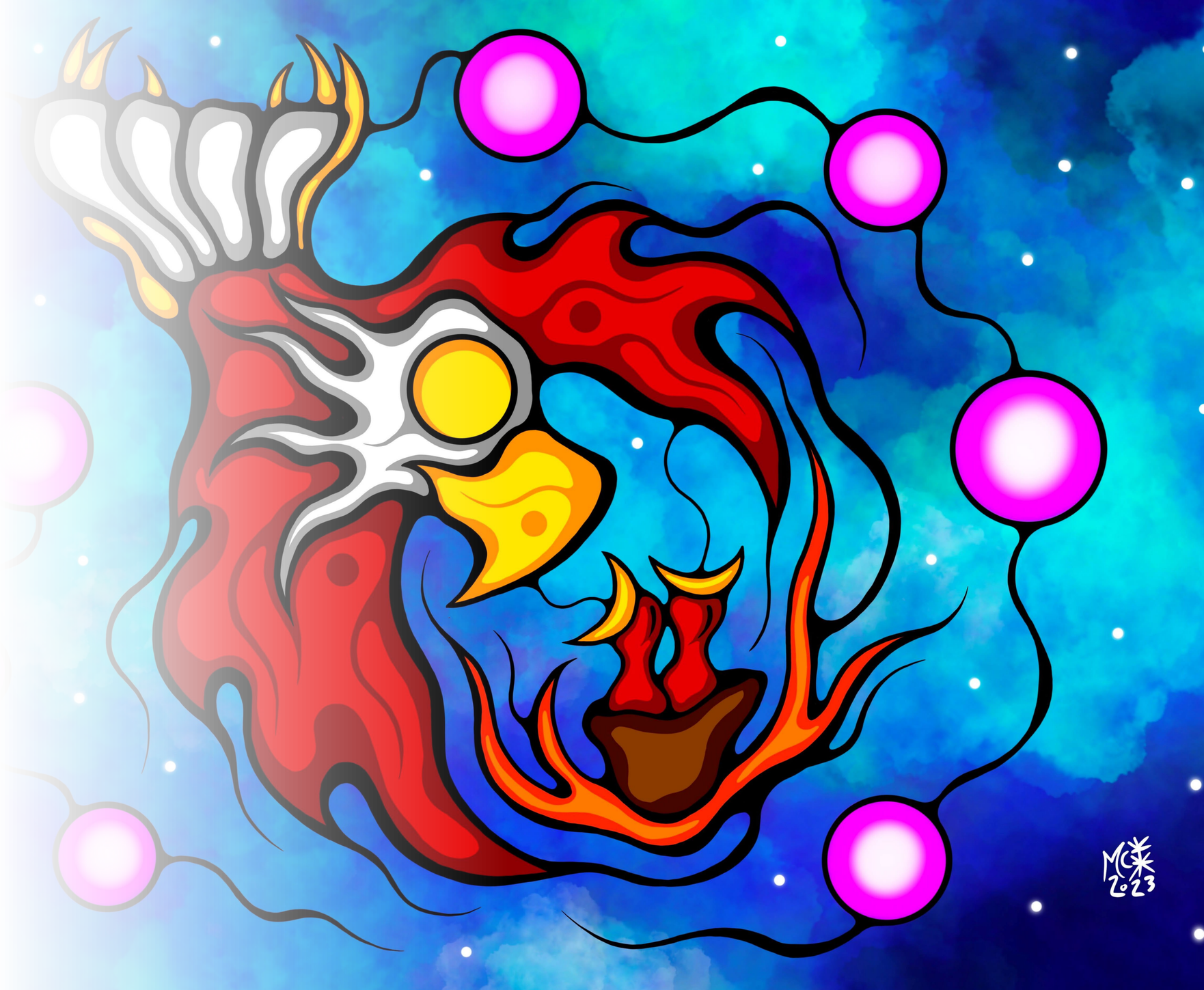
From Awareness to Action

Navigating Safety and Risk: Intersectional Considerations in Family Law Cases Involving Gender-Based Violence and International Connections

Please think about the traditional lands you are currently situated on and join us in acknowledging and thanking the generations of Indigenous Peoples who have cared for these Lands, and in celebrating the continued strength and spirit of Indigenous Peoples.

The ongoing work to make the promise of truth and reconciliation real in our communities and in particular to bring justice for murdered and missing Indigenous women and girls across the country should inform our discussions in this event and beyond.



Artist: Mike Cywink, crane clan originally from Whitefish River First Nation

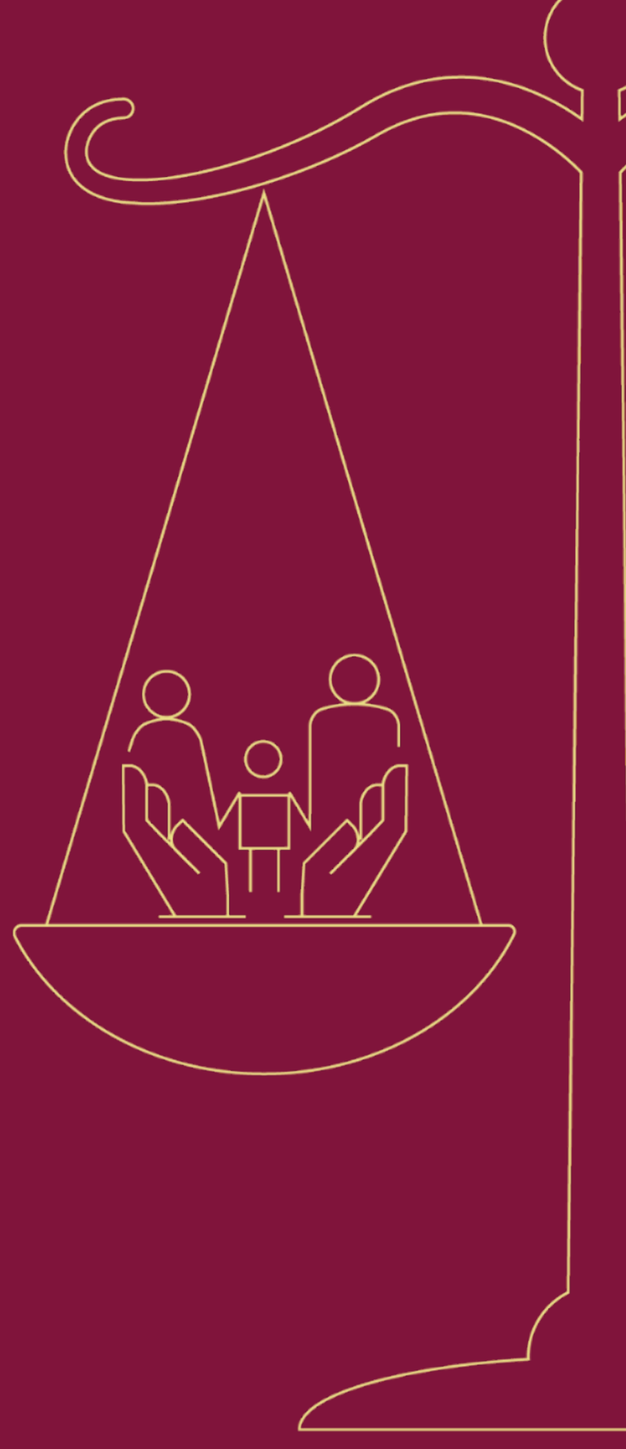
For mor information about the artist: https://learningtoendabuse.ca/about/land_acknowledgement

From Awareness to Action (A2A)

This project, funded by the Department of Justice Canada, supports the continuation of five regional Communities of Practice through the Alliance of Canadian Research Centres on Gender-Based Violence. These Communities of Practice are comprised of survivors of family violence and representatives from the gender-based violence (GBV), health, and family law sectors, and work together to:

- Enhance training opportunities for GBV and family law specialists to support trauma-informed practice.

- Promote standardized assessment tools to enhance the substantive and procedural decision- and recommendation-making by multidisciplinary family law professionals involved in family violence-related child custody matters (including judges, lawyers, and assessors).

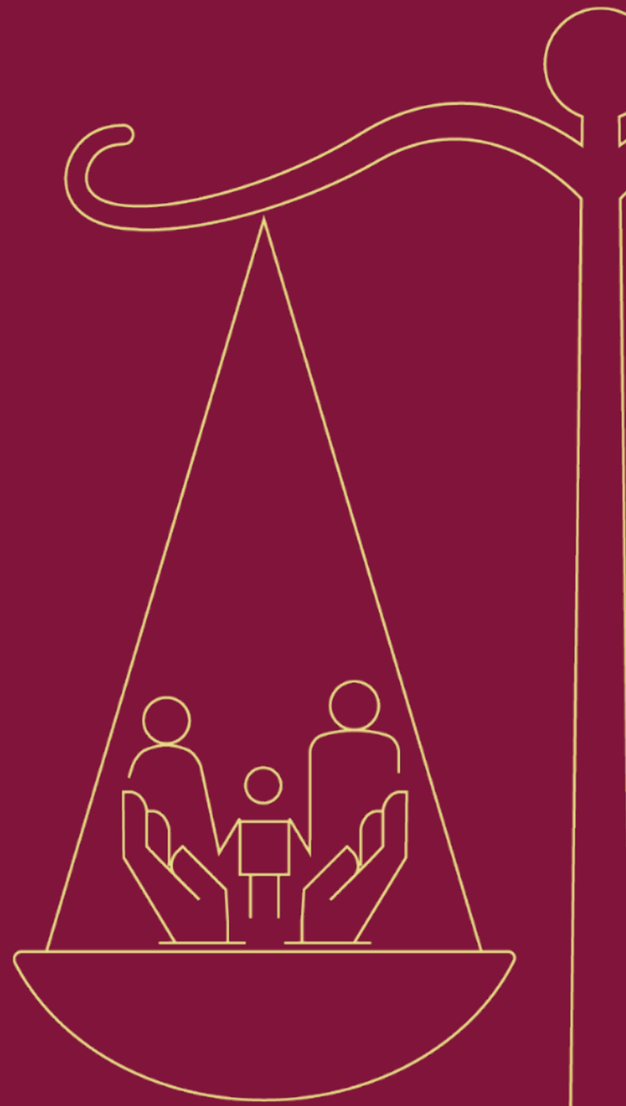


A2A Resources

- **Briefs** are documents that address issues related to family violence and family law. Topics include treating children as full rights bearers, access to justice, trauma informed approaches to family violence in family law, and more.

- **Legal Bulletins** are written summaries of recent court decisions related to family law proceedings. Court decisions covered include Harley v. Harley, Dayboll v. Binag, and LS v. BS.

- **Webinars** provide learning opportunities to build capacity of practitioners in the field of violence prevention and family law. They are offered live, and recordings are posted on our website.



Deepa Mattoo

Deepa Mattoo is a dedicated lawyer and intersectional feminist recognized for her commitment to advancing equity, anti-oppression, and anti-racism. Her extensive career spans various legal and leadership roles. Since 2019, Deepa has served as the Executive Director of the Barbra Schlifer Commemorative Clinic, overseeing multiple departments and directing the Clinic's intervention and advocacy efforts. She has appeared before the Supreme Court of Canada, Parliamentary committees, and UN civil society meetings, advocating on a broad spectrum of social justice and human rights issues. In 2023, Deepa was appointed to the Domestic Violence Death Review Committee (DVDRC).

Deepa has trained thousands of service providers to support forced marriage survivors, racialized non-status women, and clients navigating immigration law. Since 2017, she has shared her expertise as an adjunct professor at Osgoode Hall Law School through numerous speaking engagements and interviews.

Deepa's contributions have been recognized with several awards, including the Spirit of Schlifer Award in 2015 and the Law Society Medal and Women of Distinction Award in 2022 for her advocacy and access to justice efforts. In 2023, she received the Ontario Bar Association Award for Excellence in the Promotion of Women's Equality and the Desi Achiever's Award for her exceptional contributions to human rights and access to justice.

In 2024, Deepa was honoured with an Honorary Degree from Humber College in recognition of her contributions to social justice and equity.

Deepa Mattoo est une avocate dévouée et une féministe intersectionnelle reconnue pour son engagement en faveur de l'équité, de la lutte à l'oppression et de l'antiracisme. Sa longue carrière l'a amenée à occuper différents postes en droit et en gestion. Depuis 2019, Deepa Mattoo est directrice générale de la clinique commémorative Barbra Schlifer. Elle supervise plusieurs de ses services en dirigeant les interventions et le soutien devant le tribunal de la clinique. Elle a été appelée à témoigner devant la Cour suprême du Canada, des commissions parlementaires et lors de réunions de la société civile de l'ONU pour des plaidoyers relatifs à un vaste éventail d'enjeux liés à la justice sociale et aux droits de la personne. En 2023, elle a été nommée membre du Comité d'examen des décès dus à la violence familiale (CEDVF) en Ontario.

Elle a formé des milliers de personnes des fournisseurs de services visant à soutenir des personnes survivantes de mariages forcés, des femmes racialisées sans statut et des client.e.s évoluant dans le système lié au droit de l'immigration. Elle a partagé ses compétences depuis 2017 en tant que professeure adjointe à la Osgoode Hall Law School au moyen de nombreuses conférences et interviews.

Les contributions de Deepa Mattoo ont été soulignées par plusieurs prix et distinctions, notamment le prix *Spirit of Schlifer* en 2015, la médaille du Barreau de l'Ontario et le Prix Femmes de mérite en 2022 pour ses efforts en matière de plaidoyers et d'accès à la justice. En 2023, elle a reçu le prix d'excellence de l'Association du Barreau de l'Ontario pour la promotion de l'égalité des femmes et un prix des *Grant's Desi Achievers Awards* pour ses contributions exceptionnelles en matière de droits de la personne et d'accès à la justice.

En 2024, elle a enfin reçu un diplôme honorifique du Collège Humber pour ses contributions en rapport avec la justice sociale et l'équité.

Fadwa Yehia

Fadwa Yehia was called to the Bar of Ontario in 2004 after obtaining her LL.B. from Osgoode Hall where she received a special designation in international, comparative and transnational law. Fadwa practices in all areas of family law, with a special focus on child-related matters including cases involving parent-child contact problems, family violence, jurisdictional and mobility disputes as well as international abduction. She has represented clients at all levels of court including the Ontario Court of Appeal and the Supreme Court of Canada.

Fadwa has contributed to a variety of continuing legal education programs and dedicates her time to volunteer pursuits including as a Council Member of the Ontario Bar Association and the Ontario Chapter of the Association of Family and Conciliation Courts, where she serves as Treasurer of the Board. Fadwa also sits on the Executive of the Arab Canadian Lawyers Association and served several years as the Vice President of the Board of Directors to the United Nations Association in Canada, Toronto Region Branch.

Fadwa Yehia a été admise au Barreau de l'Ontario en 2004 après avoir reçu un diplôme en droit à la Osgoode Hall Law School, où elle a aussi obtenu une spécialisation en droit international, comparé et transnational. Elle exerce dans tous les domaines du droit de la famille et porte une attention particulière aux questions reliées aux enfants, notamment les affaires concernant les problèmes des contacts entre parents et enfants, la violence familiale, les litiges liés aux compétences des juridictions et de mobilité, ainsi que les enlèvements internationaux. Elle a représenté des client.e.s à tous les échelons des cours de justice, y compris devant la Cour d'appel de l'Ontario et la Cour suprême du Canada.

Fadwa Yehia a participé à l'élaboration de plusieurs programmes de formation juridique continue et consacre son temps à des activités bénévoles, notamment en tant que membre du conseil de l'Association du Barreau de l'Ontario et de la section ontarienne de la Association of Family and Conciliation Courts, où elle occupe le poste de trésorière du conseil d'administration. Elle siège aussi à la direction de l'Association des avocats arabo-canadiens et a été pendant plusieurs années vice-présidente du conseil d'administration de la section de la région de Toronto de l'Association canadienne des Nations unies.

Barbra Schlifer Commemorative Clinic
Freedom From Violence.

Navigating Safety and Risk: Intersectional Considerations in Family Law Cases Involving Gender-Based Violence and International Connections

Deepa Mattoo
November 7, 2024

AGENDA

Barbra Schlifer Commemorative Clinic
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- What is the Barbra Schlifer Commemorative Clinic?
- Who is impacted by family law cases involving GBV and international connections?
- What is the Hague Convention?
- How does GBV intersect with international family law issues in Hague Convention cases?
- How does GBV intersect with international family law issues in non-Hague Convention Cases?
- What can judges do to reduce the negative impact on women and Gender-Diverse Survivors of Violence?

THE BARBRA SCHLIFER COMMEMORATIVE CLINIC

Barbra Schlifer Commemorative Clinic
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- WHO IS BARBRA SCHLIFER
  - Barbra was an idealistic young lawyer from Toronto who was sexually assaulted and murdered on April 11, 1980.
- WHAT THE CLINIC DOES
  - The Barbra Schlifer Commemorative Clinic offers legal services and representation, trauma-informed counselling and multilingual interpretation to diverse women and gender-diverse people who have experienced violence.
- IMPACT
  - Since its founding in 1985, the clinic has assisted more than 150,000 women and gender-diverse survivors of violence through their direct services, advocacy efforts, legal reform, submissions, projects, and programs.

UNDERSTANDING THE INTERSECTION

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Intersectionality: Explain the concept of intersectionality and its importance in understanding the complexities of gender-based violence in family law. Highlight how multiple forms of discrimination (e.g., race, gender, immigration status) intersect and impact survivors.

International Connections: Discuss the additional layers of complexity when cases involve international elements, such as different legal systems, cultural contexts, and international treaties like the Hague Convention.

Legal and Cultural Barriers: Address the challenges posed by differing legal frameworks and cultural norms. Emphasize the need for culturally sensitive approaches and the potential for conflicting legal jurisdictions.

Safety Concerns: Highlight the heightened safety risks for survivors with international ties, including the risk of abduction, lack of access to support services, and difficulties in enforcing protection orders across borders.

Identifying Barriers: Identify and address systemic barriers within the justice system that disproportionately affect marginalized families. This includes biases in legal proceedings, lack of access to legal representation, and inadequate support services.

WHO IS IMPACTED BY FAMILY LAW CASES INVOLVING GBV AND INTERNATIONAL CONNECTIONS?

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Many parents face hardship and discrimination in family law cases that involve GBV and international connections. Such examples include:

- Survivors who have returned to a country where they have precarious immigration status or no status. Immigration sponsorships can be used as a tool by abusive partners to assert power and control over the sponsored spouse.
- Survivors who were temporarily living in Canada, have connections to countries abroad and are moving to another country (either by choice or not).
- Survivors who have fled across borders in an effort to find a safe place to live.
- Survivors with sole or joint custody/parenting arrangements and where the “primary home” is being relocated.
- Survivors who are leaving or have left abusive relationships and are trying to rebuild their lives and the lives of their children.

THE HAGUE CONVENTION: THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

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- The Hague Convention was concluded on October 25, 1980. There are more than 90 contracting parties, with Canada being a party from the beginning.
- The Hague Convention is an important family law instruments and is implemented by legislation in every Canadian province and territory.
- The Hague Convention intends to:
  - Enforce custody rights across international borders and secure the prompt return of wrongfully removed or retained children to their country of habitual residence.
  - Protect children from harmful effects of wrongful removal and/or retention (also referred to as child abduction).
  - Return children to the country where they are classed as "Habitually Resident" based on the belief that the courts in the country of habitual residence are generally best-placed to deal with the issues of where and with whom the child should live.

THE HAGUE CONVENTION

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Article 3

- Provides that the removal or retention of a child is wrongful

  (a) where it is in breach of custody rights under the law of the state in which the child was “habitually resident” immediately before the removal or retention and

  (b) those rights were actually being exercised or would have been exercised but for the wrongful removal or retention.

Article 12

- If the requirements of Article 3 are established, the judge in the requested state must order the return of the child forthwith.

THE HAGUE CONVENTION

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Article 13

- The judge of the requested State is not bound to order the return of the child if the person which opposes its return establishes that:

  (a) the person having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

  (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 return of the child may also be refused if 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.

- The judge shall consider the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

CHALLENGES WITH THE HAGUE CONVENTION:

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- The intention of the Convention is not being achieved through its current application, particularly when we consider cases involving domestic violence.
- Domestic violence is common in cases where the Hague Convention is implemented. Approximately 33% of parents bringing applications for the return of children had admitted that they had committed or been accused of committing domestic violence.
- This ultimately has a negative impact on women's rights and their safety and that of their children.
- Other areas of the Convention that are problematic:
  - The Convention has an expansive reading of "custody rights". This gives almost any parent the right to bring these applications regardless of their actual involvement in the care of the children.
  - Courts struggle with how the "habitual residence" is determined.
  - Ultimately, long and drawn-out court proceedings can be used as a tool of continued abuse.

OFFICE OF THE CHILDREN'S LAWYER *V* BALEV, 2018 SCC 16

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Facts:

- Respondents were married in Ontario and moved to Germany in 2001 where their two children were born. The father gave his time-limited consent for the children to move to Canada with the mother for the 2013-14 school year.
- The father purported to revoke his consent, resumed custody proceedings in Germany, and brought an action under the Hague Convention for an order that the children be returned to Germany. The father requested that his Hague Convention application be set down for a hearing before the Ontario court.

How should an application judge determine the question of a child's habitual residence?

OFFICE OF THE CHILDREN'S LAWYER *V* BALEV, 2018 SCC 16

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There are 3 possible approaches to determine the "Habitual Residence":

(1) The parental intention approach: the parental intention approach dominates Canadian jurisprudence and determines the habitual residence of a child by the intention of the parents with the right to determine where the child lives.

(2) The child-centred approach: which emphasizes the situation and perspective of the children at the time of the application for their return to the original country

(3) The hybrid approach: The judge considers all relevant links and circumstances — the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.

The Clinic' Position

- In cases of domestic violence and abuse the parental intention approach generates an unjust result: parents looking to leave an abusive relationship must rely on the consent of their abuser to remove the children from that environment and find somewhere safe and comfortable for them to be.

The Court favoured the hybrid approach – it empowers application judges with the necessary authority to consider relevant factors in determining a child's habitual residence.

NON-HAGUE CONVENTION

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- In situations where the country has not signed the “Hague Convention”, it can be quite difficult to get a child returned to Canada.
- In Ontario, with respect to non-signatory countries, the Children’s Law Reform Act (CLRA) applies. The CLRA discourages child abductions by confining Ontario jurisdiction over custody to limited circumstances.
  - s. 23 of the CLRA carves out an exception where the child is physically present in Ontario and the court is satisfied on a balance of probabilities that the child would suffer serious harm if removed from Ontario.
  - The serious harm analysis under the CLRA is less stringent than the “intolerable situation” test under the Hague Convention.
- In Hague Convention cases, Ontario courts can have confidence that whatever jurisdiction decides on a child’s custody it will do so on the basis of the child’s best interests. Ontario courts cannot always have the same confidence in s. 23 cases.

MAA v DEME, 2020 ONCA 486

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Facts:

- Mother brought her 3 children from Kuwait to Canada without the father's consent. She claims she fled an abusive relationship that put the children and her safety at risk of serious harm. The father claimed the mother kidnapped their children. The mother also applied for refugee claim.
- Kuwait is not a member of the Hague Convention
- The mother asked Ontario to exercise jurisdiction to decide her custody claim (s. 23 of the CLRA). The court must find on a balance of probabilities that the children would suffer serious harm if removed from Ontario.
- The application judge found that there was no risk of serious harm to the children and ordered that the children be returned to Kuwait.
- Mother appealed, claiming there was error in determination of "serious harm".

The Ontario Court of Appeal decided that the children's refugee claims must be resolved before considering their return to Kuwait.

court emphasized the importance of addressing the potential risks to the children if they were returned before their refugee status was determined

MAA v DEME, 2020 ONCA 486

Barbra Schlifer Commemorative Clinic
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The Clinic's Position -

- Ontario Courts must be aware that they cannot always have the same confidence in cases under s.23 when a non-signatory state is involved.
- Family Courts should consider the legal framework of the CLRA in its entirety and read s. 23 through a GBV lens, which would include the harmful effects of domestic violence on children and include making decisions based off the best interest of children
- To ensure the safety of women and children, the Family Courts' analysis must be mindful of the effect of their decisions on the refugee determination process.
- The evidence of "serious harm" must be considered in the context of GBV and the adequacy of the social and legal systems of the country of habitual residence to protect against the abuse of women and children.

RECOMMENDATIONS :

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The violence against children includes the effects of witnessing violence against their mothers, and the health and safety of mothers has a direct impact on the health and safety of children

Family courts must also consider the likelihood for parents who abuse their spouses to also abuse their children

The interpretation of domestic law (CLRA) must be interpreted in the light of compliance with Canada's positive obligation to provide state protection to victims under international human rights law and treaties, including CEDAW

To ensure the safety of women and children, the Family Courts' analysis also has to be mindful of the effect of their decisions on the refugee determination process.

Discuss strategies for developing parenting plans that prioritize the safety and well-being of survivors and their children. This includes considering supervised visitations, remote /zoom connections, and clear communication protocols.

Identify systemic barriers within the justice system that disproportionately affect marginalized families. This includes biases in legal proceedings, lack of access to legal representation, and inadequate support services.

REDUCING THE NEGATIVE IMPACT ON SURVIVORS :

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To ensure that the intention of the Convention is met, a fulsome reading of Convention as a whole, specifically how Articles 3, 12, and 13 work in conjunction with each other.

Family courts should take an intersectional, nuanced and trauma informed approach in reference with the refugee and non-status women and children's cultural context, impact of power imbalance on the victim's ability to disclose abuse and sexual abuse, language barriers, etc. so that their experience of violence is not trivialized or mischaracterized by the judges or decision-makers, which are central to the access to justice.

Family courts ought to consider the risks associated with the return of refugee claimant women and children to the country of the aggressor and the impact on the safety of women (mothers) fleeing domestic violence

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Family courts ought to consider the risks associated with the return of refugee claimant women and children to the country of the aggressor and the impact on the safety of women (mothers) fleeing domestic violence

In summary, a comprehensive and empathetic approach is essential in family court proceedings involving refugee and non-status women and children. This approach not only upholds the principles of the Convention but also promotes a more just and equitable legal system.

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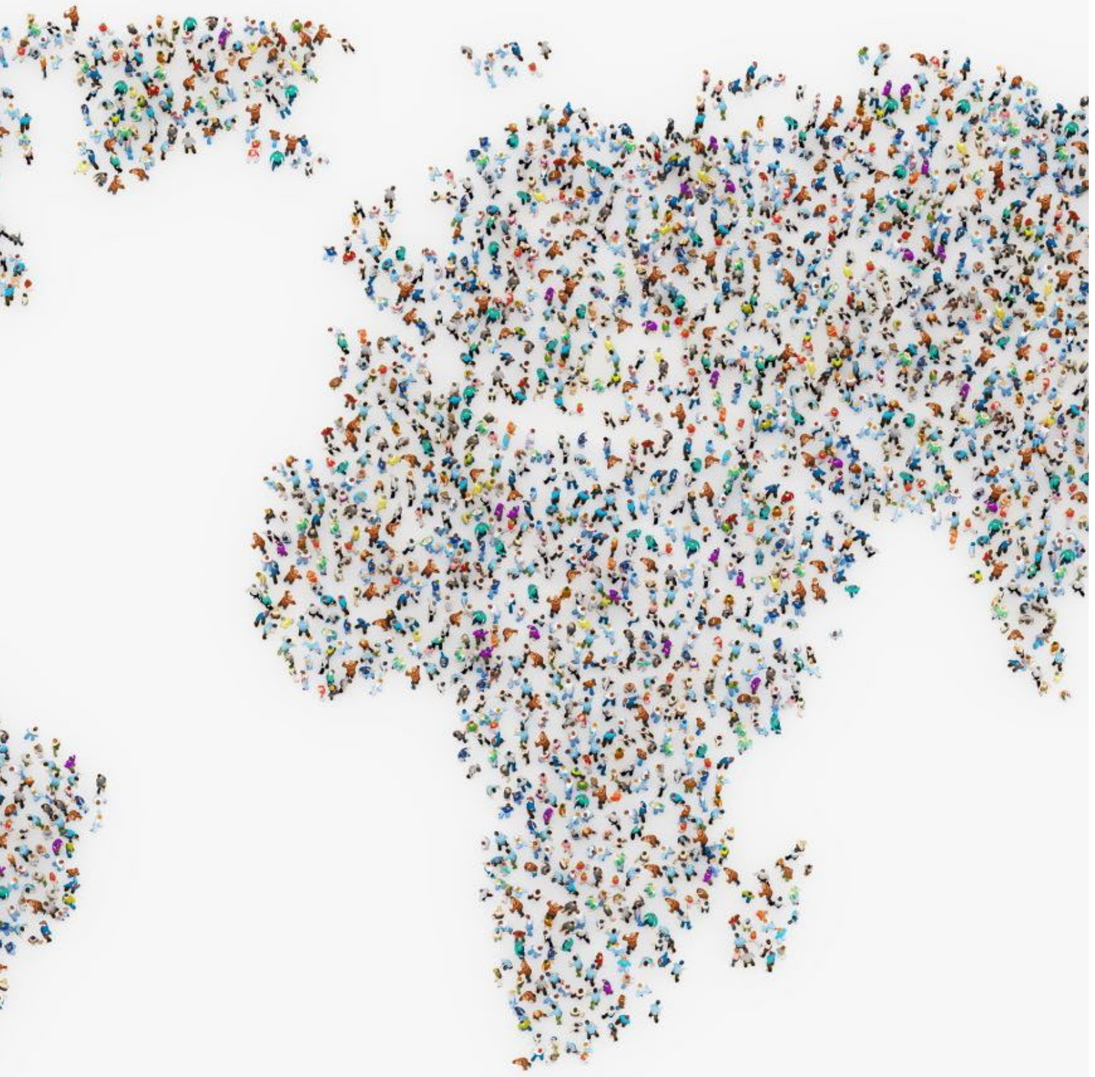
Thank you!

Navigating Safety and Risk: Intersectional Considerations in Family Law Cases Involving Gender-Based Violence and International Connections

Fadwa Yehia – Jamal Family Law, PC

November 7, 2024



Introduction

- 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
- From a theoretical perspective, Canadian provinces treat wrongful removals and retentions from non-Hague signatory states in a manner comparable to the Hague Convention: first, by declining to decide parental disputes on the merits with respect to children who do not habitually reside in the province or territory, and second, by favouring the return of children to the jurisdiction of their habitual residence. However, these similarities do not mean that an application brought under provincial legislation is treated the same way as one brought subject to the rules of the Hague Convention.

Hague Cases: Preliminary Considerations

- 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)

Hague Cases: Where to Start

- 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 to is the “requested” state
- An application can be brought in either the Superior Court of Justice or the Ontario Court of Justice

Hague Cases: Hearing by Motion or Trial?

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.”

Interjurisdictional Communication

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

Counsel should suggest interjurisdictional cooperation whenever appropriate, but whether such conferences take place is entirely discretionary

In Ontario:

Hague Convention: Habitual Residence

- Main principle: where the child is habitually resident is the proper jurisdiction to determine custody and access issues
- In order to determine whether there was a wrongful removal or retention, the Court must determine where the child was habitually resident in accordance with Article 3.
- The term “habitual residence” is not defined in the Hague Convention.
  - The Court should read the term broadly within the context of the Convention’s purpose
  - It is akin to the child’s ordinary residence

Habitual Residence: Hybrid Approach

- The hybrid approach introduced by the Supreme Court of Canada in the case of *OCL v. Balev*, requires the Court to consider the nucleus or focal point of the child's life immediately prior to the wrongful removal or retention together with other factors like the length, conditions and purpose for the child's move along with any other relevant circumstances.
- A child's habitual residence "corresponds to the place which reflects some degree of integration by the child in a social and family environment" and "taking into account all the circumstances of fact specific to each individual case".
- No single factor is determinative or dominates the analysis.

Determination of Habitual Residence – the Step by Step approach from *Ludwig v. Ludwig*

- A. On what date was the child allegedly wrongfully removed/retained?
- B. Immediately before the date of removal in which jurisdiction was the child habitually resident?
  - Assess focal point of child's life and social environment in which it has developed
  - In doing so, consider the following 3 links and circumstances:
    - The child's links and circumstances in country A
    - The circumstances of the child's move from country A to country B; and
    - The child's links and circumstances in country B
  - Consideration for these additional factors and impact on the links and circumstances:
    - Child's nationality
    - Duration, regularity, conditions and reasons for the child's stay in the present country
    - Circumstances of the child's parents including "parental intention"

Habitual Residence analysis continued…

- If the Court finds that the child's habitual residence was Ontario before the alleged wrongful removal/retention then the Hague Convention does not apply and the application is dismissed
- If the court finds that the child was habitually resident in the country of the moving party immediately before the wrongful retention/removal, then the Hague Convention applies and stage 2 of the analysis is engaged, which is a consideration of any exceptions which might prevent the immediate return of the child to their habitual residence as required by Article 12

A Quick Note on Article 13(a): Consent or Acquiescence

- Art 12 provides that if child is “settled in new environment” and one year or more, then court may decline to order return.
- Art 13 requires knowledge of relocation with child. In determining whether Article13(a) applies, consider knowledge and communication (*Ibrahim v. Girgis*, 2008 ONCA 23):
  - “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".

Article 13(b): Grave Risk of Harm

- The risk associated may be in returning the child to the other parent or from the removal of the child from their present caregiver
- The harm may be physical or psychological
- Harm must amount to an intolerable situation, which the Supreme Court of Canada in *Thomson v. Thomson* defined as:
  - "… the risk has to be more than ordinary risk, or something great than would normally be expected on taking a child away from one parent and passing him to another… not only must the risk be a weighty one, but that it must be substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'." (paragraph 82)

Intolerable Situation: A More Stringent Test

- Why is the application of this test more stringent?
  - Courts of a contracting state are presumed to be equipped to make and will make suitable arrangements for a child's welfare
  - Less stringent tests would permit the abducting parent to rely upon psychological conditions of their own making including refusing to return the child
  - Undertakings and warranties are honoured by the contracting state and may serve to respond to/alleviate any pressing risk of harm to the child
  - The return application should not become a hearing of the custody matter on the merits and so comparative investigations as to the environments offered by the two countries in question should be avoided

History: HCCA and Domestic Violence

- 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?
  - At the time of enactment of Hague Convention, 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)
- In the 1980's most Hague cases took a very narrow approach to Article 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 and that the Hague Convention was not providing adequate protection
- Courts and HCCA "Guide to Good Practice" on Article13(1)(b) now recognize that "grave risk" includes risk to children and caregiving parent from domestic violence, which requires consideration of:
  - veracity of allegations
  - nature of domestic violence
  - isolated incident vs coercive control
  - adequacy of legal protections in jurisdiction of habitual residence

Grave Risk of Harm and Domestic Violence: Important Considerations

- Onus on abducting parent to establish grave risk of harm defence
- Presumption that *Hague Convention* signatory state can protect children and parents
- Rebuttable presumption where refugee status is being claims
  - War zone or famine are reasons not to return a child
- Threat of harm to a primary caregiver is threat to a child
- Evidence required that police and courts would not be able to protect parent and child from violence of a former spouse
- Evidence of history of non-compliance and/or violation of Court Orders

Process for Invoking Article 13(b)

- 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?

Undertakings: Domestic Violence

- Undertakings can be useful in securing the safe return of parent and child if there are domestic violence concerns. Consider putting together a parenting plan that includes the following:
  - Payment of travel arrangements for the return of the parent and child
  - Housing arrangements
  - Payment of living expenses including child and/or spousal support in recognition that the parent that removed the child may have economic needs that must be met in the short term to facilitate their ability to remain
  - No contact orders between the parties and/or provisions that neither party molest, annoy or harass each other
  - Counselling and/or other therapeutic supports
  - Suspension/amendment to parenting schedule including no contact when necessary, supervision terms, gradual increases, etc. pending Order of the Court in country of habitual residence
  - If criminal proceedings have been commenced against the parent who wrongfully removed/retained the child, that those proceedings be withdrawn and proof of same
  - 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
- Consider 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

Best Interests: Paramount Consideration in Both Hague and Non-Hague Convention Cases

- The Supreme Court of Canada has emphasized that the analysis of the child's best interests in the context of parenting disputes must be undertaken from the lens of the child rather than the parents' perspectives; parental preferences and rights do not play a role in the analysis except to the extent that they are necessary to ensure the best interests of the child:
  - "…As a general rule in Canadian family law, it is undoubtedly the case that the best interests of the children are the paramount consideration for all decisions that concern children and that best interests are measured from the child's perspective […] This is no less true in matters of international abduction, whatever the child's country of origin, and whether or not the Hague Convention governs the dispute." (*F. v. N.* at paragraph 61)
- However, the best interests test requires a "differing application" in questions of jurisdiction v. determinations on the merits of parenting decisions, although there may be overlap

Non- Hague Convention Cases

- The applicable legislation in Ontario is the *Children's Law Reform Act*
- Similar to Hague Convention cases, the first step in a wrongful removal/retention case is an assessment of jurisdiction under section 22
- If the Court does not have jurisdiction, the Court must consider if there is an exceptional circumstance that would allow it to assume jurisdiction – the only exception is that of serious harm under section 23
- If no serious harm is found, the court can decline jurisdiction and then exercise any one of its residual powers for the return of the child to an appropriate place under section 40

Determining Jurisdiction: Section 22(1)(a)

- Section 22(1)(a) – the child is habitually resident in Ontario at the commencement of the proceeding. The CLRA defines habitual residence under section 22(2) as being a child that was either, a) living with both parents, or b) where the parties are separated, living with one parent under a separation agreement, court order or with consent (implied or acquiescence) or with a person other than a parent on a permanent basis for a significant period of time.

- This section is rarely satisfied, particularly because most children have not been in Ontario for very long when these applications commence, or there is a lack of consent demonstrated by the left-behind parent's application for the return of the child.

Determining Jurisdiction: Section 22(1)(b)

- Section 22(1)(b) – where the child is not habitual resident, the court looks to 6 separate criteria:
  - The child is physically present in Ontario at the commencement of the application
  - Substantial evidence concerning the best interests of child is available in Ontario
  - No application respecting parenting with respect to the child is pending before an extra-provincial tribunal or another place where the child is habitually resident
  - No extra-provincial order respecting parenting has been recognized by a court in Ontario
  - The child has a real and substantial connection with Ontario
  - On a balance of convenience, it is appropriate for jurisdiction to be exercised
- All six (6) criteria must be satisfied in order for the court to assume jurisdiction

Habitual Residence: Section 22(2) *CLRA*

- Unlike the Hague Convention, the *CLRA* contains a definition of habitual residence as follows:
- Section 22(2) A child is habitually resident in the place where the child resided in whichever of the following circumstances last occurred:
  - 1. with both parents
  - If the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order
  - With a person other than a parent on a permanent basis for a significant period of time

Mehralian v. Dunmore: The Debate Over Habitual Residence

- Leave to appeal to the Supreme Court of Canada has been granted to determine the issue of how habitual residence is to be interpreted in the context of non-Hague Convention cases notwithstanding the fact that the CLRA provides a complete answer to the determination of habitual residence
- Courts have approached the question of habitual residence in a variety of ways including:
  - Application of the definition from the CLRA
  - Application of the hybrid test established by the SCC in *Balev*
  - Application of parental intention test which predates the SCC decision in Balev

Habitual Residence Continued

- The Court of Appeal in the case of *Zafar v. Azeem* held that the test for determining a child's habitual residence under the Hague Convention in *Balev*, applies equally to determining a child's habitual residence under the CLRA.
  - Interestingly, the Court of Appeal in Zafar appears to contradict both the plain words of the CLRA, which defines habitual residence in a specific non-Hague context, and the Court of Appeal's earlier decision in *Geliedan v Rawdah*, which found that it was an error for the motion judge to "apply a Hague Convention approach when determining" a CLRA application under section 40.[4].
- However, in Aldahleh v Zayed, Justice Tobin held that the concept of parental intention is captured by section 22(2) ("consent, implied consent or acquiescence") but, following *Zafar*, the court must also consider the "circumstances of the children".

Section 23: Serious Harm Exception

- A holistic approach needs to be applied based upon a non-exhaustive combination of factors, which must be assessed while considering the best interests of the child:
  - The risk of physical harm
  - The risk of psychological harm
  - The views of the child
  - A parent's claim that they will not (or cannot) return to the other jurisdiction even if the chid is required to do so
  - Potential separation from their primary caregiver
  - Citizenship (as an element of psychological harm)
  - The rules applicable to deciding parenting rights in the foreign jurisdiction

Inconsistencies in Application of Law in Foreign Jurisdiction

- International child abduction and the implications of serious harm as part of the return analysis require Courts to be live to divergent legal and cultural traditions which may impact their assumptions and analysis.
  - “Nonetheless, there may be instances where foreign laws are so profoundly irreconcilable with Ontario law that remitting the matter to the foreign courts would constitute serious harm within the meaning of the CLRA. Drawing the line between what is acceptable and what is not is a delicate exercise. […] The proper approach recognizes that inconsistencies between local and foreign legal regimes will usually not amount to serious harm if the best interests of the child principle remains the paramount consideration in all decisions concerning children. However, if the incompatible rule automatically applies in a manner that supersedes the best interests of the child, this will be a determinative factor in the serious harm analysis, when s. 23 is read in light of s.19(a) of the CLRA.”
- It is important for counsel and the judiciary to understand how best to address elements of a foreign legal system which may be rooted in a religious or patriarchal tradition or perhaps where gender roles have different implications.
- Balancing a respect for diversity and competing human rights will invariably impact what qualifies as serious harm. Counsel are nevertheless encouraged to consider culture-based arguments because in certain circumstances, inequality among men and women, or rather make gender-based determinations regarding decision making responsibility, the inability of a woman to work or financial support herself, the perception of persons with disabilities or members of the queer community, all may give rise to serious harm.

Section 23: Lower Threshold for Harm

- Lower threshold comes primarily from the assumption that non-signatory states are not bound to place the best interests of children first in determinations of custody
- The Ontario Court of Appeal, in *Ojeikere* has held that decisions regarding serious harm under s. 23 of the CLRA have a less stringent threshold than art. 13(1)(b) cases under the Convention because:
  - i) the language of "intolerable situation" in art. 13(1)(b) imports a more stringent standard than simply "serious harm" under s. 23
  - ii) cases involving non-Hague countries do not provide the reassurance that decisions in the country of return will be made giving paramountcy to the best interests of the child
  - iii) there is no reciprocal treaty enforcement
- CLRA does not use the word "risk", however an Ontario Court must still assess the possibility or risk of harm arising from a child's removal. Risk is not assessed from a past event, but rather based upon a prediction of future harm both in terms of the likelihood and the severity

F. v. N. : Serious Harm and Best Interests

- The risk of serious harm in s. 23, starts from the ordinary alignment of best interests and focuses on factors that would establish serious harm if the child was returned.
- The court is not, however, engaged in a determination of the custody issues – on that basis, they are not engaged in a broad-based best interests inquiry as they would on the merits of a custody application.
- Thus, when deciding whether to exercise jurisdiction under s. 23, judges should not conduct a broad-based best interests analysis, but rather an individualized assessment of the risk of serious harm. There is, of course, no doubt that an individualized serious harm analysis may overlap with a full best interests analysis.
- The best interests factors provided under s. 24 of the CLRA will only be relevant to the extent that they contribute to establishing serious harm.

Section 40: Return Orders

- If a Court is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario or that they are not able to exercise jurisdiction under section 22 or section 23, then section 40 is invoked and a Court may do any one or more of the following:
  - 1. Make such interim order in respect of the custody or access as the court considers is in the best interests of the child
  - 2. Stay the application subject to,
    - The condition that a party to the application promptly commence a similar proceeding before an extra provincial tribunal, or
    - Such other conditions as the court considers appropriate
  - 3. Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application

Section 40 Continued…

- Unlike the Hague Convention which requires the return of a child to their habitual residence, the Courts are given broader discretion in situations where a child has been wrongfully retained/removed
- Section 40 makes no reference to returning a child to their habitual residence → no reference to it at all in the section
- Return is to an “appropriate place” → does not, however, permit an indefinite stay in Ontario
- Judges can also stay the application on conditions, which allows them to delay the children’s return until they are satisfied that proper arrangements have been made and that the competent authorities are seized of the dispute, if necessary

Undertakings: A New Emerging Trend from the SCC decision in F. v. N.

- With signatories to the Hague Convention, Canada has reciprocity, assurances of a best interests analysis in all signatory states, warranties, and an ability to enforce undertakings
- The SCC recognizes that undertakings in non-Hague Convention cases may present problems of enforceability before foreign courts, however they are well-known and relied upon protective measures in international abduction cases around the world and should not be dismissed as a useful tool
- This raises a series of other questions:
  - What will these undertakings mean?
  - Do they have any force? Are they binding?
  - How will they be implemented and applied?
  - When there is a breach of undertakings, in a country where there is no reciprocity – that is no reciprocal agreements to enforce undertakings – what happens?
  - How do we grapple with the fact that there is no mechanism to enforce the undertakings in these foreign jurisdictions?
  - What about undertakings that are contrary to the public policy of foreign nations?

Undertakings: Important Considerations from the US Supreme Court in *Golan v. Saada*

- This is a case that addresses undertakings, or what the Court described as ameliorative measures within the context of a Hague Convention Case involving Italy
- However, it presents important considerations that counsel could raise in the context of undertakings in non-Hague Convention cases:
  - Courts should decline to consider ameliorative measures that have not been raised by the parties, are unworkable, where the expectation is that the measures will not be reasonably followed, or draws the court into determining the custody proceedings or risk prolonging the proceeding
  - Courts may also find the serious harm is of such concern, or the potential harm so severe, that the ameliorative measures would be inappropriate

If Undertakings are Appropriate

- Counsel should consider what undertakings can be included, if jurisdiction is declined, that would help cure any uncertainties in status, or financial hardship that may be alleviated
- Be sure to address the following and ensure that the terms are reasonable and will be satisfied:
  - Logistics – when and how return is to be facilitated
  - Financial issues – interim support and payment of return flights, interim housing and meeting the child's other needs
  - Obtaining immigration status
  - Withdrawing criminal proceedings or travel bans
  - Incidents of abuse – how best to protect the parent and child from exposure

Resources

GLOBAL AFFAIRS CANADA

Consular Services

125 Sussex Drive, Ottawa ON K1A 0G2

1-800-387-3124 (toll-free from Canada and the United States) or
+ 1 613 996 8885 (call collect where available)

sos@international.gc.ca and travel.gc.ca

CANADA BORDER SERVICES AGENCY

+1 204 983 3500 / +1 506 636 5064

h0tomcg@cbsa-asfc.gc.ca or cbsa.gc.ca

ROYAL CANADIAN MOUNTED POLICE

National Missing Children Services: CanadasMissing-DisparusCanada@rcmp-grc.gc.ca or canadasmissing.ca

CENTRAL AUTHORITY FOR ONTARIO

Ministry of the Attorney General

Steeles West Post Office, PO Box 600, Toronto ON M3J 0K8

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hague.abduction@ontario.ca

Contact persons: Vivian Giang, Shane Foulds, Elizabeth Kay,
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