

May 10, 2018

## **Canada's interpretation of the *Hague Convention on the Civil Aspects of International Child Abduction* – the influence of the new hybrid approach on a child's objection to return**

**By:** Rudiger Tscherning

**Cases Comment On:** *Office of the Children's Lawyer v Balev*, [2018 SCC 16](#); *Erhardt v Meyer*, [2018 ABQB 333](#); *Husnik v Barbero Salas*, [2018 ONSC 2627](#)

### **Introduction**

On November 9, 2017, the Supreme Court of Canada (SCC) heard the 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 interpretation of 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 at [here](#), [here](#), and [here](#). The SCC rendered its decision in *Balev* on April 20, 2018.

The appeal in *Balev* involved two key issues of interpretation. Firstly, how an application judge should determine a child's habitual residence under Art. 3 of the Hague Convention. Secondly, how the exception under Art 13(2) of the Hague Convention, which provides a limited judicial discretion to the general 'prompt return' obligation to the child's country of habitual residence, should be interpreted.

This blog will focus on the second issue before the SCC in *Balev*. A prompt return is one of the key pillars of the Hague Convention mechanism, underpinned by Art. 12 of the Convention, which sets out that the default position is to order a prompt return to the child's country of habitual residence. The SCC's decision on the limited exception to a prompt return in Art 13(2) of the Convention raises important legal and practical consequences. These arise from the Court's direction that a greater focus and weighting should be placed on the child's objection to a prompt return. In particular, the SCC's decision raises critical issues about the evidence required with respect to a child's age and degree of maturity so as to support the granting of the narrow exception to a prompt return. Less than ten days after the SCC's judgement in *Balev*, two courts (the ABQB in *Erhardt v Meyer*, 2018 ABQB 333 and the ONSC in *Husnik v Barbero Salas*, 2018 ONSC 2627) considered and applied the SCC's reasoning with respect to the question of, and the practical consequences flowing from, a child's objection to return. These decisions are discussed below.

### **The Consequences of the *Balev* Hybrid Approach on a Child's Objection**

In *Balev*, a majority of the SCC changed the law in Canada and adopted a "hybrid" approach to the determination of habitual residence pursuant to the Hague Convention mechanism. In doing

so, the SCC followed the lead of similar approaches taken in Australia, New Zealand, a number of states in the United States of America, and by the Court of Justice of the European Union. The hybrid approach 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 when determining the issue of habitual residence of the child. In effect, a court must undertake a contextual analysis where no single factor dominates. The consequence of the SCC decision is that the traditional dominating factor of the parents' intention has been replaced by a multi-factored hybrid approach which now considers "all relevant circumstances" (at para 42). The new approach determines the focal point of the child's life "immediately prior to the removal or retention" (at para 43) by looking to the "entirety of the child's situation" (at para. 47). Moreover, the circumstances of the parents "including their intentions may be important, particularly in the case of infants or young children" (at para 45).

Although the SCC did not adopt an outright "child-centred" approach to habitual residence, the decision in *Balev* does represent a significant shift in Canadian law towards a greater emphasis on the rights and intentions of the child. This new approach will have important consequences on how the Hague Convention mechanism will be applied in Canada, including the important question of the child's objection to a prompt return examined in this blog.

A related matter raised by the appeal in *Balev* was the effect of the father's "time-limited consent" (permitting the children to reside in Canada for a determined period) on the question of the children's habitual residence. For a discussion of this issue, see [here](#). In a future blog, I will discuss the impact of the SCC's adoption of the hybrid approach in *Balev* upon such time-limited consent agreements between parents, and the implications of this significant shift in Canadian law. In particular, questions arise in regard to the risk of parents seeking to exploit the hybrid approach (a concern strongly raised by the dissenting minority in *Balev*) for purposes of delaying future Hague Convention applications and family disputes.

## **Determining a Child's Age and Maturity When the Child Objects**

### *The Hague Mechanism*

Since its inception in 1980, where a child has been wrongfully removed to or retained in a country other than the child's habitual residence (in the sense of Art. 3 of the Hague Convention), the Hague Convention has provided for very limited exceptions in Art. 13 to the general obligation (set out in Art. 12) for the prompt return of a child to his or her country of habitual residence. As set out above, the default position is that the child must be promptly returned.

The exceptions in Art. 13 of the Hague Convention include: consent or acquiescence to the removal/retention; the prospect of grave risk to the child in the event that a return is ordered; and the objection of the child to his or her return. The last exception is the most "child-centric". It consists of two elements, requiring (i) that the child objects to a prompt return, and (ii) that the child has attained "an age and degree of maturity" at which it is appropriate for an application judge to take his or her views into account. This Art. 13(2) exception was discussed at length in *Balev* and applied in the subsequent decisions of the ABQB in *Erhardt* and the ONSC in *Husnik*.

### *The Majority decision in Balev*

In *Balev*, the majority of the SCC affirmed that the exceptions to the Hague Convention’s prompt return mechanism “are just that – exceptions” and that Art. 13 does not “confer a general discretion on the application judge to refuse to return the child” (at para. 76). The exception for a child to object should not be read “so broadly that it erodes the general rule” of a prompt return (at para 76).

The SCC has confirmed that the approach that a Canadian court should take is that “basically, it is for the application judge to determine, as a matter of fact, whether [the Art. 13(2)] elements are established” (at para 78). According to the SCC, this can be achieved, in “most cases”, by a single process where the judge decides “if the child possesses the sufficient age and maturity to make her evidence useful, decides if the child objects to return, and, if so, exercises his or her judicial discretion” as to whether to return the child (at para 78).

According to the SCC, a determination by the application judge as to sufficient age and maturity “in most cases is simply a matter of inference from the child’s demeanor, testimony, and circumstances” (at para 79). Although the Court confirmed that in some cases it would be appropriate to call expert evidence “or have the child professionally examined”, this should not “be allowed to delay the proceedings” (at para 79). The matter of delay in Hague proceedings is particularly relevant, not least due to the obligation set out in Art 11 to act with expediency in determining applications. As the SCC in *Balev* stressed, “complacency towards judicial delay is objectionable in all contexts, but some disputes can better tolerate it. Hague Convention cases cannot” (at para 82). In an [earlier blog](#) I examined Canada’s record as to delay in Hague Convention applications. I anticipate that the citing of the Court’s *Jordan* decision by the majority in *Balev* will encourage a greater focus on expediency in Hague Convention applications. Indeed, the ABQB in *Erhardt* acknowledged its own delay in that its decision was not within the six-week target (at para 11).

According to the SCC in *Balev*, the objection of the child, like the matter of age and maturity, is to be “assessed in a straight-forward fashion – without the imposition of formal conditions or requirements” (at para 80). Adopting the *dicta* of the House of Lords in *In re M* ([\[2007\] UKHL 55](#) para 46), the SCC stressed that the exercise of the discretion not to order the child’s return requires the application judge to consider a number of factors. These factors may include 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, and 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 (at para 81).

### *Concerns Raised by the Minority in Balev*

The joint minority judgment of Moldaver, Côté and Rowe JJ provides guidance on how the discretion in Art. 13(2) of the Hague Convention “should be exercised under the majority’s framework” (at para 157). The majority’s fact-based, common sense approach “invites judges to consider the totality of the circumstance” (at para 157). The minority in the SCC stressed three

key points (at para 158) related to the child’s objection. First, a child’s objection should “not be determinative, or even presumptively determinative” of whether a court should exercise its discretion to refuse a return order. Second, “the policy objectives of the Hague Convention must be considered in determining whether to refuse a return order”. According to the minority, “this must include the express objective of protecting rights of custody and access”. Third, “the issue is not solely what the child wants, and the analysis is not to be treated as an application for custody” (at para 158). The minority noted that these three points are “consistent with the majority’s admonition” that Art. 13(2) should not erode the general rule related to the child’s prompt return to his or her country of habitual residence.

The minority placed considerable emphasis on the fact that the Art. 13(2) exception should not “be lightly invoked to systematically undermine” custody rights of the left-behind parent and that it should be applied cautiously by judges so that it “does not routinely override shared parental intent” (at para 159). The minority was particularly concerned with the fact that permitting a child’s objection to “routinely trump evidence of shared parental intent” would result in rendering “the determination of habitual residence entirely superfluous” (at para 159). The minority also noted the majority’s caution in *Balev* at para 76, that there is no general discretion to refuse to return a child. The minority was especially concerned with the fact that a court must pay “careful attention” so as to ensure that a child’s objection is not the result of the undue influence of a parent. In an assessment of the child’s objection, “courts should be cognizant of the fact” that the effect of refusing a return order is that the status quo prior to removal will not be restored and this reality “must factor into the analysis” (at para 159). The minority was at pains to stress that an application judge yields considerable power in his or her assessment of the evidence relative to the objection of the child and in making a subsequent decision on the return based on assessment of this evidence, both of which are “discretionary decisions” (at para 160).

## **A Child’s Objection Evidenced by a Voice of the Child Report**

### *Compelling Evidence as to the Maturity of the Child*

In *Erhardt v Meyer*, the ABQB dealt with an almost fifteen-year old child who, when visiting his father over the Christmas holidays in 2017, elected to remain in Canada and not to return to his mother in South Africa. The boy had spent most of his life in Canada and the mother’s application for the return of her son pursuant to the Hague Convention mechanism was unsuccessful before the Alberta court.

The decision is of interest as it marks the first time that the Hague Convention was interpreted by a Canadian court following *Balev*. Of note also is the fact that one day after the Alberta decision, the ONSC examined the Hague Convention in *Husnik v Barbero Salas* (discussed below). In a decision of the case management justice, the court in *Erhardt* considered the Art. 13 exception to the mandatory return of the child to his or her place of habitual residence where the child objects to such a return. The judgment in *Erhardt* applied the SCC’s interpretation of the Art. 13 discretion in *Balev* as one that should not be read so broadly as to erode the Hague Convention mechanism’s general rule of prompt return (*Erhardt*, at para 36).

The recent shift towards a greater “child-centric” focus in *Balev* raises the difficult question of

how a court should determine the issue of an objection to the return by the child? *Erhardt* addressed this question by directly applying *Balev*. The ABQB followed a “common-sense approach within the context of the rapid return” mechanism (at para 37) and applied *Balev* in that a determination of the child’s sufficient age and maturity is, in most cases, simply one of a “matter of inference from the child’s demeanor, testimony and circumstances” (per *Balev*, para 79). As *Erhardt* confirmed, the Hague Convention mechanism “contemplates that the child will be heard” (at para 39). The ABQB noted that a Voice of the Child report from a trained psychologist is “the most appropriate way for the child’s voice to be heard” (at para 42).

In *Erhardt*, the psychologist had conducted extensive interviews with the child and with the parents and had prepared a Voice of the Child report. Based on the report, the court concluded that the child had reached the sufficient age and degree of maturity for his views to be taken into account in an Art. 13(2) determination. At the time the report was prepared, the child was fourteen years old. It should be recalled at this point that the Hague Convention ceases to apply to a child when the child reaches sixteen years (Art. 4).

The child in *Erhardt* articulated solid reasons as to why he wished to remain in Canada, including: (i) Canada being more enjoyable; (ii) Canada having better education and offering better academic opportunities; (iii) South Africa being less safe; and (iv) the South African education system offering less technology classes which was an area of interest for the child. The court noted that the child “emphasized that he was choosing Canada over South Africa and not one parent over the other” (at para 50).

Owing to the “compelling” evidence of the child’s age and maturity as set out in the Voice of the Child Report (at para 52), the court concluded that it was not necessary to determine the habitual residence or the exercise of custody by the mother. According to the court, the child “understands the choice he has expressed to live in Canada” and “there is no other conclusion that this Court could come to but to exercise its discretion” for the child to remain in Canada (at para 52). Since the case management judge determined that the child was not to be returned to South Africa, the courts of Alberta are now in a position to consider the father’s application for custody pursuant to the *Family Law Act*. This application had been suspended pending the Hague Convention application for prompt return of the child commenced by the mother in South Africa (at para 13, 14).

A similar position on determining the maturity of a child by way of a Voice of the Child report was taken by the ONSC in *Husnik v Barbero Salas*, one day after the judgment of the ABQB in *Erhardt*. In *Husnik*, the ONSC applied the *Balev* hybrid test to the question of the child’s habitual residence. The court concluded that the habitual residence at the time of the wrongful retention of the child in Ontario was not Mexico but in fact Ontario. The court considered the intentions of the parents, relevant links and the circumstances of the child’s move to Ontario.

The ONSC noted that even if it was mistaken in its determination of habitual residence (at para 40), a return of the child to Mexico would not be ordered because Art. 13 of the Hague Convention would be applicable. The court stated that: “[t]he Voice of the Child Report sets out that RB has voiced his desire to remain in Ontario with his father. RB is almost 14 years of age. Given his age and degree of maturity, it would be appropriate to take into account his views” (at

para 40). Although on the facts, the court noted that RB had not specifically objected to a return to Mexico, the Voice of the Child report documented that he wished to remain with his father and that he was “extremely hurt and upset by his mother’s conduct” of returning to Mexico with his sister (at para 40). RB had also been placed on an airplane from Florida to Ontario alone (at the age of eleven years) by his mother to return him to the care of his father, which the court considered to amount to consent by the mother for the purposes of Art. 13 of the Hague Convention.

## Commentary

As noted, the majority in *Balev* emphasized that Hague Convention applications should be determined with expediency. Determining a child’s age and maturity is, in most cases, “simply a matter of inferences” drawn by the application judge (at para 79). Only in “some cases” is it appropriate to either call expert evidence or to have the child professionally examined (at para 79). A child’s objection pursuant to Art. 13(2) should be assessed in a “straight-forward fashion”, without the imposition of “formal conditions or requirements” (at para 80). Whilst the SCC in *Balev* was correct to stress that an unduly formalistic process as to the child’s evidence would run counter to the expedited resolution of Hague Convention applications, this does not resolve the important question of how an application judge should consider the difficulties of, and potential consequences flowing from, an Art. 13(2) objection of the child to his or her prompt return. The adoption of a hybrid approach to the issue of habitual residence only compounds these difficulties.

When a court determines that a child should not be returned to his or her habitual residence, this has important implications to the international family dispute. For example, as noted above, the minority in *Balev* expressed concerns that Art. 13(2) should not be “lightly invoked” so as to “systematically undermine custody rights of left-behind parents” (at para 158). The facts in *Erhardt* are a reminder that the Hague Convention mechanism is a preliminary step to any formal consideration of custody of the child. Indeed, the Alberta courts could not proceed with the custody application before a determination of the Hague Convention application.

In my view, the *Erhardt* decision exposes the risks of Hague Convention applications when an application judge does not have access to high quality evidence as to the child’s age and maturity and to his or her ability to form sound conclusions. As noted, the objection of the child in that case to return to his habitual residence in South Africa was based on solid evidence set out in a Voice of the Child report. This was sufficient for the court to exercise its Art. 13(2) discretion. Furthermore, reliance on the compelling evidence not only gave credibility to the child’s objections (the information as to the child’s objection was the issue “that [was] determinative in this case” (at para 34)), but also permitted the ABQB to make a determination on Art. 13(2) from which two critical *consequences* flowed. The consequences of the child’s compelling objection were that it was not necessary for the ABQB to determine (i) the child’s habitual residence and (ii) the exercise of custody by the mother in South Africa (at para 52). But how can a Canadian court potentially reach this decision without any formal evidence, as suggested by the “Fact-based common-sense” approach of the majority in *Balev*? How should a court reconcile the need for expediency in determining a Hague Convention application (per *Balev*) with the significant

consequences (as seen in *Erhardt*) for the child and the left-behind parent flowing from an Art. 13(2) determination?

The decision in *Erhardt* applied the increased focus on the child's interest pursuant to the hybrid approach adopted in *Balev*. But in *Erhardt*, the court also had the benefit of a Voice of the Child report. Would the court have been able to reach the same determination without this type of evidence? As I commented in an [earlier post](#) on a previous ABCA decision (*Thompson v Thompson*, [2017 ABCA 299](#)):

“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”.

I made these comments in light of the *Thompson* decision, which held 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). The ABCA in *Thompson* noted that absent evidence to the contrary, it may be reasonable to assume that a child of fourteen is sufficiently mature to express a view as to why he or she objects to being returned. At the same time, however, *Thompson* also noted that the trial judge had erred in refusing to allow expert evidence through the filing of a Voice of the Child report on the child (at para 18). Unfortunately, the court in *Erhardt* did not refer to *Thompson* at all when ordering a Voice of the Child report (at para 42). This may be because in *Erhardt*, both parents participated in the Voice of the Child process, both counsel agreed on the psychologist, and the child's objection were so compelling.

In *Erhardt*, the child was almost fifteen years old. Yet, the ABQB still ordered and relied upon a Voice of the Child report. In fact, the ABQB considered the report central to its determination of the Art. 13 exception “as it was the most appropriate way for the child's voice to be heard” (at para 41 and 42). Given the child's age, which meant that he was effectively one year away from the Hague Convention ceasing to apply to the child, the reliance on a Voice of the Child report is noteworthy.

More importantly still, the Voice of the Child report evidenced the child's unquestionable degree of maturity (“Pieter demonstrates more maturity than his parents. They could learn much from him”, at para 47), as well as his sound reasons for wishing to remain in Canada. The court may also have been influenced by the child's evident neutrality with regard to either parent (he was not choosing one over the other, wishing to remain in frequent contact with his mother and seeking out a therapist to assist him with all of these matters, at para 49) in accepting the child's objection to return. All of this spoke directly to the interaction between reliance on expert evidence and the court's exercise of its discretion pursuant to Art. 13(2) of the Hague Convention.

The fact that this information was contained in a Voice of the Child report is crucial. It lent credibility to the child's objection. It also resulted in a decision on the Hague Convention application that will facilitate, in the form of custody hearings before the Alberta courts, a Canadian court being in a position to act in the best interests of the child with relative expediency. The key point to note is that all of this information could, potentially, have been obtained by the application judge by inferences and in a "straight-forward fashion" by way of testimony. But the quality of the evidence may have suffered without formal evidence obtained outside of the courtroom. If we combine this line of reasoning with the minority in *Balev* (which, as set out above, reminded us of the potential consequences on custody rights of a left-behind parent by granting an Art. 13(2) exception) then arguably, the importance of obtaining and relying on formalized evidence in the form of a Voice of the Child report is further underscored.

This leaves the issue of expediency. The SCC in *Balev* was correct to express serious concerns about delay. The tragic facts in *Balev* exposed the dangers of delay, ultimately rendering the decision of the court moot. Hague Convention cases must be flagged and expedited and "determined using the most expeditious procedures available" (at para 89). How, then, can expediency be reconciled with a court obtaining the best possible evidence on the child? The majority in *Balev* adopted a "fact-based common-sense approach" that considers the "totality of the circumstances" (at paras 76 and 158). This may suggest that there is potential for flexibility on the question of evidence. But on a strict reading of the majority in *Balev*, there is little to compel an application judge to risk delay in order to rely on expert evidence. For example, in *Erhardt*, the age of the child and his degree of maturity would not automatically have suggested that a formal report should be prepared. Indeed, one may wonder why, in *Erhardt*, a report was prepared at all as it did not appear to be necessary (contrast this, for example, with a younger child where questions of maturity and understanding of the consequences of his or her objection may be less clear). Ordering a Voice of the Child report is a discretionary power. It is entirely possible, therefore, that a different application judge in *Erhardt* could have read the majority in *Balev* narrowly and to have relied only on his or her own inferences drawn from the child's demeanor and testimony in court (as per para 79).

But the preparation of a Voice of the Child report does not have to be an unduly cumbersome or time-consuming process. As the Court of Queen's Bench of Alberta Family Law Practice Note 7 notes (October 1, 2012), the child is typically seen twice by an expert. The objective of the report is to assist the court in its decision making. In *Erhardt*, the court received notice of the Hague Convention application at the end of January 2018. The first meeting with counsel for the parties was held some 14 days after. The parties agreed on March 5, 2018 that a Voice of the Child report should be prepared and the report was produced on April 13, 2018. The ABQB rendered its decision on April 26, 2018. Although this is outside the six-week target period, the commission of the report does not appear to have unduly delayed the application. In *Husnik*, unfortunately, no details as to how the Voice of the Child report was prepared were discussed.

## **Conclusion**

The degree and quality of a child's objection may not always be as clear-cut as on the facts in *Erhardt* or *Husnik*. Despite this, the ABQB and the ONSC ordered a Voice of the Child report.

The compelling nature of the evidence in *Erhardt* allowed the court to determine that there was no other conclusion it could reach but to order that the child remain in Alberta (thus it was not necessary to determine habitual residence or the exercise of custody by the left-behind mother in South Africa).

The court's decision is consistent with the overall direction of giving greater effect to the wishes of the child, as recently confirmed by the SCC in adopting a hybrid approach in *Balev*. Where a child's express objection, and the supporting evidence as to the child's age and maturity in a Voice of the Child report are so compelling (as was the case in both *Erhardt* and in *Husnik*), it is difficult to take issue with a court given effect to the child's intentions. The flexibility anticipated by the SCC in *Balev*, which noted that "in some cases, it may be appropriate" to call expert evidence or to undertake a professional examination of the child, would suggest that a Canadian court can reconcile both the need for expediency as emphasized by the majority in *Balev* ("[expert evidence] should not be allowed to delay the proceedings") with a court's obligation to give greater weight to a child's intentions and wishes, as per the hybrid approach in *Balev* (at para 79).

In light of this, application judges may benefit from clearer guidance (*e.g.* in the form of a practice note) which should clarify the Voice of the Child report mechanism and underline the importance of expediency in the preparation of such reports. Once the emphasis by the SCC in *Balev* on expediency is given effect to, reliance on expert evidence can reconcile both the majority's focus on expediency and the minority's concerns that an application judge may give undue determinative weight to what the child wants, at the expense of the Hague Convention policy objectives or the intentions of the parents. Such an approach may therefore represent a perfect application of the spirit of the hybrid approach to a child's objection to his or her prompt return in international family law disputes in Canada, without unduly taking away from the intentions of the parents and the overall objectives of the Hague Convention mechanism. This would represent a true consideration of the "totality of the circumstances" in Art. 13(2) applications.

---

This post may be cited as: Rudiger Tscherning, "Canada's interpretation of the *Hague Convention on the Civil Aspects of International Child Abduction* - the influence of the new hybrid approach on a child's objection to return" (10 May, 2018), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2018/05/Canada's\\_interpretation\\_of\\_the\\_Hague\\_Convention\\_on\\_the\\_Civil\\_Aspects\\_of\\_International\\_Child\\_Abduction-the\\_influence\\_of\\_the\\_new\\_hybrid\\_approach\\_on\\_a\\_c.pdf](http://ablawg.ca/wp-content/uploads/2018/05/Canada's_interpretation_of_the_Hague_Convention_on_the_Civil_Aspects_of_International_Child_Abduction-the_influence_of_the_new_hybrid_approach_on_a_c.pdf)

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

