retention
- ◉ family environment
- ◉ social environment: relatives
- ◉ school, day care
- ◉ doctor, dentist etc.
- ◉ registration for health care etc.
- ◉ languages spoken by child
- ◉ age of child
- ◉ friends
- ◉ nationality & immigration status of child
- ◉ toddler vs older child who has social ties
  - intention of parents has more weight if very young, but not determinative in any circumstance
- ◉ child's social ties
- ◉ physical residences (house, apartment)

# LAW OF THE HABITUAL RESIDENCE

- ◉ The law of the place of the child's habitual residence determines whether a parent was exercising "rights of custody"
- ◉ Can be proved informally:
  - Internet sources
  - Letters from lawyers in the requesting state
  - Case law from the requesting state
  - Judicial notice (not the usual rule of needing "proof of foreign law")

## “ACTUALLY EXERCISING RIGHTS OF CUSTODY”

- ◉ Article 3b: Convention only applies if left-behind parent was “actually exercising” rights of custody
- ◉ Canadian courts apply a low standard for “actual exercise” of “rights of custody,” provided it is “custody right”:
  - telephone contact;
  - occasional visits;
  - “some involvement” in child’s life

# CHASING ORDERS

- ◉ Chasing orders are orders obtained in the place of the child's habitual residence after removal, usually granting custody to the left behind parent and may order return of abducting parent
- ◉ Article 17: just because there is a custody order, or the right to seek one, in the place of habitual residence doesn't mean the requested state has to return a child
- ◉ The Supreme Court of Canada has indicated that chasing orders don't help the left-behind parent **for incoming cases** in Canada,
  - *Thomson v. Thomson*, [1994] SCJ 6
  - *V.W. v D.S.*, [1996] SCJ 53

# THE PARADOX OF CHASING ORDERS

- ◉ **For incoming cases**, if non-primary caregiver obtains a chasing orders, courts in Canada may actually be less willing to order return as it will result in immediate, disruptive change in custody as well as return
- ◉ Can mitigate effects through undertaking, mirror orders etc.
- ◉ **BUT for out-going cases**, obtaining a chasing order in Canada may have real value e.g. USA (though variation depending on approach in requested state.)

# EXCEPTIONS TO MANDATORY RETURN

## HCCA ART 12: “SETTLED IN”

**Art 12: “Even where the proceedings have been commenced after the expiration of the period of one year [after wrongful removal or retention from the jurisdiction of habitual residence, the court] shall ...order the return of the child, unless it is demonstrated that the child is now *settled in* its new environment.”**

*O.C.L. v Balev*, 2018 SCC 18, at para 67

⦿ the hybrid approach does not "ignor[e] the fact that a child could develop genuine links to a new jurisdiction following a wrongful removal or retention" . . . **Habitual residence is determined immediately prior to the wrongful removal or retention . . . Subsequent links are relevant only to the exception under Article 12.**

## CONSENT OR SUBSEQUENT ACQUIESCENCE: ART 13(A)

- ◉ Art 13(a): Notwithstanding the provisions of Art 12, the court of the “requested State is not bound to order the return of the child if the person [who] opposes its return establishes that the person [seeking return] had consented to or subsequently acquiesced in the removal or retention.”

Often alternative arguments between **acquiescence or implied consent to change in habitual residence** by other parent [Art 3 & 12] and **consent or subsequent acquiescence to removal** [Art 13(a)] but conceptually distinct.

# CONSENT OR ACQUIESCENCE

## - ART. 13A

- ◉ In determining whether Art 13(a) applies, consider knowledge and communication. Implied consent or acquiescence require more than “some delay” in commencing proceedings, especially if lack of resources or uncertainty of plans or location of child: *Ibrahim v Girgis*, 2008 ONCA 23 (8 months delay):

“acquiescence is a question of the aggrieved parent's **subjective intention**, not one of the outside world's perceptions of that intention. Subjective intention can be demonstrated through conduct, but such a demonstration requires the abducting parent to **show ‘clear and cogent evidence’ of ‘conduct . . . which is inconsistent with the summary return of the children to their habitual residence’**. Moreover, to override the mandatory return mechanism, the acquiescence must be **“unequivocal”**.”

- ◉ Art 13 requires knowledge of relocation with child
- ◉ Art 12 provides that if child is “settled in new environment” and one year or more, then court may decline to order return.
  - Knowledge of location is not essential, though may be a factor

# RISK & CHILD'S OBJECTIONS: ART 13(B) (FREQUENTLY LITIGATED PROVISION)

13) the judicial ...authority of the requested State is not bound to order the return of the child if the person... which opposes its return establishes that ....

b) there is a **grave risk** that his or her return would expose the child to physical or psychological harm or otherwise place the child in an **intolerable situation**.

# THE NATURE OF ART. 13(B)

Court must take account of

- (1) the degree of risk;
- (2) the nature of the likely harm; and
- (3) the adequacy of any protective measures that may be taken in the jurisdiction of habitual residence. The interrelationship of these issues is recognized in *Re E*, 2011 UKSC 27:

“...the risk to the child must be ‘grave.’ It is not enough, as it is in other contexts such as asylum, that the risk be ‘real’. It must have reached such a level of seriousness as to be characterised as “grave”. *Although ‘grave’ characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as “grave” while a higher level of risk might be required for other less serious forms of harm.*”

# ARTICLE 13B: GRAVE RISK

- ◉ “Grave risk” of physical or psychological harm or “intolerable situation”
- ◉ Must be something more than “ordinary risk” and disruption of return to care of left behind parent
  - *Thomson v. Thomson*, 1994 SCJ 6
- ◉ War zone or famine is reason not to return child, but OK to return to Israel despite terrorism or Mexico despite poverty and less adequate medical care

Courts concerned about “undermining the effectiveness of the Convention” by applying Canadian medical standards to Mexico, as it would “otherwise encourage the wrongful removal and retention of children by parents with access to superior resources in their countries.”

*Solis v. Lenoski*, 2015 BCCA 508

# N v F (SCC 2022) - PSYCHOLOGICAL HARM

- ◉ Mother took children from their habitual residence in UAE to Ontario. While judge found that the children could face adverse psychological impacts if separated from their primary caregiver (mother), it was not known whether these children would suffer serious harm from such potential adverse impacts. In any event, no immediate separation if return unless mother decided not to return with children. Trial judge ordered return to UAE, with father's undertaking to provide mother and children residence and support, and she would remain primary caregiver, with joint decision-making, unless varied by UAE court.
- ◉ ONCA 2:1(2021) & SCC 5:4 uphold. **Onus on taking parent to establish "serious harm" is "demanding" and requires more than proof of "negative impact."** A parent ought not to be able to create serious harm by refusal to return unless **"legitimate reasons,"** including **"intimate partner violence."**
- ◉ More below on N v F as UAE is not a Hague signatory, but similar language in CLRA & HCCA

# GRAVE RISK & DOMESTIC VIOLENCE: CONTROVERSY & CHANGE

- In the 1980's most Hague cases took a very narrow approach to Art 13(b), based on belief that this would best fulfill objectives of the Convention.
- By 1990s there were concerns that victims of family violence and children were being returned to situations of danger were not recognized in Hague proceedings
- Courts and *Guide to Good Practice on Art 13(1)(b)* now recognize that “grave risk” includes risk to children and caregiving parent from domestic violence, requires consideration of:
  - veracity of allegations
  - nature of domestic violence
    - isolated incident vs coercive control
  - adequacy of legal protections in jurisdiction of habitual residence



## 1980 Child Abduction Convention

### Guide to Good Practice

#### Part VI

#### Article 13(1)(b)



# PROCESS FOR ART 13(B) CASES

- ◉ Consider nature & degree of risk
- ◉ **May need to assess credibility of allegations**, but not always necessary to do so if not "grave risk" or adequate protections  
*Ajayi v. Ajayi*, 2022 ONSC 2678 & 5268
- ◉ Is there a grave risk if child returned to jurisdiction) of habitual residence (not care of left behind parent)? Consider effect on primary caretaker of return
  - What protection measures or undertakings?
  - Is there a history of compliance/violation of orders?

# GRAVE RISK & DOMESTIC VIOLENCE

- ◉ How can taking parent satisfy onus to be within Art 13(b) exception and prove nature of violence and risk in another country?
- ◉ How can alleged abuser challenge or rebut unless significant resources to participate?
- ◉ How much and what type of violence?
- ◉ How to take account of ability of legal system in jurisdiction of habitual residence to protect
  - Do Canadian judges sometimes discount effectiveness or integrity of police and justice system in countries like Peru, Mexico and Latvia? See e.g. *Husid v Daviau* [2012] OJ. 380 (SCJ), aff'd. 2012 ONCA 655
  - Is this justified? Is it politic? Will courts in those countries be less willing to recognize rights of left behind Canadians?

# GRAVE RISK AND DOMESTIC VIOLENCE

## ◉ *Borisovs v Kubiles*, 2013 ONCJ 85

- Mother, child, new partner & her parents came to Canada from Latvia after former husband abused her, threatened to kill her, tried to burn down her apartment etc.
- **Threat of harm to a primary caregiver is threat to a child.**
- Dispute about evidence, but here OCL appointed clinical investigator & corroboration from independent sources and police reports in Latvia to help establish. Failure of applicant father to fully co-operate with OCL affected his credibility
- Child is 8 years and interviewed. Her views are to be “taken into account” - overlap of evidence of facts from child and child “objects” to return
- Usually onus on abducting parent to establish Art 13(b) defence. Presumption under the Hague Convention that requesting states can protect children and parents, but this presumption is rebutted if refugee status in Canada due to non-protection from domestic violence in Latvia.
- Significant evidence that Latvian police and courts would not protect mother from violence of former spouse

# DOMESTIC VIOLENCE & CULTURE

*Mbuyi v. Ngalula*, 2018 MBQB 176, per McPhail J.

- ◉ The parents were born in Democratic Republic of Congo. Man immigrated to USA lived in Iowa. Woman immigrated to Canada and resided in Manitoba. After parents married, mother moved to Iowa where she obtained immigration status and employment; the parties had two children were born in Iowa. After one or more incidents of spousal abuse, mother left for Manitoba with the two children aged 1 & 2 years. The father agreed to their trip, but shortly after he realized that they would not return, he began a Hague application in Manitoba for their return to Iowa.
- ◉ Mother conceded that children were habitually resident in USA and were wrongfully retained by her in Canada. She claimed that there were many incidents of domestic violence in relationship with father, and some of events she described were serious. The Manitoba judge was satisfied that at least some of them occurred. However, by the mother's own evidence, police and other agencies in Iowa were responsive to her situation, but she chose **not to avail herself of police and support services for "cultural and religious" reasons**. The Manitoba judge arranged for a call with a judge in Iowa through the Hague Network of judges, with both Canadian counsel and the mother in attendance in Canada, and the father in court with the judge in Iowa. The judge in Iowa reported on the civil and other remedies available to the mother there, including resources to provide support to victims of spousal violence, and there was a discussion about interim orders and enforcement of undertakings of the father by the court in Iowa.
- ◉ The judge in Manitoba ordered the return of the children to Iowa, noting the **"high threshold" for satisfying Art 13(b) and accepting** that the evidence did not establish that the mother and children could not be protected in Iowa. The Iowa court and law enforcement agencies should be trusted to take measures to protect children, including protecting mother from any domestic violence.

# CHILD'S WISHES/EVIDENCE OF ABUSE

- ◉ Undocumented claims of younger child who have been in Canada for a while about poor relationship with left-behind parent or step-parent may have less weight
  - *Silva v da Silva*, 2018 BCSC 788; 11 year old boy wanted to stay in Canada with father after summer visit from Azores. Better lifestyle. Boy's wishes discounted as not sufficiently mature & 'reports about poor treatment by step-father in the Azores discounted and he was ordered returned to mother

# ARTICLE 13(2): CHILD'S WISHES

- ◉ Court may refuse to return child if it “finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”.
- ◉ Views of children 10 - 11 years can be significant, even 8 or 9 yrs old may be considered, but 12 -14 yrs seems to be threshold
- ◉ As with other exceptions, onus is on parent asking for the exception, and onus may be substantial.
- ◉ Concern about influence of abducting parent if substantial time since other parent had much care
  - alienation
- ◉ Views of child may be introduced through psychologist or social worker
- ◉ Lawyer may be appointed to determine child's views and preferences, and share with Court

# SCC IN *O.C.L. v BALEV*: CHILD'S OBJECTIONS

**"Article 13(2) is an exception to the general rule that a wrongfully removed or retained child must be returned to her country of habitual residence, and it should not be read so broadly that it erodes the general rule.... This, however, does not preclude a fact-based, common-sense approach to determining whether the elements of Art. 13(2) are established...**

**....it is telling that the *Hague Convention* does not specify particular requirements or procedures to establish sufficient age and maturity and an objection. Basically, it is for the application judge to determine, as a matter of fact, whether those elements are established. In most cases, the object of Art. 13(2) can be achieved by a single process in which the judge decides if the child possesses sufficient age and maturity to make her evidence useful, decides if the child objects to return, and, if so, exercises his or her **judicial discretion** as to whether to return the child.**

**Determining sufficient age and maturity in most cases is simply a matter of inference from the child's demeanor, testimony, and circumstances... In some cases, it may be appropriate to call expert evidence or have the child professionally examined... However, this should not be allowed to delay the proceedings.**

**As in the case of age and maturity, the child's objection should be assessed in a straight-forward fashion – without the imposition of formal conditions or requirements not set out in the text of the *Hague Convention*.**

**If the elements of (1) age and maturity and (2) objection are established, the application judge has a discretion as to whether to order the child returned, having regard to the "nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations".**

# USSC: GOLAN V. SAADA (2022) 146 S CT. 1880 US (SOTOMAYOR J.)

- ◉ If a court in a Hague Convention case has found that return would expose the child to a grave risk of harm due to family violence concerns, the court is not categorically required to examine all possible ameliorative measures in jurisdiction of habitual residence before denying a Hague Convention application
- ◉ USSC recognizes significance of family violence, but case remanded for rehearing, and judge again orders child's return to Italy (Mother dies in suspicious circumstances in NYC)

# CHILD'S RIGHT TO PARTICIPATE

## A.M.R.I. v K.E.R., 2011 ONCA 417

- Ontario courts hold that *Charter* s. 7 gives right to older child to participate in HCCA case with lawyer
- 13 year-old-girl from Mexico in Ontario with paternal aunt after father deported to Norway attending school in Ontario, claims abuse by mother. Mother from Mexico has HCCA application in Ontario. Ontario court accepts that child has constitutional right to participate and
  - “An order of return under the Hague Convention has a profound and often searing impact on the affected child.”
- Child’s lawyer may also participate in mediation
- Variation between jurisdictions in whether will have counsel and in role of counsel, but usually advocate for child’s position:
  - see *Ludwig v Ludwig*, 2019 ONCA 680; *Ciccone v Ritchie*, [2016] EWCH 608;

# USING THE CONVENTION IN CANADA (IN-COMING)

# BASIC ISSUES

- ◉ Is the child 16 years of age or younger? (Article 4)
- ◉ If so, was the child habitually resident in the “left-behind” jurisdiction? (Article 3(a))
- ◉ If so, did the left-behind parent have “rights of custody”? (Article 3(a))
- ◉ If so, was the left-behind parent exercising custody rights at the time the child was removed or retained? (Article 3(b))
- ◉ If the answers to questions 1 - 4 are “yes”, are there any exceptions in the individual case recognized in the Convention to the general expectation that the child will be returned to his or her place of habitual residence? (Articles 12 and 13)

# FIRST OF ALL

- ◉ The Convention can only be pleaded if both countries are contracting states
- ◉ The case should be started in the jurisdiction to which the child has been taken
- ◉ “any person or institution” exercising “rights of custody” at the time a child is removed from the habitual residence can apply
- ◉ The contracting state from which the child is removed is the “requesting” state
- ◉ The contracting state to which the child is removed is the “requested” state

# WHICH COURT?

- ◉ In Ontario, if there is a Superior Court, Family Branch, *Courts of Justice A* requires it the application there
  - If there is a Superior Court & OCJ Family Court, the proceeding can start in either court (OCJ may be faster, but appeal to SCJ)
- ◉ In many countries (eg USA), HCCA applications may be made to any one of 1000's of judges
- ◉ Informal direction of cases to specific judges in some courts who gain expertise

# AVOIDING DELAY (ONTARIO)

- ◉ Art.11 of HCCA requires courts “to act expeditiously” to have hearing to decide whether to return child.”
- ◉ In *Leigh v. Rubio*, 2022 ONCA 582, due to court delays (in part due to pandemic), it took more than 3 years for case to get to ONCA, which observed:
  - “When there is a delay, the abducting parent gains an advantage.” While ONCA had concerns about trial judge’s decision, due to delay child became estranged from father and settled in Canada, so no return
- ◉ Ontario Family Law Rules changed Oct. 1, 2022 to require case management and prompt resolution (within 6 weeks) (Rule 17(3.1) and 37.2)

# WHAT PROCEDURE: TRIAL OR MOTION?

- ◉ The *Good Practice Guides* published by the Hague Secretariat encourage summary proceedings (no oral evidence, affidavits only)
- ◉ Ont CA prefers no oral evidence, except in “exceptional cases”
  - *Cannock v. Fleguel*, [2008] O.J.4480 (OCA);
  - *AMRI v KER*, 2011 ONCA 417
- ◉ Whether to hear It will depend on whether or not there are serious credibility issues
- ◉ Trials take a longer time to schedule, and a longer time to hear; motions take less time to schedule and hear

## ONT C.A.: A.M.E.R. v K.E.R. (2011)

“Given the strong commitment under the Hague Convention to expeditious proceedings and the need for the prompt return of an abducted child, this court has repeatedly recognized that the receipt of **viva voce evidence** on a Hague application should occur **only in exceptional circumstances....**

Where, however, serious issues of credibility are involved, fundamental justice requires that those issues be determined on the basis of an oral hearing....This applies with equal force to the determination of serious credibility issues in Hague applications involving refugee children. **Expediency will never trump fundamental human rights.”**

FACILITATING RETURN...

# COMMUNICATION BETWEEN JUDGES

- ◉ If there are concurrent proceedings in requesting and requested state, and HCCA proceeding
- ◉ Something that counsel can suggest or request, if representing a parent on a Convention application
- ◉ There are “liaison judges” in each province and country who can assist
- ◉ The conversation is usually by telephone conference or Zoom, and counsel are permitted to listen and make submissions

# COMMUNICATION BETWEEN JUDGES

- ◉ Issue discussed at 6th Special Commission in 2012 and now HCCA protocol (2013) to help govern communication between judges on Convention cases
- ◉ Discretionary: Was not undertaken in *Husid v. Daviau*, 2012 ONCA 655, and could easily have been (Ontario and Peru), because the trial judge spoke Spanish
- ◉ This decision by the trial judge not to communicate was endorsed by the OCA

# FACILITATING RETURN

- ◉ Not just return to original jurisdiction
- ◉ Can there be safe return with taking parent retaining custody in original jurisdiction e.g undertakings or “mirror order” (on consent)?
- ◉ Not uncommon to have mediated return with conditions or undertakings. Commencement of Hague application may help facilitate mediation

# ROLE OF UNDERTAKINGS

- ◉ If there has been a chasing order made in the requesting state, court may ask left-behind parent to undertake not to enforce it, in order to maintain level playing field upon child's return (*Thomson v. Thomson*, [1994] SCJ 6);
- ◉ Courts may also ask for undertakings regarding the practicalities of returning the child (paying for flights; interim support, etc.)
- ◉ Unless “mirror order,” what is effect of undertaking or even order?

# UNDERTAKINGS: DOMESTIC VIOLENCE

- Undertakings can be useful in securing the safe return of the taking parent and child if there is a Domestic Violence concern:
  - The Applicant pay for the Respondent and child to travel to the country where the child habitually resides;
  - The Applicant make appropriate housing arrangements for the Respondent and the child in the country where the child habitually resides;
  - The Applicant pay the living expenses or spousal and child support for the respondent and child in the country where the child habitually resides (recognizing the absconding parent, although acting wrongfully, will have economic needs that must be met in the short term);
  - The Applicant commence an application to determine the custodial rights of the child(ren) immediately, if it has not already been commenced. If such a proceeding has been commenced that the applicant arrange an immediate court date;
  - The Applicant not assume custody of the child if he or she obtained a custody order from the court in the child's habitual residence after the wrongful removal or retention or a return to the pre abduction status quo custodial arrangements;

## MORE UNDERTAKINGS

- An order that the Applicant have no contact with the respondent if the Respondent returns to the country of the child's habitual residence;
- An order that the Applicant have no contact with the child except through an order of the court in the child's habitual residence;
- Provisions that neither party molest, annoy or harass the other parent;
- Provisions that a parent refrain from the use of physical discipline, alcohol or drug use while the child is in the care of the parent;
- A provision to temporarily stay the enforcement for the return of the child pending completion of the child's school year or the ability of the absconding parent to make travel arrangements;
- If the Applicant has caused criminal proceedings against the Respondent, that those proceedings be abandoned prior to the return of the Respondent to the country of habitual residence;
- The Court or a neutral party retain all the passports of the Applicant, Respondent and child(ren) pending the conclusion of the custody proceedings in the country of habitual residence and the children not be removed from the jurisdiction of the court of habitual residence.

# RETURN TO NON-HAGUE COUNTRIES

# RETURN FROM ONTARIO

- ◉ Ontario court may direct return to non-Hague country (CLRA s. 42-45).
- ◉ Many of the same factors will apply as in Hague cases, though more judicial discretion to take account of best interests of this child
- ◉ ***Ojeikere v. Ojeikere***, 2018 ONCA 372: Since other jurisdiction (Nigeria) is not Hague signatory -> not certain that best interests test applies, there so more discretion for court
- ◉ More recently more confidence regarding family justice systems and respect for best interests in **some** non-Hague countries (Nigeria: : *Ajayi v. Ajayi*, 2022 ONSC 2678, affd 2022 ONSC 5268 Div Ct)

# N v F, 2022 SCC 51

- Father was a Pakistani national and the mother was born in Pakistan and immigrated to Canada when 15 years old and she became Canadian citizen. They had an arranged marriage in 2012, and lived in the United Arab Emirates since their marriage. They had two children who were Canadian citizens (aged 1 & 4 years at trial). In June 2020, with father's consent, mother travelled to Ontario with the children to visit her parents. Mother then informed father that she intended to stay in Ontario with the children. The father commenced legal proceedings in Ontario seeking an order under CLRA s. 40 (similar to HCCA but not identical). Trial judge (hearing Nov 2020, decision Dec. 15, 2020) found that the mother had always been the children's primary caregiver, but the children had habitual residence in UAE.
- Based on expert evidence trial judge found that the best interests of the children would be the paramount consideration in a custody determination by the UAE court. While judge found that the children could face adverse psychological impacts if separated from their primary caregiver, it was not known whether these children would suffer serious harm from such potential adverse impacts. In any event, no immediate separation if return unless mother decided not to return with children. Trial judge ordered return to UAE, with father's undertaking to provide mother and children residence and support, and she would remain primary caregiver, with joint decision-making, unless varied by UAE court.
- ONCA 2:1(2021) & SCC 5:4 uphold. Onus on taking parent to establish "serious harm" is "demanding" and requires more than proof of "negative impact." A parent ought not to be able to create serious harm by refusal to return unless "legitimate reasons," including "intimate partner violence"
- SCC distinguished UKSC decisions where no return to Saudi Arabia as not a best interests test and gender-based custody rules there.
- Kasirer writes that Ontario should not become "haven for child abductors"

# PREVENTION & RESPONSE

# “RED FLAGS” OF THREAT OF ABDUCTION

Raise issue of abduction risk at initial meeting with family client and reassess as case progresses, especially after court order or if change in circumstances

- Relationship has broken down
  - Domestic violence – alleged victim or perpetrator
- Immigration status & citizenship issues
- Other parent has family or strong ties to another country
- Other parent does not have strong ties to Canada
  - Concern if sale of property in Canada
  - Quits job or unemployed
- Permission being sought by the other parent to travel to another country
- Potentially abducting father is from country that requires the father's permission to enable the children and / or the wife to leave travel.

# PREVENTION: ROLE OF LAWYERS

- Assess risk with client
- Become familiar with laws and customs of place where child might be taken
  - Hague signatory?
  - Father protecting legal regime?
- Draft clear and detailed parenting orders
- If high risk, consider:
  - Only supervised visits
  - Require posting bond by travelling Parent
  - Police enforcement term
  - Secure passport and other travel documents
  - Involve CBSA, Consular affairs, foreign government

# CRIMINAL LAW

- Criminal Code provides it is a criminal offence for one parent to remove a child under 14 yrs from care of the other in violation of custody rights of other without Court Order or the consent of the other parent.

***S. 282 : Abduction in Contravention Of Custody Order***

***S. 283 : Abduction if No Custody Order***

- AG consent required for s. 283 charge and police responsiveness discretionary
- Location known?
  - In Canada or international?
- Notice or planning?
- Domestic Violence?
- Views of child?
- Clarity of rights & violation? Defiance of on-going proceedings?

***See [www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch30.html](http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch30.html)***

- Because of Criminal Code, police may be involved in location, apprehension etc. Especially likely to be involved if international case

## FAMILIARITY WITH LAWS & CUSTOMS OF OTHER COUNTRY ESP RELATING TO WOMEN AND CHILDREN

- ❖ Contact Consular Affairs Ottawa
- ❖ Visit Hague related websites such as Reunite:  
<http://www.reunite.org/>
- ❖ Consult with experienced Canadian Counsel and Counsel in the foreign jurisdiction.

*There are some countries where the father could unilaterally place a travel ban on the Mother or Child. Lawyers and courts need to take extraordinary steps when a parent requests travel to any of these countries.*

## REMOVAL TO HAGUE CONVENTION COUNTRY

- ❖ Contact Central Authority - will they represent left behind parent?
- ❖ Hague proceedings are Expedited
- ❖ Limited time to obtain Expert information
- ❖ Limited time to obtain information on child
- ❖ Evidence is usually submitted only through Affidavits & documents
- ❖ Possibility of “Judicial Communication” with Canadian court having jurisdiction

## NON-HAGUE CONVENTION COUNTRY

- IF the Child has been abducted to a Non-Hague Convention Country
  - Contact Police / RCMP
  - Contact Canada Border Services
    - Canada Border Services has a missing Children's program in partnership with government agencies.
    - <http://www.cbsa.gc.ca/security-securite/omc-ned-eng.html>
  - Missing Children's Society of Canada
    - MCSC uses a team of investigators to locate missing children.
  - Use Court system to obtain ex-parte custody Order for full Custody.
  - There are some countries where the abducting parent could utilize their Court System to obtain an ex-parte Custody Order

# HAGUE “HAVENS”

- Some non-Hague countries (eg India) may enforce Canadian orders and co-operate with Canadian Central Authorities.
- But there are many non-Hague countries where the legal system is unwilling to recognize rights that arise in other countries, even if it is an “abduction case” by a non-custodial parent,
- Especially if abduction by father to Islamic country



## FACILITATING RETURN

- ◉ Immigration issues may arise for the abducting parent and child to return to Canada-in Canada can seek Minister's Permit
- ◉ Only the Federal Court of Canada has the jurisdiction to order Passport Canada to act, although Passport Canada responds to Superior Court orders
- ◉ Judges need to be encouraged and supported to network and communicate
- ◉ Chasing Orders – Domestically and Internationally

CONCLUSIONS...

## SETTLEMENT & FACILITATING RETURN

- International Child Abduction cases often resolved by best negotiation or mediation
  - More control over timing & process for return
- Conditions for return may be part of settlement
- Undertakings or mirror orders
- In more contentious cases, whether settlement or court order, may need to involve Central Authority and child welfare authorities to facilitate return
- Some airlines offer free or discounted travel assistance to the left behind parent to bring the child(ren) back
- Immigration issues may arise for the abducting parent and child to return to Canada. Can seek Minister's Permit, or order from Federal Court (in theory only Fed Ct has jurisdiction but Passport Office seems to comply with Superior Court orders)

# CONCLUSION

- ◉ With increased international mobility and “international marriages,” number of international abductions increasing
- ◉ Important role for mediators
- ◉ Family Lawyers need to be able to address issues on preventative basis and to respond quickly
- ◉ Involve more experienced counsel or international family bar

# WEBSITES: PREVENTION & LOCATION

- Locating Children
  - Our Missing Children Program- CBSA, RCMP and Foreign Affairs
    - <http://www.cbsa.gc.ca/security-securite/omc-ned-eng.html>
- ◉ <http://travel.gc.ca/travelling/publications/international-child-abductions>



# SOME RESOURCES & REFERENCES

- ◉ Foreign Affairs Consular Services: Child Abduction and Custody Issues <http://travel.gc.ca/assistance/emergency-info/child-abduction-welfare>
- ◉ Reunite: <http://www.reunite.org/>
- ◉ Hague Convention Child Abduction Section: [http://www.hcch.net/index\\_en.php?act=text.display&tid=21](http://www.hcch.net/index_en.php?act=text.display&tid=21)
- ◉ The I CARE foundation <http://theicarefoundation.org/>

## Articles

- ◉ Bala, *OCL v. Balev*: Not an ‘Evisceration’ of the Hague Convention and the International Custody Jurisdiction of the CLRA (2019), 38 *Canadian Family Law Quarterly* 301-357.
- ◉ Bala & Maur, “The Hague Convention on Child Abduction: A Canadian Primer” (2014), 33 *CFLQ* 267
- ◉ Harnois, 1980 Hague Convention on the Civil Aspects of International Child Abduction: The Impact of a Refugee Claim or the Grant of Refugee Status on a Hague Return Application (2019) 38 *C.F.L.Q.* 121
- ◉ Starr, “Preventing Parental Child Abduction — The Role of the Lawyer in Managing the Risk” (2013) 32 *C.F.L.Q.* 137.

## Books

- ◉ Jeremy Morley, *The Hague Abduction Convention: Practical Issues and Procedures for Family Lawyers*, 3<sup>rd</sup> edition (American Bar Association, 2021)
- ◉ Rhona Schutz, *The Hague Child Abduction Convention: A Critical Analysis*  
Hart Publishing, Oxford 2013



# Appendix :Who is involved at CBSA?

- **National Coordinator - Policy**
- **National Operations Coordinator**
- **Regional Coordinators**
- **Intelligence Officers (IOs)**
- **Border Operations Centre (BOC)**
- **Warrant Response Centre (WRC),  
Border Watch Line (BWL)**
- **National Targeting Centre (NTC)**
- **Ports of Entry**



# Appendix: CBSA websites

**National Centre for Missing Persons and Unidentified Remains:**

*<http://www.canadasmissing.ca/index-eng.htm>*

**Carry the proper identification:**

*[http://www.cbsa-asfc.gc.ca/travel-voyage/td-dv-eng.html#\\_s3](http://www.cbsa-asfc.gc.ca/travel-voyage/td-dv-eng.html#_s3)*

**Taking children on a plane:**

*<http://travel.gc.ca/travelling/children/taking-children-on-a-plane>*

**Canada's missing children resource centre:**

*<http://missingkids.ca/app/en/>*

**Passport Canada's System Lookout List**

*<http://www.ppt.gc.ca/protection/16-.aspx?lang=eng>*