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Anticipating the SCC's Direction in *Balev*: The ABCA in *Thompson v Thompson* Emphasizes a 'Child-centered' Approach to the *Hague Convention*

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Case Commented On: *Thompson v Thompson*, [2017 ABCA 299 \(CanLII\)](#)

On November 9, 2017, the Supreme Court of Canada (SCC) will hear an appeal in *Office of the Children's Lawyer v JPB and CRB* (Supreme Court of Canada, [Leave to Appeal \(37250\)](#)) (*Balev*), a case which raises important issues about the [Hague Convention on the Civil Aspects of International Child Abduction](#). For an overview of the background and issues arising from the *Balev* litigation, see my earlier posts [here](#) and [here](#).

The appeal in *Balev* involves the key issue of whether the habitual residence of a child can change for purposes of the *Hague Convention* during the period of a father's time-limited consent (which permitted the children to attend school in Canada). If so, the mother in that case would not have wrongfully retained the children in Ontario within the *Hague Convention's* prompt return mechanism. The appeal is likely to engage questions around how best to determine the habitual residence of a child. Should it be through a "child-centered" approach, a "parental intentions only" approach, or both?

As noted in my previous [post](#), on April 27, 2017, the SCC granted leave to appeal (without reasons) the judgment of the Ontario Court of Appeal of September 13, 2016 which had ordered the prompt return of the children to Germany. The Office of the Children's Lawyer (OCL) has subsequently intervened on behalf of the children and for this reason, the appellant before the SCC is the OCL. The OCL's factum advocates for the adoption of a purely child-centered approach to the question of habitual residence of a child within the context of the *Hague Convention* mechanism ([Factum of the Appellant OCL](#) at para 4). The respondent mother maintains that the correct determination of a child's habitual residence should involve a hybrid approach, one that considers both the situation of the child (taking into account the child's views and preferences) but also the objective actions and intentions of the parents ([Factum of the Respondent CRB](#) at para 2). By contrast, the respondent father argues that any interpretation that is contrary to a strict "shared parental intentions" approach will result in an increase in international child abductions as a result of an undermining of the *Hague Convention* mechanism: "The greater the ease...the greater the incentive to try" ([Factum of the Respondent JPB](#) at para 54).

In light of the upcoming appeal before the SCC in *Balev*, this post discusses the approach taken by the Alberta Court of Appeal (ABCA) in the recent case of *Thompson v Thompson*. In particular, it examines the ABCA's conclusion that expert evidence as to a child's level of maturity to object to his or her prompt return to the country of habitual residence is not a

requirement (in the absence of evidence to the contrary) under the *Hague Convention*'s prompt return mechanism. This post discusses the reasoning in *Thompson* and suggests some significant legal and practical consequences that could flow from a shift towards a more child-centered interpretation of the *Hague Convention* by Canadian courts. These consequences may form part of the SCC's consideration of the issues in *Balev*.

Facts

In *Thompson*, the Canadian mother and the British father divorced in 2014. In July 2015, the mother brought an application in the United Kingdom to relocate the two sons (aged sixteen and fourteen at the time of the appeal) to Canada. This application was denied. Notwithstanding the order of the United Kingdom court not to remove the children from the United Kingdom for a period of more than one month (without the written consent of both parents), the mother moved to Calgary with the children in October 2015.

On November 10, 2015, the father filed an application for the return of the children with the Alberta Court of Queen's Bench (ABQB) pursuant to the prompt return mechanism of the *Hague Convention*. In June 2016, a chambers judge ordered that the children should be returned to England, with such order stayed until they completed the school year in Calgary. On their own initiative, the children relocated to British Columbia to live with their aunt, without the mother's knowledge. The children are currently residing in British Columbia, the mother having subsequently relocated to British Columbia (it is unclear from the judgments whether the children are currently living with their mother or aunt).

In response to the order to return the children to the United Kingdom, the mother appealed the decision on two grounds. First, that the chambers judge erred in his interpretation of the "grave risk of physical and psychological harm" exception (Art 13(b)) of the *Hague Convention*. Second, that the chambers judge improperly refused to take the views of the children into account, amounting to a contravention of the *Convention* and an error in the exercise of his discretion.

Grounds of Appeal

The Age of the Child Threshold

The facts in *Thompson* raised a number of important issues for the interpretation of the *Hague Convention* mechanism. One such issue was the consequence of the older child having reached the age of sixteen at the time the ABCA heard the appeal. Article 4 of the *Convention* provides that the *Convention* ceases to apply to a child when the child reaches the age of sixteen. Accordingly, the ABCA held that the order to promptly return the older son to England had to be varied and that the court had no Hague jurisdiction over the child. The order directing his prompt return was therefore vacated.

A Child's Objection to the Prompt Return

The second issue before the ABCA arose because the children continued to "strongly object to being returned to England" (at para 8). In relation to the younger child (to whom the *Hague*

Convention still applied), the appeal involved the Art 12 obligation to promptly return the child to his or her place of habitual residence in case of a wrongful removal. The prompt return mechanism includes a narrow consideration of three limited exceptions as set out in Art 13 of the *Convention*. The ABCA reiterated the importance of the *Hague Convention* mechanism to return a child to his or her place of habitual residence, subject to one or more of the three exceptions applying. These exceptions are: i) the consent or acquiescence of the child's removal by a parent; ii) the grave risk of harm to the child; and iii) where the child objects to being returned, and the child is of an age and degree of maturity at which it is appropriate to take their view into account. If any of these exceptions are established, the court has discretion not to order the return of the child.

The ABCA confirmed that there was no reason to interfere with the chambers judge's determination that there was no evidence of grave risk of harm which would arise from the return of the child to England, or that the father had consented to the children's removal to Canada. This narrowed the appeal to the third exception in Art 13 of whether the children were of an age and degree of maturity that it would be appropriate to take their views into account. The ABCA took issue with the chambers judge's conclusion that the two children were not mature enough to have their objections to the return taken into account (at para 13). At the time that the lower court considered this central issue, the children were fifteen and thirteen years old.

The lower court had considered itself bound by a case management note which had prescribed that a "voice of the child" report was not necessary to determine the Art 13 exception where a child objected to his or her return. Consequently, the chambers judge concluded that formal expert evidence would be required to determine whether the child had reached a sufficient level of maturity for the court to consider the views of the child. Since no such expert evidence had been filed, the court concluded that the children's objections were "insufficient to prevent their return to England under Article 13" (at para 13).

The appeal to the ABCA involved the issues of whether the objections of the children should have been taken into consideration, and whether expert evidence as to their maturity was required before those wishes could be considered by the court.

The ABCA concluded that the chambers judge had erred in declining to consider the wishes of the younger child in ordering his return. According to the ABCA, based on established case law (*RM v JS*, [2013 ABCA 441 \(CanLII\)](#)), the exercise of a court's discretion to consider the wishes of a child is dependent on two pre-conditions: i) that the child objects; and ii) that the child has attained an age and degree of maturity at which it is appropriate to take account of the child's views.

The ABCA held that it was an error of law to require expert evidence before the exercise of such a discretion, "regardless of the age or apparent maturity of the child" (at para 17). The court concluded that, "at a certain age", the need for expert evidence to determine a child's level of maturity "diminishes or is eliminated entirely" (at para 17). In the absence of evidence to the contrary, "a child of fourteen is sufficiently mature to express a view" as to why the child objects to being returned (at para 17).

According to the ABCA, the objection of a child is not “determinative of the outcome”. It is, however, a “relevant and important consideration” in the court’s evaluation. In the Court’s view, it is for this reason that the exclusion was explicitly set out in Art 13 of the *Convention* (at para 17). On this basis, the failure of the lower court to consider the child’s views simply because of a lack of expert evidence amounted to an error. This error was compounded by a refusal to allow expert evidence through the filing of a “voice of the child” report.

The ABCA remitted the matter back to the ABQB for redetermination, directing that a “voice of the child” report be prepared for the younger child.

Commentary

Mindful of the upcoming appeal to the SCC in *Balev*, does *Thompson* mark a departure by Canadian courts from the established *Hague Convention* mechanism of “presumed prompt return” in favour of a greater emphasis on the interests of the child? This would entail a shift from the current established “parental intentions” approach to a more “child-centered” approach when interpreting the provisions on habitual residence of a child in the *Hague Convention*. *Thompson* may therefore offer some valuable insights on how the SCC could rule on the issue of the effect of a time-limited consent on a child’s habitual residence in *Balev*.

As I have argued in previous ABlawg posts (linked above), the *Hague Convention* mechanism was established to facilitate the prompt return of a child, subject to the very limited exceptions set out in Art 13. One such exception, noted above, is that a child’s objections to being returned are to be taken into account where it is appropriate to do so based on the child’s age and degree of maturity. In order to test the child’s degree of maturity for the purposes of this exception, it seems reasonable to conclude that expert evidence is required. The ABCA’s decision in *Thompson*, however, suggests that at least for some ages, such expert evidence will not be required (unless there is evidence adduced that suggests a lack of maturity). This is clearly a “child centered” approach to interpreting the *Hague Convention* prompt return mechanism. Even though the ABCA recognized that a child’s objection to return is not automatically “determinative of the outcome”, the reasoning in *Thompson* suggests that the child’s views should be considered in some cases even where the child’s degree of maturity to present those views has not been tested.

In my view, a number of legal and practical consequences flow from the ABCA’s approach in this case. First, although under the language of Art 13, it seems that some evidence as to the degree of maturity for children under sixteen should always be brought prior to considering their objections, the effect of the ABCA’s decision is to put the onus on the parent who wishes to cast doubt on the child’s objections. Practically speaking, this burden could put the parent in a difficult situation vis-à-vis the child, as the applicant parent would effectively be arguing that he or she does not believe the child’s objections. Moreover, requiring a parent to question the degree of maturity of a particular child prior to knowing exactly what objections might be brought forward in the application (for fear that a court might simply hear the child’s objections without assessing their degree of maturity) may have the effect of slowing down what should necessarily be an expedited process.

Second, the ABCA does not specify what age will qualify for the purposes of removing the requirement for expert evidence as to degree of maturity under Art 13 of the *Convention*. We are told that fourteen qualifies (absent evidence to the contrary), but is that the cut-off? Or is the ABCA suggesting that a younger child, of thirteen for example, should also be presumed to have the necessary degree of maturity (unless evidence to the contrary is adduced) for purposes of the *Convention*? It is not clear from the decision.

It may be that the ABCA in *Thompson* was particularly influenced by the ages of the children involved in that case. As noted, they were fifteen and thirteen at the time the application was heard by the ABQB. Given the age of the one child to whom the *Convention* applied at the time of the appeal, the Court did not find it necessary to require expert evidence as to that child's level and degree of maturity. However, it is not at all clear why children of thirteen and fifteen years of age should automatically be excluded (absent evidence adduced to the contrary) from the strict language of the Art 13 exception in the *Hague Convention*. The *Convention* applies to children until the age of sixteen. In addition, with respect, this conclusion serves to place the onus of adducing evidence that questions a child's maturity (and the nature of his or her objections) squarely upon the parent who is asking for a prompt return to the place of habitual residence. This may have the effect of potentially undermining the prompt return mechanism established under the *Convention*.

In sum, my primary concern with the decision in *Thompson* is that it appears to be a move away from the strict prompt return mechanism as intended by the *Hague Convention*. The effect of the ABCA's decision is to elevate the objections of a child in a prompt return application. This seems contrary to the objective and intention of the Art 12 *Hague Convention* prompt return obligation. To reiterate, both children were the subject of this obligation at the time of their unlawful removal to Canada in October 2015.

In my view, should the SCC endorse a shift towards a more child-centered approach to the *Hague Convention* in *Balev*, considerations around the maturity of the child to object to his or her return should be central to any court's assessment of the exception in Art 13 of the *Convention*. Without expert evidence in this regard, Canadian courts will not be able to properly assess a child's objection and views. Any shift towards a "child-centered" interpretation of the *Hague Convention* should require the strengthening, and not the weakening, of the expert evidence requirement.

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