

"Children on the Move"
The Importance of Children's Evidence

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Best Interests Are Paramount: *F. v. N.*, 2022 SCC 51

- "…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**." **(at para. 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 **(at paras. 62, 68)**

The Child's "True Interests"

- the preamble to the Hague Convention provides that **"the interests of children are of paramount importance in matters relating to their custody"**
- and the **Pérez-Vera Explanatory Report** re the Convention states:

> the struggle against international child abduction **"must always be inspired by the desire to protect children and should be based on an interpretation of their true interests"; and**
>
> "[…]the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child […] **'children must no longer be regarded as parents' property, but must be recognised as individuals with their own rights and needs'."**

The UN Convention on the Rights of the Child (UNCRC)

- Canada is a ratifying party to **the UN Convention on the Rights of the Child (UNCRC)**, the most widely ratified human rights treaty in history
- all countries except the U.S. have ratified the UNCRC; through ratification, a treaty becomes a binding instrument that a country has a legal obligation to implement in domestic law, policy and practice
- our laws are presumed to conform with international law: ***R. v. Hape*, 2007 SCC 26, para. 53; *Michel v. Graydon*, para. 103**
- the rights of children under the UNCRC have long been held to directly inform statutory interpretation and the exercise of discretionary decision-making. Interpretations adverse to the rights of children should be avoided: ***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, at para. 37; *AC v. Manitoba*, at para. 93; *Michel v. Graydon*, 2020 SCC 24, at para. 104: *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, at para. 82**

Concluding Observations of the UN Committee on the Rights of the Child

- the **UN Committee on the Right of the Child** monitors States Parties' compliance with the UNCRC by receiving periodic reports and preparing Concluding Observations **(UNCRC, articles 43 & 44)**
- in its **June 2022 Concluding Observations re Canada**, the Committee recommended that Canada:
  - Ensure that the views of the child are a requirement for all official decision-making processes that relate to children, including custody cases, child welfare decisions, criminal justice, immigration, and the environment;
  - Ensure that children have the possibility to voice their complaints if their right to be heard is violated with regard to judicial and administrative proceedings, and that children have access to an appeals procedure. **(para. 22(b), (c))**
- Concluding Observations have been referred to by courts in legal analysis

General Comments
of the UN Committee on the Rights of the Child

- the UN Committee on the Rights of the Child issues **General Comments** to clarify the normative content of specific rights/offer authoritative guidance re their interpretation. See, for e.g.:
  - ***General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc. CRC/C/GC/14 (2013)**
  - ***General Comment No. 12 (2009): The right of the child to be heard*, UN Doc. CRC/C/GC12 (2009)**
- the general comments of treaty bodies have been referred to by courts for interpretive guidance, including re the UNCRC– e.g. ***Divito v. Canada*, 2013 SCC 47, at paras. 26-27; *Divito v. Canada*, 2013 SCC 47, at paras. 26-27; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, at para 67; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, at para 197; *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, at para. 462; *Justice for Children and Youth v. J.G.*, 2020 ONSC 4716, at para. 62; *S.S. v. R.S.*, 2021 ONSC 2137, at paras. 32-36, 46-47, 49, 54; *S.K. v. D.G.*, 2022 ABQB 425, at para. 162**

General Principles of the UNCRC

There are **4 General Principles** for interpreting and implementing all the rights the child:

- **Article 2** – the obligation to respect and ensure the rights set forth in the UNCRC to each child **without discrimination** of any kind
- **Article 3** – the obligation for the **best interests of the child to be a primary consideration** in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies
- **Article 6** – the recognition that every child has the inherent **right to life** and the obligation to ensure to the **maximum** extent possible the **survival and development** of the child
- **Article 12** – the obligation to ensure that the child who is capable of forming his or her own views **the right to express those views** freely in all matters affecting the child, the views of the child being given **due weight** in accordance with the age and maturity of the child; for this purpose, **the child shall be provided the opportunity to be heard in any judicial and administrative proceedings** affecting the child, either directly, or through a representative or an appropriate body

Other Rights under the UNCRC

Although all rights are inclusive, indivisible and interdependent, other rights relevant to the international relocation context include:

- **Article 8** - child's right to preserve their identity, including nationality, name and family relations as recognized by law without unlawful interference
- **Article 9** – child's right not to be separated from their parents against their will except as necessary for the best interests of the child; in any proceedings, all interested parties shall be given an opportunity to participate in the proceedings and make their views known
- **Article 11** - States Parties shall take measures to combat the illicit transfer and non-return of children abroad, including bilateral or multilateral agreement
- **Article 19** – child's right to be free from all forms of violence
- **Article 22** - refugee child or child seeking refugee status shall receive appropriate protection and humanitarian assistance

Article 12 – Right to Be Heard

- under Article 12(1), States Parties "shall assure" the right of the child to freely express his or her views – this leaves no leeway for discretion:

  > There is no ambiguity in the language used. The [UNCRC] is very clear; all children have these legal rights to be heard, without discrimination. **It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both.** It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation. **(*B.J.G. v. D.L.G.*, 2010 YKSC 44, at para. 13; cited with approval in *Medjuck v. Medjuck*, 2019 ONSC 3254, para. 31; *M. v. F.*, 2022 ONSC 505, paras. 12-13)**

- the fact that a child is very young or in a vulnerable situation "does not deprive him or her of the right to express his or her views…" **(General Comment 14, para 54)**

- "Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting..." **(General Comment 12, para. 21)**

Articles 12 & 19 - Right to Be Heard and Freedom from Violence

- the child's right to be heard has particular relevance in situations of violence and the participation right commences with very young children who are particularly vulnerable to violence **(General Comment No. 13 (2011) *The right of the child to freedom from all forms of violence*, UN Doc. CRC/C/GC/13 (2009), para. 63)**
- securing and promoting children's fundamental rights to respect for their human dignity and physical and psychological integrity, through the prevention of all forms of violence, is essential for promoting the full set of child rights in the Convention **(General Comment No. 13, para. 13)**

Best Interests and the Right to be Heard / Avoiding Tokenistic Approaches

- **the right of children to express their views in all matters affecting them *and* to have those views taken seriously** -- to be heard at all stages of the process - is a right directly linked to their **best interests (General Comment 14, at para. 4)**
- there can be no correct application of Article 3 if the provisions of Article 12 are not respected – similarly, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives **(General Comment 14, at para. 43)**
- once heard, article 12 requires that children's views be given **due weight** in accordance with the child's age and maturity. **Tokenistic approaches** are to be avoided **(General Comment 12, at para. 132)**
- if the child is capable of forming her or his own views in a reasonable and independent manner, **the decision maker must consider the views of the child as a significant factor in the settlement of the issue. (General Comment 12, at para. 44)**

The Proper Question - *S.K. v. D.G., 2022 ABQB 425*

"The proper question in my view is: Why should I not follow the child's wishes? If we accept that a child-centered approach in decisions of this nature is appropriate, the burden should not be on the child to prove why their views should be considered. The adults should have to demonstrate why what the child wants is not in their best interests. The international and domestic legal framework discussed above is not an abstract notion of justice for children. **One must try to appreciate their lived experience through their lens, take their views seriously, and engage in a subjective consideration of what they consider important to them." (at para. 257)**

Children as Agents

***Yenovkian v. Gulian*, 2019 ONSC 7279**

[66] **The importance of hearing, and placing appropriate weight on, the views of the child is a critical development in family law.** Article 12 of the Rights of the Child Convention provides […]
[67] […] **It is important to recognize the agency of children**, and where possible, to hear their voice before making custody and access decisions which have a profound effect on the life of a child.

***S.S. v. R.S.*, 2021 ONSC 2137**

27. A **human rights-based approach** to the new *Divorce Act* calls on courts to recognize, respect and reflect **each child as an individual distinct from their parents,** and **to empower children to be actors in their own destiny.**
28. In practice, it requires judges to probe into each child's lived experience, to meaningfully consider their views and preferences, and to craft an order that promotes that child's best interests and overall well-being. […]
39. **A human rights-based approach fundamentally recognizes children as subjects of law rather than objects of their parents. Making children more visible in legal proceedings that affect their rights is fundamentally important in Canada because children are not guaranteed legal representation in family law proceedings.**

The Importance of Child Participation

A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30

With our evolving understanding has come the recognition that **the quality of decision making about a child is enhanced by input from that child.** The extent to which that input affects the "best interests" assessment is as variable as the child's circumstances, but one thing that can be said with certainty is that **the input becomes increasingly determinative as the child matures.** (at paras. 92-93)

OCL v IPC, 2018 ONCA 559

[62] A classic family law custody dispute gave rise to the Children's Lawyer's involvement in this case. Over the past several years, courts have taken great initiative to seek out and consider the views and preferences of the child. Professors Birnbaum and Bala explain: The movement towards child inclusion in decision-making in education, medical treatment, and various areas of the law, including separation and divorce, has grown over the last decade. Studies have explored children's rights as citizens, children's perspectives on family relationships and what is a family, and children's attitudes about parental separation and participation in the decision-making process about post-separation parenting. **Research clearly suggests that children's inclusion in the post-separation decision-making process is important to the promotion of their well-being.**

B.J.G. v. D.L.G., 2010 YKSC 44

When children are actively involved in problem solving and given recognition that their ideas are important and are being heard, **they are empowered and their confidence and self esteem grow. They feel that they have been treated with dignity.** (at para. 22)

Adverse Consequences of Exclusion for Children

***B.J.G. v. D.L.G.*, 2010 YKSC 44**

Short and Long Term Adverse Consequences of Exclusion for Children

[23] Excluding children and adolescents may have immediate adverse effects such as: feeling ignored, isolated and lonely; experiencing anxiety and fear; being sad, depressed, and withdrawn; being confused; being angry at being left out; and having difficulty coping with stress.

[24] Further, longer-term adverse effects of not consulting children and adolescents may include: loss of closeness in parent-child relationships; continuing resentment if living arrangements don't meet their needs in time or structure; less satisfaction with parenting plans, less compliance, more "voting with their feet"; and longing for more or less time with the non-resident parent.

Heard but Ignored

***Lawrence v. Moll*, 2021 ONSC 7338**

[17] Sometimes a child simply longs for one parent at a particular point in their life. Sometimes a child simply needs to align with one parent because the stress of the battle is too much to bear. Sometimes going back and forth between houses is just too complicated. Sometimes a child needs to find a way to get people to listen so escalates a small complaint into a reason when really all he wants is to have his feelings heard.

[18] Of course a 10 year old child is not free of influence! His parents are still, in some ways, his whole world. What the OCL evidence states is that because they have not been able to solve his problem, Kayne has been forced to choose, knowing full well the position of each parent.

[19] I hear him.

[20] Once you have asked a child for his views, and you hear him, what message does it give to the child if you ignore him?

[21] How, or why, would he trust his parents, the court's investigators, his therapist, the judge or, perhaps, anyone again with his true feelings?

[22] Rhetorical question: he would not. Rendering a child unable to trust is not in his best interests.

The Importance of Children's Evidence in Non-Hague Cases

- children's views may be relevant to issues relating to their **habitual residence/residence under s. 22** of the CLRA; whether they would suffer **serious harm under s. 23;** and/or potential **orders under s. 40**
- courts must consider both **s. 64(1) of the CLRA and article 12 of the UNCRC**

CLRA – s. 64(1)

Child entitled to be heard

64 (1) In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.

M.A.A. v. D.E.M.E., 2020 ONCA 486 (non-Hague return order case)

[46] The right of children to participate in matters involving them is fundamental to family law proceedings. Canada has adopted the *Convention on the Rights of the Child*, effectively guaranteeing that their views will be heard. A determination of best interests -- which is engaged in all child-related matters -- must incorporate the child's view.

Family Law Rules

International child abduction cases

8(12) The clerk shall send a copy of an application in an international child abduction case to the Office of the Children's Lawyer.

Same, Central Authority

(13) If the Office of the Children's Lawyer receives a copy of an application under subrule (12) respecting an international child abduction **case under the Convention on the Civil Aspects of International Child Abduction, the Children's Lawyer shall send a copy of the application to the Central Authority for Ontario** […]

Family Law Rules

Interpretation of rules

37.2(2) For the purposes of subrules 2 (2) and (4), dealing with an international child abduction case justly includes applying these rules **with a view to providing the timeliest and most efficient disposition of the case that is consistent with the principles of natural justice and fairness to the parties and every child involved in the case.**

Prompt disposition

(3) An international child abduction case shall be disposed of promptly, and not later than six weeks after the case is commenced if Article 11 of the Convention on the Civil Aspects of International Child Abduction applies to the case.

Case management judge

(4) Wherever possible, a judge shall be assigned at the start of an international child abduction case to manage it and monitor its progress. O. Reg. 320/22, s. 7.

First meeting

(5) A first meeting of the parties with a judge shall be held not later than seven days after the case is commenced. O. Reg. 320/22, s. 7.

[…]

Same

(7) At the first meeting, the judge,

(a) shall set a timetable for the service and filing of further materials in the case, as well as a hearing date; and

(b) may make any further order the judge considers necessary. O. Reg. 320/22, s. 7.

Hearing

(8) Wherever possible, the hearing of the case shall be by the judge who attends the first meeting.

Prompt Disposition

- both the FLR and the SCC have emphasized the need for prompt disposition of alleged international child abduction cases. In the non-Hague context, see ***F. v. N.*, 2022 SCC 51 (at para. 73)** and ***Dunmore v Mehralian*, 2025 SCC 20 (at para. 76)**
- but in ***Zafar v. Azeem*, 2024 ONCA 15,** the ONCA noted that while non-Hague Convention cases must be dealt with "promptly", "they do not have to be disposed of within the six-week timeline required by both the *Family Law Rules* and the *Hague Convention*" **(at para. 42)**
- the Court also noted that "we must ensure that procedural fairness and natural justice are not sacrificed for efficiency and expediency. This is particularly true when dealing with jurisdictions that do not share obligations under the *Hague Convention*" **(at para. 61)**
- see also ***Geliedan v. Rawdah*, 2020 ONCA 254 (at para. 60); *AA v. ZSM*, 2025 ONCA 283, at paras. 10, 49; (*AMRI v. KER*, 2011 ONCA 417, at para. 125; *K.F. v. J.F.*, 2022 NLCA 33, at para. 47 in the Hague context)**

Non-Hague Cases

- Ontario courts may assume jurisdiction to make parenting orders on the basis of **ss. 22(1)(a) or (b) or 23 of the CLRA** or by invoking their ***parens patriae*** jurisdiction (superior courts) **(*F. v. N.*, 2022 SCC 51, at para. 59)**

- where jurisdiction is not established on one of the four bases above, parents whose children have been removed from a non-Hague signatory country may apply for their return pursuant to **s. 40 of the CLRA**

S. 40 *CLRA*

S. 40 Analysis

- unlike the Hague context, the determination of wrongful removal or retention is not tied to the concept of "habitual residence" under s. 40; moreover, even if a wrongful removal or retention is found, the making of a return order is discretionary rather than mandatory **(*Geliedan v. Rawdah*, 2020 ONCA 254, at para. 33)**
- courts should consider the best interests of the child in exercising their discretionary powers under **s. 40** but should not use their residual powers under this section to postpose indefinitely the return of the child to the jurisdiction best positioned to decide the case on the merits **(*F. v. N.*, 2022 SCC 51, at para. 96)**
- incorporating **undertakings** within a **s. 40** return order may effectively facilitate a child's return by addressing an anticipated risk of harm or less consequential or short-term distress **(at para. 98)**; however, protective measures only attenuate risk of harm if there is satisfactory **evidence that they would be respected and enforceable in the foreign jurisdiction (*F. v. N.*, at para. 81)**

Habitual Residence under the *CLRA*: *Dunmore v. Mehralian, 2025 SCC 20*

- under **s. 22(1)(a) of the CLRA**, a court may exercise jurisdiction to make a parenting order if the child is **habitually resident** in Ontario at the commencement of the application. Habitual residence is defined with reference to **ss. 22(2) and (3)**
- in ***Dunmore v. Mehralian***, the SCC held that under **s. 22(2)**, a **"child resides where they are at home" (at paras. 6, 62, 68, 71)**
- the SCC held that although the question of where a child "resided" under **s. 22(2)** is distinct from the determination of habitual residence in the Hague context as set out in ***OCL v. Balev*, 2018 SCC 16**, similar considerations "may still inform the analysis" **(at para. 50)**
- as in ***Balev***, the Court **rejected a shared intention approach**, which "wrongly takes the focus away from objective factors, such as where the child lived, and gives undue priority to the parents' subjective views. **It treats children as "passive recipients of their parents' decisions", when the better view is that they are 'people with a part to play in their own lives'" (at para. 59)**
- consistent with ***Balev***, the Court held that **the focus must remain squarely on the child's life and circumstances** rather than searching for legal formalities **(at para. 62)**

Residence under the *CLRA*: *Dunmore v. Mehralian, 2025 SCC 20*

General principles re **where a child is at home/resides** include:

- physical presence in a jurisdiction at a point in time is neither necessary nor sufficient to reside in that jurisdiction at that time **(at para. 64)**
- permanence is not necessary for residence. The determination of whether a child is habitually resident "is not a pure mathematical calculation" of the number of days they resided in a place **(at para. 65)**
- as stated in ***Balev***, for very young children who may not have clear objective ties to a place, the ties of those who are taking care of them are likely to weigh more heavily in the analysis. This does not mean an exclusive focus on shared parental intention, but rather recognizes that very young children rely on the adults in their lives to create a home for them, and the ties of those adults to a jurisdiction, including their intentions about the family's residence, therefore become relevant. **As children become older, their own ties to the jurisdiction take on greater importance. To the extent possible, the voice of the child and their own views on the connections that they have formed in Ontario ought to be considered**. This is consonant with the purposes of Part III and s. 64(1) of the CLRA **(at para. 66)**
- a child may reside in more than one jurisdiction at any given time. This "reflects the reality of children who share their time with both parents in different jurisdictions" **(at para. 67)**

Residence under the *CLRA*: *Dunmore v. Mehralian, 2025 SCC 20*

General principles (cont'd):

- courts asking where the child is at home should look to **"all relevant links and circumstances".** As in ***Balev***, the analysis should focus on the factual connections between the child and the jurisdiction in question, as well as the circumstances surrounding any movement to and from the jurisdiction**. This may include things like the use of social services in the jurisdiction, linguistic, cultural, educational and social ties to the jurisdiction, the presence of family in the jurisdiction, and the duration of and reasons for their being in the jurisdiction (at paras. 68-69)**
- the determination of where a child resided must remain **sufficiently flexible to adapt to the varied/real circumstances of migrant children** (e.g. citizenship is but one factor to consider) **(at para. 72)**
- a court determining residence must also appreciate the evidence in light of the dynamics of the particular family, being especially **alert to gender dynamics and the presence of family violence (at para. 73)**
- **attornment of the parents to a foreign jurisdiction is, by itself, irrelevant to where the child is residing (at para. 68).** Children have no control over where their parents litigate and should not lose protection to which they are entitled because of litigation choices made by the adults in their life **(at para. 91)**

S. 23 CLRA – Serious Harm Inquiries Must Be Child-Centered: *F. v. N.*, 2022 SCC 51

- serious harm inquiries under **s. 23 of the *CLRA*** must be **child-centered and individualized (at paras. 70, 72, 80)**

  > As La Forest J. wrote in *Thomson*, building upon this Court's decision in *Young*, "from a child centered perspective, harm is harm. If the harm were severe enough to meet the stringent test of the Convention, it would be irrelevant from whence it came" (p. 597). One implication of this focus is that, as a general rule, return orders should not become a vehicle for punishing the abducting parent. The relevance of the abducting parent's conduct is assessed from the child's point of view. **(at para. 70)**

- "[s]imply put, the presumption in favour of the jurisdiction of habitual residence must give way to the imperative of protecting a child when serious harm is made out" **(at para. 66)**

Serious Harm – s. 23 *CLRA*: *F. v. N.*, 2022 SCC 51

- **s. 23** is **not limited to situations of physical or psychological abuse** – see the **non-exhaustive *Ojeikere*** factors, which **include the views of the children (at para. 74)**
- "serious harm" may be established **"through a single consideration" or "a combination of factors"** given the holistic nature of the assessment **(at para. 71)**
- the **assessment of grave risk of harm is forward-looking and requires an assessment of the likelihood and the severity of the *anticipated* harm (at para. 71; *Ojeikere v. Ojeikere*, 2018 ONCA 372, at para. 62)**
- **separation of a young child from their primary caregiver can pose a risk** to the child's psychological well-being **rising to the level of serious harm** but this will not always be the case **(at paras. 76-78)**; see also ***MAA v. DEME*, at para. 58; *H.E. v. M.M.*, 2015 ONCA 813, at para. 88; *AA v. ZSM*, 2025 ONCA 283, at paras. 46, 55-56)**
- considerations include the child's age, special needs, and vulnerabilities that may mitigate or aggravate risk of harm. The child's sense of safety is a relevant consideration **(*F. v. N.*, at paras. 78-80; *Thomson*, p. 597)**
- **courts must consider all barriers to the return of the primary caregiver, both voluntary and involuntary (at para. 82)** – e.g. impediments to the parent re-entering and remaining in the country of the child's habitual residence, risks to safety, or obstacles to employment **(at para. 83)**

Serious Harm – s. 23 *CLRA*: *F. v. N.*, 2022 SCC 51 – "A Non-Exhaustive List of Considerations"

- "*Ojeikere* provided a non-exhaustive list of considerations that can serve as useful guidelines in assessing whether serious harm arises, although they do not encompass the wide variety of circumstances in which such a risk exists: **the risk of physical harm; the risk of psychological harm; the views of the children; and the parent's claim that they would not return to the habitual residence even if the children were required to do so (para. 64). The rules applicable to deciding custody in the foreign jurisdiction may be another relevant factor when assessing serious harm.**" **(at para. 74)**

Serious Harm – s. 23 *CLRA*: *F. v. N.*, 2022 SCC 51 Foreign Law as a Source of Harm

- where children are returned to a jurisdiction where their best interests would be superseded by an inflexible rule that invariably assigns custody of decision-making powers on the basis of gender, **the foreign law could be the source of serious harm, but the risk of harm will be mitigated if the *application* of the gender-based law is not automatic but instead depends on the best interests of the child (at para. 88);** this requires courts seized of a return application involving a non-Hague country to verify that this is the case **(at para. 86);** "…judges assessing petitions for return to non-party jurisdictions must therefore consider the tenor of foreign law, generally through expert evidence adduced by the parties" **(at para. 53)**

Serious Harm – s. 23 *CLRA* Family Violence

- a number of appellate decisions in both the non-Hague and Hague context have confirmed that physical and psychological violence toward a parent can create a risk of harm to a child under s. 23 of the *CLRA* and article 13(b) of the Hague Convention ("grave risk"): ***Zafar v. Azeem*, 2024 ONCA 15, at para. 84; *H.E. v M.M.*, 2015 ONCA 813, at para. 125; *Isakhani v. Al-Saggaf*, 2007 ONCA 539, at para. 13; *M.A.A. v. D.E.M.E.*, 2020 ONCA 486, at paras. 48-49, 58; *A.A v. Z.S.M.*, 2025 ONCA 283, at paras. 47, 54; *Pollastro v. Pollastro*, 1999 CanLII 3702 (ONCA), at paras. 33-36; *Kirby v. Woods*, 2025 ONCA 601 , at para. 50; *Maarif v. El-Fazazi*, 2026 ONCA 584, at para. 42(4).** See also ***Barendregt v. Grebliunas*, 2022 SCC 22, at para. 143** which arose in the domestic relocation context

Serious Harm – s. 23 *CLRA*: *A.A. v. Z.S.M.*, 2025 ONCA 283

"…**the risk of physical harm to the child was not the only route to a finding of serious harm.** It was an error for the motion judge to restrict his analysis to only this factor and to fail to consider the other potential bases for serious harm raised by the appellant, namely: **1) the potential effect on the child if the appellant's allegations of domestic violence against her were true; 2) the child's potential separation from her primary caregiver; and 3) the extinguishment of the child (and appellant's) refugee applications." (at para. 46)**

Evidence of Serious Harm / Grave Risk

- **separating a child from their primary caregiver can give rise to a grave risk of harm**. The "issue is particularly pressing in the case of young children with an established dependence on their primary caregiver parent who … is the abductor and who is unable or unwilling to return." Such separation "most certainly can cause psychological harm to the child" and **"should never be considered lightly**, given the 'particular role and emotional bonding the child enjoys' with their primary caregiver." **(*F. v. N.*, at paras. 77)**
- considerations include: the child's age, special needs, and vulnerabilities that may mitigate or aggravate risk of harm. Parenting capacity of the left-behind parent and alternate caregivers as well as the child's sense of safety are relevant considerations (**F. v. N., at para. 80)**
- expert evidence is not necessarily required to infer that a child would be harmed if removed from their primary caregiver **(*F. v. N.*, at paras. 179, 182; *Aldahleh v. Zayed*, 2024 ONSC 547, at para. 264; *Maarif v. El Fazazi*, 2026 ONCA 584)**
- as to the likelihood of separation, **courts should consider all barriers to the return of the primary caregiver**, such as significant obstacles to employment, risks to safety (child abuse or intimate partner violence) or a risk of imprisonment or persecution **(*F. v. N.*, at paras. 82, 166)**
- in the context of family violence, expert evidence may be helpful to assess the impact of the primary caregiver and/or child's exposure to family violence in relation to any order for return – e.g. the existence/effects of PTSD or developmental trauma **(*Walker v. Greenwood*, 2026 ONSC (Sept. 22, 2026) (unreported); *MAA v. DEME*, 2020 ONCA 486, at paras. 26, 45)**
- assessments may also address a child's mental health status more generally and the impact of a return order

Grave Risk of Harm / Serious Harm
Refugee Children

- in ***AMRI v. KER*, 2011 ONCA 417**, the ONCA held that a **rebuttable presumption against return** arises under **article 13(b)** of the Hague Convention in situations **where a child has been found to be a Convention refugee** – i.e. a child's refugee status will give rise to the presumption that a return to the country of origin "would expose [the child] to a risk of persecution and, hence, to risk of harm within the meaning of art. 13(b)" **(at para. 94)**
- this was recently confirmed in ***Kirby v. Woods*, 2025 ONCA 601 (at para. 68)**
- in ***Kirby***, the Court extensively reviewed both the evidentiary principles applicable in a refugee hearing **(at para. 66)** and what the rebuttable presumption requires from a judge hearing a *Hague* application **(at para. 78)**, including, *inter alia*:
  - a court must not categorically dismiss the IRB's refugee determination process due to differences in procedure and evidentiary standards that have been specifically designed for the unique functions of that tribunal. The *A.M.R.I.* framework accounts for those differences in the articulation of the presumption;
  - **courts should in general respect and defer to determinations of fact and credibility made by the tribunal and resist engaging in a reweighing of evidence considered in the refugee determination process**
  - so long as the refugee proceeding is protected by the IRPA's confidentiality provisions, **the refugee claimant need not but may disclose documents prepared for or relied on in the refugee determination process in the *Hague* application. Recognizing the confidentiality protections inherent in the refugee determination process, it will be rare that a *Hague* application judge, without oral evidence, draws an adverse inference or negative credibility determination based on a refugee claimant's choice not to produce such documents.**

Serious Harm / Grave Risk of Harm
Pending Refugee Claims

- in ***MAA v. DEME***, **2020 ONCA 486**, a case arising under s. 23 of the *CLRA*, the ONCA addressed the impact of the children's ***pending*** refugee claim on the return proceedings
- the Court cited the obligation owed to refugee children under **article 22 of the UNCRC** and held that **refugee protection is not limited to those granted refugee status but applies equally to asylum-seekers (at paras. 63, 65, 68)**
- the Court concluded that children are entitled to protection as they seek asylum and **must not be returned pursuant to family law return proceedings under the CLRA before the determination of their refugee claims (at paras. 68, 72, 78, 80)**
- the Court held, however, that a court is not required to await a refugee determination before deciding the issue of serious harm under the CLRA; if the court is satisfied as to serious harm, it may exercise jurisdiction under s. 23 and proceed to make parenting orders even before the refugee determination
- even if the court concludes that the s. 23 test is not met, it will **always be required to revisit the s. 23 analysis in light of the refugee determination** and through the lens of the rebuttable presumption of harm. **Most importantly, the return order under s. 40 cannot be made before the refugee claim is resolved (at para. 78)**

Serious Harm / Grave Risk of Harm
Pending Refugee Claims

- in ***AA v. ZSM*, 2025 ONCA 283**, the ONCA revisited the issue of the impact of a pending refugee claim in a s. 23 CLRA case and modified its previous holding in ***MAA v. DEME,*** holding that:

  [103] The **existence of a refugee claim** does not automatically stay CLRA proceedings or oust the court's discretion to make an order under s. 40. **It is, however, a significant consideration**. As stated in *M.A.A.*, **in the face of a pending refugee claim, "the court may want to consider exercising its power under s. 40(2) to stay the proceedings until the refugee claim is determined" (at para. 103)**

  [104] **The court must weigh the goals of return orders pursuant to provincial legislation (or the Hague Convention, as the case may be), against federal and international obligations under refugee law, to exercise its discretion appropriately. Where, as here, an IRB decision can be expedited and obtained in short order, this will significantly affect the calculus as to whether a stay or return order should be made.**

- the SCC has also recently confirmed that under both international and domestic Canadian law, refugees have the right to seek asylum, and Canada has committed not to expel them from the country until their claims are determined **(*Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7, at para. 12)**

S. 23 CLRA
Children's Views / Psychological Harm:
Ojeikere v. Ojeikere, 2018 ONCA 372

(ii) The risk of psychological harm and (iii) the views of the children

[74] In my opinion, **the views of the three children are relevant to the risk of psychological harm** if they are required to return to Nigeria, and so I consider these two factors together…

[77] **This case is not a *Hague Convention* case, but the second clause of Article 13(b) is relevant because it reflects widespread international agreement that in jurisdictional disputes over custody, a mature child's objection to returning to the place of habitual residence should be considered. Mature children should have a say in their future lives.** Moreover, this clause of Article 13(b) has a parallel in s. 64(1) of the *CLRA*. This section, like s. 23, is in Part III of the *Act*, and is headed "Child entitled to be heard". It provides:

> In considering an application under this Part, a court where possible shall take into account the views and preferences of the child to the extent that the child is able to express them.

[78] **The three Ojeikere children are able to express their views. They are of an appropriate age and maturity to do so. And I regard the views of a child of an appropriate age as potentially relevant to the risk of psychological harm if the child is ordered to return to the country of habitual residence…**

[79] According importance to an adolescent child's own views even in a dispute over jurisdiction is also consistent with this court's comments in *I. (A.M.R.I) v. R. (K.E.)*, 2011 ONCA 417, 106 O.R. (3d) 1. That case dealt with a return order decided under art. 13(b) of the *Convention*. Nonetheless, the court observed at para. 110 that taking into account the views and preferences of a child in accordance with the child's age and maturity "conforms with the spirit and intent of s. 64 of the *CLRA*"…

S. 23 CLRA
Children's Views / Psychological Harm:
Ojeikere v. Ojeikere, 2018 ONCA 372

[80] The three Ojeikere children are now teenagers. As I have said, they are able to express their views. More telling, **they have reached an age and, by their accounts to Ms. Jones, a degree of maturity where not only should their views be considered by the court, but they should be given significant weight. Their views speak directly to the risk of psychological harm they would suffer if required to return to Nigeria. This risk has five aspects**…

[81] First, after having moved around a great deal and having gone to many different schools, **the children now have some stability in their lives…**Now Sam and his siblings are settled in Ontario, have made friends here, and want to stay here.

[82] Second, **all three children object to returning to Nigeria because in their considered view Canada offers them better opportunities to pursue their goals in life…**

[83] The third aspect of the risk of psychological harm is **the children's sibling status.** Siblings are a part of a family unit and play "important role[s]" in each other's emotional well-being…All three children have expressed the same strong desire to remain in Canada…

[84] Fourth, **the children perceive Nigeria as a place where "bad things happen". Their perception suggests they would experience some emotional upset from a court order requiring them to return there.**

[85] Fifth, **the children's desire to stay in Ontario is reinforced by their citizenship.**

[86] **Overall, the fresh evidence shows that there is a real risk the children would experience a serious letdown in their hopes and aspirations for their futures if, over their objections, they were ordered to return to Nigeria. They would feel angry, sad, and resentful at once again having their lives disrupted.**

[87] …And in my view, **the children would likely suffer serious psychological and emotional harm if now forced to return to Nigeria against their will.**

S. 23 CLRA
Children's Views / Psychological Harm:
Ojeikere v. Ojeikere, 2018 ONCA 372
Canadian Citizenship

As noted, in ***Ojeikere***, the majority regarded the Canadian citizenship of the children as an element of its assessment of the risk of psychological harm:

> [T]he children's desire to stay in Ontario is reinforced by their citizenship. All three children are Canadian citizens who would be entitled to stay here but for this custody dispute. Of course, the views and objections of non-Canadian citizens would also be relevant under s. 23. **But the children's rights as Canadian citizens, rooted in their constitutional right under s. 6(1) of the *Canadian Charter of Rights and Freedoms* to remain in Canada, is an added consideration somewhat increasing the risk of psychological harm from being ordered to return to Nigeria. (at para. 85)**

Hague Convention
Objection of the Child – Article 13(2)

- under the Hague Convention, a court may refuse to order the return of a 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 their views **(Art. 13(2))**
- as stated in the **Perez-Vera Explanatory Report (at para. 30):**

  > **…the Convention also provides that the child's views concerning the essential question of its return or retention may be conclusive**, provided it has, according to the competent authorities, attained an age and degree of maturity sufficient for its views to be taken into account. **In this way, the Convention gives children the possibility of interpreting their own interests.**

- this is a **stand-alone defence** to the return of the child under the *Convention* and need not be connected with an assertion of grave risk of harm under Art. 13(b) **(*A. v. M.*, 2002 NSCA 127, at para. 46; *Kirby v. Woods*, 2025 ONCA 601, at paras. 106, 120; *Walker v. Greenwood*, 2026 ONSC (Sept. 22, 2026) (unreported), at para. 113; *Kaila v. Baker*, 2026 ONSC 4206, at paras. 66, 68)**

Children's Views – Hague and Non-Hague Cases

- in ***A.M.R.I. v. K.E.R.*, 2011 ONCA 417**, a Hague case, the ONCA confirmed the importance of hearing from the child, citing both article 12 of the CRC and s. 64(1) of the *CLRA* **(at paras. 110-111)**. It also confirmed the need for meaningful procedural protections given the **"profound and often searing impact"** return orders have on the affected child:

  > Where the proposed return engages the child's s. 7 Charter rights, meaningful procedural protections must be afforded to the child". These include the right to: (1) receive notice of the application; (2) receive adequate disclosure of the case for an order of return; (3) a reasonable opportunity to respond to that case; (4) a reasonable opportunity to have his or her views on the merits of the application considered in accordance with the child's age and level of maturity; and (5) the right to representation **(at para. 120)**

- in ***Kirby v. Woods*, 2025 ONCA 601**, the ONCA Court confirmed that "giving appropriate weight to the objections of a sufficiently mature child" is consistent with the policy objectives of the Convention, the CRC and the role of children's views under the *CLRA* **(at para. 110)**
- in ***MAA v. DEME*, 2020 ONCA 486**, a non-Hague case, the ONCA cited the CRC and confirmed that a determination of best interests -- which is engaged in all child-related matters -- must incorporate the child's view **(at para. 46)**

Children's Views – No Minimum Age

- neither the CLRA nor the Hague Convention sets a minimum age at which a child's objection to return ought to be given weight. Several courts have accepted the objections of 8- and 9-year-old children and have given weight to views of children as young as 5 **(*Borisovs v Kubiles*, 2013 ONCJ 85, para. 50; *M.L.L.C. v. J.L.R.R. Droit de la famille – 2785*, 1997 CanLII 10219, paras. 69-71, 82, 87, 99; *Gulyas v. Messa*, 2022 ONSC 6198 (unreported), paras. 107-109; *X.L. v. C.B.*, 2024 ONSC 3895, paras. 196-206, 282-284)**
- but there continue to be challenges in having due weight accorded to the views of younger children, even when there is evidence of their maturity and intelligence **(e.g. *Mazzeo v. Mazzeo*, 2026 ONCA 674, at para. 9; *Zaidi v. Zia*, 2026 ONSC 291, at paras. 314, 318)**
- this is particularly concerning in situations of family violence, where the right to be heard is critical to the protection of children and commences with very young children who are particularly vulnerable to violence **(General Comment 13, para. 63)**

Capacity

There is an obligation to assess the capacity of the child to form an autonomous opinion to the extent possible

A child's capacity must be assessed individually with no age limitation and no starting presumption of incapacity

It is not necessary that the child have comprehensive knowledge of all aspects of the matter affecting them, but that they have sufficient understanding to be capable of appropriately forming their own views on the matter

(General Comment 12, at paras. 20-21)

Capacity refers to cognitive capacity to form views and communicate them: *B.J.G. v. D.L.G.*, 2010 YKSC 44, at para. 27; Child Capacity and Participation in Family Law, The Society for Children and Youth of BC & Representative for Children and Youth

Children's Views – The Imposition of Additional Conditions

- ***OCL v. Balev*, 2018 SCC 16** states that a child's objection to return "should be assessed in a straightforward fashion – without the imposition of formal conditions or requirements not set out in the text of the Hague Convention"
- despite this direction, some courts have continued to impose additional conditions on a child's objection to return, often referring to pre-***Balev*** case law, suggesting, *inter alia*, that the reasons must be "substantial" and more than a mere preference for remaining in the jurisdiction or as might be expressed in a parenting dispute **(e.g. *Cormier v. Borsk*, 2019 ONCJ 889, at paras. 50, 52; *Trottier v. Streeter*, 2019 ONSC 476; *Zaidi v. Zia*, 2026 ONSC 291, at paras. 311, 319)**
- this approach is also inconsistent with the direction provided by the ONCA since ***Balev*.** In ***Ludwig v. Ludwig*, 2019 ONCA 680**, the Court stated that when considering a child's objection to return under article 13(2), a court may take into account a child's wish to remain in a given country because it offers greater economic or educational opportunities **(at para. 65).** This accords with ***Ojeikere v. Ojeikere*, 2018 ONCA 372, at para. 82,** in the non-Hague context
- rejecting a child's reasons "where the reasons are not based on objectively incorrect information and where there is no evidence that upholding the child's views will be harmful is unnecessarily paternalistic and inconsistent with the child's right to have appropriate weight attached to his views." **(Schuz, Rhona, *The Hague Child Abduction Convention: A Critical Analysis*, at pp. 330, 332, 334, 335)**
- for post-***Balev*** decisions accepting children's objections to return, see ***van Dijk v van Dijk-DeVos*, 2019 BCSC 1968, at paras 33-37; *Erhardt v. Meyer*, 2018 ABQB 333, at paras. 36-53; *D.Y. v. K.Y.*, 2022 ABCA 90, at para. 26; *Garcia Neris v. Pena Lajara*, 2024 ONSC 4444, at paras. 108-122; *Harley v. Harley*, 2023 ONSC 2563, at paras. 231-251; *Gulyas v. Messa*, 2022 ONSC 6198 (unreported), at paras. 107-109; *Kaila v. Baker*, 2026 ONSC 4206, at para. 66; *Walker v. Greenwood*, 2026 ONSC (Sept. 22, 2026) (unreported)**

Children's Views – Other Considerations

- ***Balev*** further states that "[i]f 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"
- general Convention considerations must be seen to include the policies behind the exceptions to return and not merely deterrence of child abduction/comity. As stated by Convention scholar, Rhona Schuz, **"even if it were appropriate to sacrifice a particular child's interests for the benefit of children as a whole, there is no clear relationship between comity and protecting other children" (Schuz, *The Hague Child Abduction Convention: A Critical Analysis,* at pp. 349, 353)**
- re other considerations relevant to the child's welfare, the harm of denial of the child's autonomy should be taken into account. As noted by the Committee on the Rights of the Child, **"Institutional and system violations of child rights" is a form of violence which includes professionals executing their responsibilities "in a way that disregards the best interests, the views and the developmental objectives of the child" (General Comment 13, at para. 32)**

Children's Views – Allegations of Undue Influence

- courts must also be cautious not to automatically discount the child's objections on the basis of alleged influence by the removing parent. The assumption that the effects of such influence are more pernicious when the child has been in the care of the removing parent for a considerable period of time fails to consider that "the longer the child has been away from the country of habitual residence, the more reasonable it will be for him to object to return from an objective point of view since he will usually have settled in the country of refuge" **(Schuz, *The Hague Child Abduction Convention: A Critical Analysis*, at p. 330)**
- the specter of alienation may side-step a more nuanced examination of the complexities of child-parent relationships both pre- and post-relocation
- there may be any number of factors at play, ranging from a child's natural affinity for one parent to realistic estrangement from the other parent due to abusive or other less-than-ideal parenting behaviours
- current research suggests that the "best explanation is a multi-factor systemic view of the phenomena" **(J. Kelly and J. Johnston, *The alienated child: A reformulation of parental alienation syndrome*, 39:3 Family Court Review 249 (2001))**
- allegations of alienation have the potential to minimize and even silence the voice of the child in these cases, often causing great distress to the child. There are cases where children have physically resisted, become ill, or threatened self-harm if returned, highlighting the importance of ensuring that children's views are not only canvassed, but adequately considered **(Claire Fenton-Glynn, "Participation and Natural Justice: Children's Rights and Interests in Hague Abduction Proceedings" (2014) 9:1 Journal of Comparative Law 129; Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard* (2018); *Office of the Children's Lawyer v. Balev*, 2018 SCC 16; Factum of the Appellant dated 14-08-2017, at para. 30, https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37250/FM010_Appellant_Office-of-the-Children's-Lawyer.pdf)**
- an approach which considers the extent to which the child's views are rooted in reality, or *might reasonably be perceived as such by the child*, is preferable, as it considers the situation from the child's perspective. This is consistent with the child's right to have appropriate weight given to their views under article 12 of the UNCRC

Children's Views – The Harm of Denying Autonomy

"The standard of harm is so high in Hague Convention cases as to be unrecognisable in the context of family law and the best interest principle, apparently in pursuit of a quick return, and respect for the legal systems of other jurisdictions.[61] […] Courts emphasise that the distress of "an unwelcome return"[63] does not fit the harm envisioned in the Convention and courts have been willing to accept high levels of harm indeed.[64]

There needs to be greater and more explicit recognition that overriding a child's autonomy is very likely going to be harmful. It also needs to be recognised that it is *this* matter, rather than the adults' perception of what constitutes harm (for example perceived harm likely to arise from the child's wishes), which should be treated as the more important type of harm. The ready acceptance by the courts that harm to children is inevitable renders unjustifiable the mantra that children need protection from their own decisions. **Courts are correct that harm is inevitable – but it should be children who are seen to be the primary experts on what is more or less harmful for them in their personal lives." (A. Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard,* at p. 362)**

Additional Resources

- HCCH documents, https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction
- R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis,* Hart Publishing (2013)
- A. Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard,* Brill (2018)
- C. Tempesta, E. Murray & M. Birdsell, *Children's Rights and Voices: Critical Issues for Family Court Proceedings*, in N. Bala, P. Jaffe, K. Scott & L. Heslop (Eds.), Understanding Family Violence in Family Court Proceedings, University of Toronto Press (2025)