

# **CROSS BORDER PARENTAL CHILD ABDUCTION – SOCIAL CONTEXT ISSUES<sup>1</sup>**

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## **I. INTRODUCTION – WHY THE SOCIAL CONTEXT OF CHILD ABDUCTION MATTERS**

Cross-border child abduction cases, in which a parent wrongfully removes a child from a jurisdiction, or retains a child from another jurisdiction, can be particularly challenging for judges. The child can be taken to, or kept from another country, or another jurisdiction in Canada. There is the potential for a wrongful removal to another jurisdiction, or retention in another jurisdiction in any child custody case a judge is dealing with as part of the judge's day to day family law work.

Judges are well placed to identify at least some potential abduction cases and to take steps to try to prevent abductions from taking place. While the majority of cases are resolved within the first week<sup>3</sup>, for those that are not, the impact upon the child, parents and others can be devastating. Judges are called upon to make timely decisions, considering the use of inter-jurisdictional judicial communication networks and guidelines.

The profile of parental child abductors has changed over time. Mothers are increasingly becoming the more likely parent to remove or retain children and allegations of domestic violence by them are not uncommon. Giving appropriate consideration to these allegations while at the same time dealing with the need to proceed in a timely, summary way can be particularly difficult.

This paper provides an evaluation and analysis of the myriad of social context issues at stake in parental abduction cases. It draws particular attention to the problem of domestic violence as a contributory factor in cross-jurisdiction and cross-border child abductions and concludes that more research is needed in the long-term to better

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<sup>3</sup> RCMP Fast Fact Sheet 2013 - <http://www.canadasmissing.ca/pubs/fac-ren-2013-eng.htm>

understand the complexities of parental abductions and protect both children and parents from lasting harms.

Using social context information informs contextual analysis and concerns the lived reality of the people affected by court decisions. The Chief Justice of Canada, Beverley McLachlin, described contextual analysis in a keynote address entitled *Judging: the Challenges of Diversity*<sup>4</sup> and repeated her main points in a speech to British Columbia judges. In both addresses the Chief Justice emphasized understanding “the social context of legal issues and disputes...”<sup>5</sup> To truly understand and appreciate the various perspectives necessary to reach a just result, she stated, judges must understand facts, law, and the social context from which they arise. She indicated that judges apply rules and norms to individuals embedded in complex social situations. To “judge justly”, therefore, they must “appreciate the human beings and the situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions.”<sup>6</sup>

The outline of the paper is as follows:

## II. GENERAL INFORMATION ABOUT THE NATURE OF CHILD ABDUCTION

This section opens with a summation of changes to Canada’s missing children inquiries, noting that the Canadian government has shifted both funding and agencies despite the ongoing prevalence of parental abductions. It then highlights general information on Canadian parental abductions, identifying ‘typical’ abductions and the motivating factors behind removing children to other jurisdictions. This section maintains a specific focus on family and domestic violence as a motivating factor for parents, usually mothers, to flee to another jurisdiction.

## III. THE IMPACT OF PARENTAL CHILD ABDUCTION

This section examines the impacts of parental child abduction on the taking and leaving parent, as well as the child. As so few studies examine the links between domestic violence, parental abductions and harm to children, this section connects these factors, highlighting the need for long-term research in this area in future.

## IV. RISK FACTORS FOR ABDUCTION

This section elaborates on a series of general risk factors that, if identified early, can indicate a potential abduction is about to occur. A series of checklists and guidelines are introduced, which may assist judges, or other bodies, in preventing abductions from taking place. Once again, this section places particular emphasis on recognising domestic violence as a critical factor in child abductions.

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<sup>4</sup> Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, Judicial Studies Committee Inaugural Annual Lecture, June 7, 2012, Edinburgh, Scotland: <http://www.scotland-judiciary.org.uk/Upload/Documents/JSCInauguralLectureJune2012.pdf>

<sup>5</sup> *Judging: the Challenges of Diversity*, at p. 14. See also the cautionary comments at p. 16.

<sup>6</sup> *Judging: the Challenges of Diversity* at p.14.

## V. EVOLVING ISSUES

This paper then describes four evolving issues that will be of particular interest to judges:

- A. The approach to grave risk/serious harm exceptions (including the approach taken by the European Court of Human Rights),
- B. Mediation processes following abductions,
- C. The growing importance of the child's right to be heard, and
- D. The impact of refugee proceedings.

## VI. CONCLUDING OBSERVATIONS

In the final section of our paper, we discuss the importance of social context information, particularly information relating to domestic violence; consider both the appropriate and inappropriate use of such information; and note that there are gaps in the social science research, emphasizing the importance of ongoing research.

### II. GENERAL INFORMATION ABOUT THE NATURE OF CHILD ABDUCTION

#### A. Changes to Canada's Missing Children Inquiries

To best understand the contemporary social context of parental child abduction, judges should be aware of changes that have taken place in Canada, affecting access to concrete statistics.

From December 1988 to December 2009, Canada's National Missing Children's Services (NMCS) tracked all missing children cases across Canada. NMCS assisted the RCMP by storing information on missing children cases (including cases of parental abduction), providing investigative support and coordinating the implementation of the Amber Alert search mechanism within Canada.<sup>7</sup> The NMCS released annual reports containing updates to federal government programs for missing children, RCMP training and partnerships. In 2007, an in-depth study of parental child abduction was conducted by Dr. Marlene Dalley and released by the RCMP<sup>8</sup>, showing the nature of the problem and the impact of abductions on left-behind parents as well as on abducted children.

In 2011 the NMCS was renamed the National Missing Children Operations and its cases were absorbed into the National Centre for Missing Persons and Unidentified Remains (NCMPUR). The federal government made the decision to stop producing in-depth reports, instead producing annual 'Fast Fact Sheets' containing a fraction of the information.<sup>9</sup> The most recent in-depth report from NMCS is from 2009. The

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<sup>7</sup> 2003 National Missing Children Services Reference Report, <http://www.rcmp-grc.gc.ca/pubs/omc-ned/an-ra/annrep-rappann-03-eng.htm>

<sup>8</sup> Marlene Dalley, Ph.D, *The Left Behind Parent's View of the Parental Abduction Experience, Its Characteristics and Effect on the Canadian Victims* (2007), <http://www.rcmp-grc.gc.ca/pubs/omc-ned/leftbe-laisderr-eng.htm>

<sup>9</sup> Canada's Missing – Background: 2012 Fast Fact Sheet, <http://www.canadasmissing.ca/pubs/fac-ren-2012-eng.htm>; 2013 Fast Fact Sheet, <http://www.canadasmissing.ca/pubs/fac-ren-2013-eng.htm>

most recent detailed statistical analysis of Canadian applications under *The Hague Convention on the Civil Aspects of Child Abduction (1980)* (the *Hague Convention*) is from 2008.<sup>10</sup> These facts and statistics are useful tools for judges, but must be understood in the context of their age. More studies and more comprehensive research need to be done to keep pace with the evolving complexities of child abduction cases.

## **B. General Information on Parental Abductions in Canada**

### **1. Prevalence of Parental Abductions**

According to the RCMP, parental abductions are decreasing. The Fast Fact Sheet for 2013 reflects 130 missing children transactions handled by the RCMP across Canada<sup>11</sup>, as against 167 in 2012<sup>12</sup> and 186 in 2010.<sup>13</sup> However, unofficial statistics released by Canada's Department of Foreign Affairs reflect a nearly 40% *increase* in wrongful removals from Canada between 2009 and 2013.<sup>14</sup> These statistics do not represent a complete picture of all the incidences of wrongful removals and retentions, since many are managed domestically and abroad by police and other authorities, or directly through provincial/territorial Central Authorities. As a result, it is very difficult to get an accurate picture of the prevalence of parental abductions occurring in Canada. Most of the cases where assistance has been requested, according to DFATD, involve the U.S. and Mexico. Non-Hague Convention countries with a number of Canadian wrongful removal and retention requests include India, Lebanon, Morocco, Algeria, Pakistan and China. Resolution rates were deemed to be country-specific, although Hague Convention signatories had a higher rate of success than non-Hague countries. Finally, there were 240 active cases of child abduction into and outside of Canada, as of March 31<sup>st</sup>, 2014.<sup>15</sup>

### **2. Age of Abducted Children**

The RCMP 2009 Missing Children Reference Report: National Missing Children Services<sup>16</sup> (hereafter the 2009 RCMP Report) reported that 41 percent of abducted

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<sup>10</sup> Professor Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 Under The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part III (National Reports)* p. 38- 55 <http://www.hcch.net/upload/wop/abduct2011pd08c.pdf>

<sup>11</sup> Canada's Missing – Background: 2013 Fast Fact Sheet, <http://www.canadasmissing.ca/pubs/fac-ren-2013-eng.htm>. Please note that transactions may indicate repeat occurrences and may not reflect the number of 'actual' abductions that occurred.

<sup>12</sup> Note 9 above.

<sup>13</sup> Canada's Missing – Background: 2010 Fast Fact Sheet, <http://www.canadasmissing.ca/pubs/fac-ren-2010-eng.htm>

<sup>14</sup> The DFATD statistics are not publically available, but were sent by email to reporter Lee Berthiaume of the Ottawa Citizen, who kindly passed on the statistics to the authors (Personal Communication, May 2<sup>nd</sup> 2014). See also *Left Behind Parents Fight Through Legal Maze*, Vancouver Sun, April 28, 2014, <http://www.canada.com/vancouver/news/westcoastnews/story.html?id=ce3782f9-a693-4f9c-831f-919b32810b82>

<sup>15</sup> Ibid.

<sup>16</sup> RCMP *National Missing Children Services Reference Report* (2009), <http://www.rcmp-grc.gc.ca/pubs/omc-ned/an-ra/annrep-rappann-09-eng.htm>

children were under the age of 5, 31 percent were between 6 and 11 years old and 28 percent were between 12 and 17 years old. This reflects a global trend - a 2008 statistical survey made in collaboration with the Permanent Bureau of the Hague Conference found that the average age of abducted children was 6.4 years old.<sup>17</sup>

### 3. Gender of Abducted Children

According to the 2013 RCMP Fast Fact Sheet, 62 females and 68 males were reported as having been abducted by a parent.<sup>18</sup> This marks a change in trend from 2011, when a greater proportion of females were reported missing.<sup>19</sup>

### 4. Provinces

According to the 2013 RCMP Fast Fact Sheet, the provinces with the most parental abduction transactions were Ontario (59), Quebec (32), British Columbia (14) and Manitoba (12).<sup>20</sup> A number of missing children and youths (5138 females and 4009 males) were reported in the same year with reasons 'Unknown' and it is plausible that some parental abduction cases may have fallen under this category.

### 5. Custody Orders

The 2009 RCMP report showed that just over half of the cases (127 of 227) had no custody orders in place. The majority of abductions (76 percent) took place without any history of prior abductions.<sup>21</sup>

### 6. 'Typical' Abductions

A 2008 RCMP study conducted by Kiedrowski and Dalley provides information on how abductions are likely to take place.<sup>22</sup> According to the study, children are more likely to be removed from the home than any other location. They are also more likely to be removed during the summer or winter school holidays.<sup>23</sup> The parent abducting the child tends to plan the abduction carefully – it is not an impulsive act.<sup>24</sup>

According to the 2009 RCMP report, 58 percent of missing reports were filed within twenty-four hours.<sup>25</sup> According to general statistics on the 2013 RCMP Fast Fact

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<sup>17</sup> Professor Nigel Lowe and Victoria Stephens (2012) Global Trends in the Operation of the 1980 Hague Abduction Convention *Family Law Quarterly* 46(1): 41-85.

<sup>18</sup> Note 11 above.

<sup>19</sup> <http://www.canadasmissing.ca/pubs/fac-ren-2011-eng.htm>

<sup>20</sup> Note 11 above.

<sup>21</sup> 2009 RCMP Report, above, note 16.

<sup>22</sup> John Kiedrowski and Marlene Dalley. *Parental Abduction of Children: An Overview and Profile of the Abductor* (2008) <http://www.rcmp-grc.gc.ca/pubs/omc-ned/parent-eng.htm>

<sup>23</sup> This is also true at the global level. See Professor Nigel Lowe and Katarina Horosova (2007). The Operation of the 1980 Hague Abduction Convention – A Global View *Family Law Quarterly* 41(1): 59-103 at p. 73.

<sup>24</sup> See also Taryn Lindhorst and Jeffrey L. Edleson (2012). *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention*. Northeastern University Press, Boston at p. 76

<sup>25</sup> 2009 RCMP Report, above, note 16.

Sheet, 87% of overall missing children reports were removed within a week.<sup>26</sup> Kiedrowski and Dalley emphasise in their study that the majority of parental abductions are short-term and resolved within seven days.<sup>27</sup> It is not made clear what proportion of the removed reports from the 2013 RCMP Fast Fact Sheet were classified as parental abductions.

According to the 2007 study conducted by Dalley, sixty three percent of abducted children were removed from Canada to another country and more were removed to the United States than anywhere else.<sup>28</sup> At a global level, Lowe and Stephens found a high proportion of abductors removed their child(ren) to a state of which they were nationals.<sup>29</sup>

## 7. Resolving Cases

As mentioned, a significant proportion of cases did not proceed beyond a week.<sup>30</sup> Lowe and Stephens posit that states are becoming more adept at using their national resources to resolve cases quickly.<sup>31</sup> When cases reached the courts under the *Hague Convention* however, resolutions took longer. The average time taken to reach a decision of judicial return was 166 days in 2008, compared to 125 days in 2003 and 107 days in 1999.<sup>32</sup>

Left-behind parents used police, legal and not-for-profit agency services to assist with finding and returning their children.<sup>33</sup> Parents were more often satisfied with the not-for-profit agency services than with police and legal services.<sup>34</sup> The average cost of search and recovery in 2007 was C\$34,000.<sup>35</sup> By 2011, this had risen to \$62,166 (USD, approximately C\$57,632) according to The Hague Permanent Bureau.<sup>36</sup>

### C. Identifying Potential Parental Abductors

At the time the *Hague Convention* was drafted it was believed that noncustodial fathers were most likely to abduct their children.<sup>37</sup> Now however, mothers are more likely to be the 'taking parent' and there is a high probability that they will be the primary caregiver of the child(ren) at the time of the abduction.<sup>38</sup> This is true across the world - a recent global study showed that sixty nine percent of the taking parents,

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<sup>26</sup> Note 11 above.

<sup>27</sup> Note 22 above.

<sup>28</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>29</sup> Lowe and Stephens, above, note 17.

<sup>30</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>31</sup> Lowe and Stephens, above, note 17.

<sup>32</sup> Ibid.

<sup>33</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> *Domestic and Family Violence and the Article 13 'Grave Risk' Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper* <http://www.hcch.net/upload/wop/abduct2011pd09e.pdf>

<sup>37</sup> Lowe and Horosova, above, note 23 at p. 70.

<sup>38</sup> See J. Kiedrowski and M. Dalley, *Parental Abduction of Children*, above, note 22.

who were respondents to Hague petitions, were mothers.<sup>39</sup> Mothers are more likely to remove a child after a court order is made, while fathers are more likely to do so beforehand.<sup>40</sup>

Many abductor mothers claim to be fleeing domestic violence. A study conducted by **reunite** in 2003 showed that domestic violence was raised as a concern in 44% of cases where the abductor was the mother.<sup>41</sup>

Although socioeconomic factors may vary, fathers who abduct are more likely to be employed and mothers are more likely to be unemployed.<sup>42</sup> Parental abductors tend to be between the ages of 28 and 40.<sup>43</sup> According to the 2009 RCMP report, the left-behind parent tended to be better educated than the abducting parent and abducting fathers were more likely to be better educated than abducting mothers.<sup>44</sup>

The economic status of the left-behind parent is usually better than the abducting parent. According to the 2009 RCMP Report, a third of the abducting parents were making under \$25,000 per year, with over half making between \$25,000 and \$60,000 annually.<sup>45</sup> Only half of the abducting parents were employed at the time of the abduction.<sup>46</sup>

#### **D. Why Parents Abduct Children**

There are a number of factors that may cause a parent to abduct his or her child. In-depth studies conducted in the UK, USA and Canada have provided a range of contributory issues.<sup>47</sup> Parents may experience one or more of these factors at any

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<sup>39</sup> See Lowe and Horosova, above, note 23 at p. 70; Ethan Stoege (2011). International Child abduction and Children's Rights: Two Means to the Same End *Michigan Journal of International Law* 32: 511-552; Marilyn Freeman (2009) *Relocation: The reunite Research* <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Relocation%20Report.pdf>; Linda J. Silberman, The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe – Abbott, Neulinger, Zarraga, 2011, *Oklahoma Law Review* 63(4) at p.736; Peter Ripley, A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention, 2008 *Journal of Private International Law*: 443-477 and FCO Press Release (2012) *New FCO Figures Show Parental Child Abduction Cases on the Rise* <https://www.gov.uk/government/news/new-fco-figures-show-parental-child-abduction-cases-on-the-rise>

<sup>40</sup> 2009 RCMP Report, above, note 16.

<sup>41</sup> **Reunite** Study (2003) *The Outcomes for Children Returned Following an Abduction*. <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Outcomes%20Report.pdf>

<sup>42</sup> 2009 RCMP Report, above, note 16.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> See Dalley, 2007 RCMP study, above, note 8; 2003 **reunite** study, above, note 41; US Department of Justice, *A Family Resource Guide on International Parental Kidnapping* <https://www.ncjrs.gov/pdffiles1/ojdp/215476.pdf> and US Department of Justice, *The Crime of Family Abduction: A Child's and Parent's Perspective* <https://www.ncjrs.gov/pdffiles1/ojdp/229933.pdf>

given time. These can be summarized and divided into discrete categories, as follows:

### **1. Relationship Issues**

- The parent may be frustrated by the parental relationship or have a lack of skills necessary to resolve a dispute with the other parent.
- The fear of marital separation may motivate extreme measures.
- Power struggles between parents.<sup>48</sup>

### **2. Revenge**

- The abducting parent may want to punish the other spouse.
- The abducting parent may see the removal of the child as a means of taking away something that 'belongs' to the left-behind parent.<sup>49</sup>

### **3. Security**

- To escape physical, sexual or emotional violence.<sup>50</sup>
- To 'rescue the child' from the other spouse.<sup>51</sup>
- To avoid persistent feelings of unhappiness or desperation.<sup>52</sup>

### **4. Fears of Losing Custody**

- A 'last resort' effort to maintain custody of the child, with the expectation that a court would remove the child to the other parent without action being taken.<sup>53</sup>

### **5. Forcing Reconciliation**

- An attempt to force reconciliation – threats may be made with the hope that the other parent will reconsider the situation and attempt to repair the relationship.<sup>54</sup>

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<sup>48</sup> All taken from Dalley, 2007 RCMP study, above, note 8.

<sup>49</sup> US Department of Justice, *The Crime of Family Abduction*, above, note 47.

<sup>50</sup> Present in the UK, US and Canadian studies, above, note 47.

<sup>51</sup> Ibid.

<sup>52</sup> 2003 **reunite** Study, above, note 41 at p. 24.

<sup>53</sup> Ibid, at p. 42

<sup>54</sup> Dalley, 2007 RCMP study, above, note 5; US Department of Justice, *The Crime of Family Abduction*, above, note 47.

## 6. Uncertainty Regarding the Law

- The abducting parent may not be aware that what they are doing violates the *Hague Convention* and acts in the belief that they will not be challenged (particularly if returning to their home country). They may also not recognise potential criminal law repercussions to their behaviour.<sup>55</sup>
- Custody order disagreements and uncertainty surrounding the outcome.<sup>56</sup>

## 7. Other

- The abducting parent wants a better life.<sup>57</sup>
- The abductor fears the values with which the other parent would raise the child.<sup>58</sup>
- To attend more fully to the child's needs and improve their quality of life (particularly following the dissolution of a marriage).<sup>59</sup>
- To avoid feelings of fear, unhappiness or desperation.<sup>60</sup>

## E. Domestic Violence and Parental Abduction

As has already been mentioned, fear of domestic violence is one of the most commonly cited reasons why abduction occurs. Violence against women is a persistent and international problem and is broadly defined to mean:

Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.<sup>61</sup>

Recent global prevalence figures indicate that 35% of women worldwide have experienced either intimate partner violence or non-partner sexual violence in their lifetime.<sup>62</sup> Women are more likely to be abused by their intimate partners than

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<sup>55</sup> Trevor Buck, *An Evaluation of the Long-Term Effectiveness of Mediation in Cases of International Parental Child Abduction*, 2012, **reunite** Study, at <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20research%20report.pdf> at p. 63.

<sup>56</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>57</sup> 2003 **reunite** study, above, note 41 at p. 23

<sup>58</sup> US Department of Justice, *The Crime of Family Abduction*, above, note 47.

<sup>59</sup> Marilyn Freeman for **reunite** (2006), *International Child Abduction: The Effects*, <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Effects%20Of%20Abduction%20Report.pdf> p. 23

<sup>60</sup> Ibid.

<sup>61</sup> UN Declaration on the Elimination of Violence Against Women, Article 1.

<sup>62</sup> WHO Factsheet No. 239, *Violence against Women* <http://www.who.int/mediacentre/factsheets/fs239/en/>

strangers, are twice as likely to experience violence than men, and are particularly vulnerable in developing countries.<sup>63</sup>

The *Hague Convention* does not recognise domestic violence as a specific reason to deny the return of a child to its habitual residence. Domestic violence is not mentioned by name in the Convention.<sup>64</sup> It is, however, becoming increasingly recognised as a factor influencing non-returns under Convention proceedings.

While both men and women can be victims of domestic violence, women are disproportionately affected. According to a 2012 Statistics Canada study, the risk of becoming a victim of police-reported family violence was more than twice as high for girls and women than it was for boys and men.<sup>65</sup> As has already been noted, mothers constitute a significant majority of abducting parents and many may abduct to escape domestic violence against themselves or their children.

In November 2013 a Canadian Federal/Provincial/Territorial Working Group completed a long-term project that examined the intersection of different justice system responses to family violence. The comprehensive report, *Making Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems* considers the prevalence of family violence in Canada and its disproportionate impact upon women.<sup>66</sup>

#### Why Focus on Family Violence and the Justice System?

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<sup>63</sup> Ibid.

<sup>64</sup> Karen Brown-Williams. *Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases* (2011) 4. J. Marshall L.J. 39 p. 44

<sup>65</sup> See Statistics Canada (2012). *Family Violence in Canada – A Statistical Profile*, <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11643-eng.pdf>, p. 13.

<sup>66</sup> Executive summary: <http://canada.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html>.

Family violence is a devastating reality for many Canadians regardless of their social, economic or cultural backgrounds. It may include various forms of abuse, mistreatment, or neglect experienced by adults or children in their intimate, family or dependent relationships. In fact, in 2009, almost one fifth (17%) of Canadians indicated that they had experienced physical or sexual violence at the hands of their former marital or common-law partner. Family violence may be the cause, a contributing factor, or the outcome of the family breakdown. Studies have shown that separation and divorce can exacerbate an already violent relationship and that the period following family rupture represents a period of heightened risk for family members. Evidence suggests that child abuse and exposure to spousal violence can have serious long-term negative impacts on children. In 2011, family violence accounted for just over one quarter (26%) of police-reported violent crime – almost half (49%) the family violence victims were victims of spousal and ex-spousal violence while the other half (51%) were children, siblings or extended family members. In 2011, almost one third (32.6%) of all solved homicides were family homicides – nearly one quarter (22%) of the victims were children.

The impacts of family violence on Canadian society are significant. According to a 2013 Justice Canada study, the economic cost of spousal violence in Canada in 2009 was \$7.4 billion, amounting to \$220 per capita. While family violence is a concern for all Canadians, women report intimate partner violence to police nearly four times more than men and are almost three times more likely than men to be killed by a current or former spouse. Almost half (48%) of women reported fearing for their lives as a result of the post-separation violence, moreover, family violence is disproportionately experienced by Aboriginal Canadians who are almost twice as likely as non-Aboriginal Canadians to report being the victim of spousal violence (10% versus 6%). Aboriginal female victimisation is almost triple the non-Aboriginal rate and the level of violence can be severe, with Aboriginal women more likely to be injured or to fear for their life. Aboriginal children are over-represented in the foster-care system and the rate of substantiated child-maltreatment investigations is four times higher for Aboriginal children than for non-Aboriginal children.

Dr Linda Neilson identifies several major categories of abduction where domestic violence is occurring. She finds that abduction by the perpetrating parent may be a last resort to gain custody or a means to 'get even with', control or intimidate the child and the other parent.<sup>67</sup> For the 'victim' parent (who is also the abductor), abduction occurs because they perceive it to be the only option to protect themselves and their children.<sup>68</sup>

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<sup>67</sup> Chapter 12 of Linda C. Neilson (2010-2011) *Domestic Violence and Family Law in Canada: A Handbook for Judges* (Ottawa: National Judicial Institute) with introductory comments by Justice John F. McGarry, Superior Court, Ontario, published in electronic bench book format as *Domestic Violence, Family Law*, 12.5.5

<sup>68</sup> *Ibid*, see also fn. 58 in Chapter 12, which suggests that abductions may be associated with perceptions that courts do not take domestic violence seriously or that the legal system is not attending to child safety issues. Abductions may indicate an overall mistrust of the legal system that is associated with lack of education, poverty or culture. When foreign courts do not take domestic violence seriously, such perceptions may be valid.

Several studies provide information and commentary on the role played by domestic violence in abduction cases. Dr. Jeffrey Edelson and Taryn Lindhorst's article, *Multiple Perspectives on Battered Mothers and their Children Fleeing to the United States for Safety*<sup>69</sup> notes the great hardships experienced by women fleeing domestic violence with their children. The authors define domestic violence as "an ongoing pattern of intimidating behaviour in which the threat of serious partner violence is present and may be carried out with the overall goal of controlling the partner".<sup>70</sup> They suggest that the legal system often disadvantaged these women more than it assisted their desire to flee to safety.<sup>71</sup>

Karen Brown-Williams, in her assessment of difficulties with the relationship between domestic violence and the *Hague Convention*, found that the domestic violence perpetrator has impacted the Convention "like an unanticipated organism".<sup>72</sup> She proposes that the main flaws of dealing with parental abduction in conjunction with domestic violence are: rights of custody "which swallow the primary custodian's ability to determine the residence of her own child"<sup>73</sup>; habitual residence determinations that fail to take coercion or force into account and defence systems that recognise direct harm to a child but indirect harm through the primary caregiver.<sup>74</sup> To remedy these problems, Brown-Williams suggests that judges must recognise the social science behind cases and enforce methods that allow the *Hague Convention* to flourish, whilst simultaneously providing for the safety of battered women and their children.<sup>75</sup>

A reflection paper issued by the Hague Conference on Private International Law<sup>76</sup>, posits that the outcome for cases of parental abduction involving domestic violence, hinges on:

- The range of evidence upon which judicial actors could rely.
- The extent of the scrutiny given to this information when reported.
- Judicial commentary and opinion as to the appropriateness of dealing with evidence of domestic violence during *Hague Convention* proceedings.<sup>77</sup>

Noah Browne, in his 2011 analysis of US cases<sup>78</sup>, notes that exposure to interpersonal violence can have a profound impact on a child's emotional

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<sup>69</sup> Dr. J. Edelson and T. Lindhorst (2010). *Multiple Perspectives on Battered Mothers and their Children Fleeing to the United States for Safety*  
<https://www.ncjrs.gov/pdffiles1/nij/grants/232624.pdf>

<sup>70</sup> Ibid, at p. 17.

<sup>71</sup> Ibid, at p. 349.

<sup>72</sup> Brown-Williams, above, note 64, p. 82.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> *Domestic and Family Violence and the Article 13 'Grave Risk' Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper* <http://www.hcch.net/upload/wop/abduct2011pd09e.pdf>

<sup>77</sup> Ibid, at p. 21

development *but* emphasises that left-behind fathers, batterers or not, must still be protected to the extent that *Hague Convention* proceedings do not become in-depth custody disputes.<sup>79</sup> In contrast to Browne's article, Edelson and Lindhorst emphasise that the mothers and children in their study experienced particularly high levels of hardship after return, and that fathers used *Hague Convention* proceedings as leverage in custody cases.<sup>80</sup> Edelson and Lindhorst's primary findings were as follows:

- a. *Most of the mothers in the study had experienced "serious physical and sexual assaults"<sup>81</sup> that caused them to flee.*

These assaults were coupled with life threatening behaviours by their husbands that led the mothers to believe that their lives and/or the lives of their children were in danger.<sup>82</sup>

Forty percent of the mothers believed that their choice of residence (the residence they kept in the immediate period before the removal of the child) was "coerced, forced or the result of deception by their husbands, leading to questions about the intentions of parents when establishing a child's habitual residence."<sup>83</sup>

A number of mothers reported having undertaken measures such as leaving their partners and obtaining custody of their children from a foreign court, "only to face continued violence and threats from their husbands when they remained in the other country".<sup>84</sup>

- b. *Mothers experienced difficulties with legal proceedings*

Mothers reported that they had made multiple efforts to engage both formal and informal help in the other country, which had little success and sometimes resulted in further reinforcement of their violent husbands' positions by the authorities.<sup>85</sup>

In almost all cases, regardless of whether the women were US citizens or immigrants, their decision to move to the US was a calculated strategy to make use of the "emotional and financial support" of family members residing in the US.<sup>86</sup>

It was suggested that the mothers safety concerns were not always mirrored by courts. A majority of mothers in the study (54.4%)<sup>87</sup> had their children removed to the

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<sup>78</sup> Noah Browne (2011) Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers under the Hague Convention on International Child Abduction. *Duke Law Journal* 60 (5): 1193

<sup>79</sup> *Ibid*, at p. 1238

<sup>80</sup> Edelson and Lindhorst, above, note 69, Annex I, p. ii

<sup>81</sup> *Ibid*, at p. viii.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid*, at p. ix.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*, at p. ix and p. 155.

requesting State, which meant (in 7 out of 12 cases where the return was ordered)<sup>88</sup> that the children returned to a life proximate to their violent fathers.<sup>89</sup>

The severity of the domestic violence was compounded by the fact that even those who were successful in retaining their children in the US faced continued threats from their former husbands. This is consistent with theories of post-separation violence and separation instigated violence.<sup>90</sup>

### **III. THE IMPACT OF PARENTAL CHILD ABDUCTION**

The left-behind parent, abducting parent and the child all feel the effects of parental abduction. For the child in particular, these effects may vary based on the nature and length of the abduction, the age of the child, whether siblings were also abducted and the child's awareness of the abduction. There is consensus on the effects of abduction across jurisdictions and studies are ongoing in the UK, USA and Canada. In this section, the impacts of parental abduction will be considered in a general sense and the effects of domestic violence on children will also be discussed. Much more must be done to merge these two areas of research and assess the longer-term impacts of parental abduction.

#### **A. Impact on the Left-Behind Parent**

In a 2007 RCMP study<sup>91</sup>, Dalley discussed the financial implications of abduction, concluding that by far the most extensive costs for left-behind parents were legal fees. The average amount spent was \$16,250, with a range of \$4,000 to \$50,000. Canadian parents, whose children were taken to another country, often paid a higher price. The result was that some left behind parents accumulated a debt load that was not proportionate to their income. The left-behind parents in the study spent an average of about \$34,000, which included: the costs of search and recovery; communication; translation; loss of income because they had to take time off; travel, accommodation and meals, medical; follow-up services; and private investigators.<sup>92</sup>

Dalley points out that the cost to the left-behind parent is not only monetary but personal. The longer the parent searches, the more stress they are likely to experience. They worry about parental alienation; they can suffer from separation anxiety. If they suspect that a child was taken to another country there is the added stress that certain countries are not signatories to the 1980 *Hague Convention* and this compounds the stress. The stress often affects their day-to-day living; for those employed, it may cloud their judgement.<sup>93</sup>

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<sup>88</sup> Ibid, at p. 155.

<sup>89</sup> Ibid, at p. ix.

<sup>90</sup> Holly Johnson and Myrna Dawson. 2011 *Violence Against Women in Canada: Research and Policy Perspectives* Don Mills, Ont: Oxford University Press Canada p. 71.

<sup>91</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>92</sup> Ibid

<sup>93</sup> Ibid.

In many cases, the left-behind parent experiences feelings of shock and betrayal, which can lead to ongoing mistrust and bitterness against the taking parent.<sup>94</sup> The initial abduction and the complexities of police and legal responses may cause frustration.<sup>95</sup> Left-behind parents report a range of health problems, including depression, anxiety and difficulty concentrating.<sup>96</sup> These problems disproportionately affect left-behind mothers, who are more likely to experience negative health impacts than left-behind fathers.<sup>97</sup> Edelson and Lindhorst emphasise that the literature on abductions does not sufficiently take into account the impact of abductions on left-behind parents and siblings. They found that a variety of effects were reported, including sleep disorders, depression and reliance on prescription drugs.<sup>98</sup>

Dalley notes that part of the frustration related to the response time of the police and says that the extent of the risks must be understood more fully. As she puts it, the “familiar phrase, ‘the child is with the parent so there is no need to worry’ is out dated and unrepresentative. There are victims and the risk is present.”<sup>99</sup> The 2012 **reunite** study reflects parental confusion on both sides, regarding the exact chronology of events, court proceedings and the legal system. The participants’ memories of these processes were overwhelmingly negative and ultimately impacted the relationship between parents and between parent and child, particularly where legal disputes extended for long periods of time.<sup>100</sup>

## **B. Impact on the ‘Taking’ Parent**

According to the 2012 **reunite** study the most common feelings experienced by the taking parents are first ignorance, then fear and shock that their abduction of their child was in breach of the *Hague Convention*. They have difficulty recognising that their actions might be labelled ‘unlawful’.<sup>101</sup> A 2006 study also conducted by **reunite** suggests that there may be moderate to severe effects on the taking parents’ physical and/or psychological health.<sup>102</sup> Some symptoms experienced by parents in the 2012 **reunite** study included weight loss, shingles, panic attacks, depression and blood pressure problems<sup>103</sup>. These symptoms may be exacerbated in cases where domestic violence is a factor in the abduction, although more research must be done on the effects of abduction in this instance.

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<sup>94</sup> Trevor Buck, 2012 **Reunite** Study, above, note 55, at p. 77.

<sup>95</sup> Ibid, at p. 69.

<sup>96</sup> Ibid, at p. 70.

<sup>97</sup> R.F. Janvier, K. McCormick & R. Donaldson (1990). Parental Kidnapping: A Survey of Left-Behind Parents. *Juvenile and Family Law Court Journal* 41, 1-8.

<sup>98</sup> Edelson and Lindhorst, above, n69 at p. 21. See also Chiancone, J., Girdner, L., & Hoff, P. (2001). *Issues in resolving cases of International Child Abduction by Parents* Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice. <https://www.ncjrs.gov/pdffiles1/ojjdp/190105.pdf>

<sup>99</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>100</sup> Trevor Buck, 2012 **reunite** Study, above, note 55 at p. 59.

<sup>100</sup> Ibid, p.63.

<sup>101</sup> Ibid.

<sup>102</sup> Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 65.

<sup>103</sup> Trevor Buck, 2012 **reunite** Study, above, note 55, at p. 70.

The 2006 **reunite** study referred to common effects of abduction for both the left-behind and taking parent.<sup>104</sup> Both parents spoke consistently about the lack of security and the lack of trust that they now feel in their lives; they identified difficulties forming relationships.<sup>105</sup> The study identified depression as a frequent effect suffered by both the abductors and the left behind parents and often this appeared to be related to the guilt felt at putting the child(ren) through such traumatic times. Many parents spoke “negatively of their experiences with the social workers, lawyers and legal system encountered”, and felt let down by those in authority with whom they had dealings during the abduction process.<sup>106</sup>

It is worth noting that in many abduction cases both parents are dealing not only with the civil consequences of child abduction, but also with concurrent criminal proceedings. This can further complicate the issues that arise.

### **C. Impact on the Child - Generally**

#### **1. *During the time of the Abduction***

Researchers identify child neglect, physical, sexual and emotional abuse as possible effects of parental child abduction.<sup>107</sup>

##### ***a. Emotional Harm***

Children mostly suffer from emotional abuse in the following ways:<sup>108</sup>

- They are victims of a torn relationship;
- They are forced to leave their family and friends;
- They, on occasion, live the life of a fugitive, moving from place to place to escape authorities.
- Normal relationships are difficult to develop and sustain.
- When the child is told that the left-behind parent does not want him or her anymore, or has died, the child feels betrayed.<sup>109</sup>

Abductions can take many forms, and in most cases of international child abduction, the children are well cared for physically during the time away, and are living with a parent who is well known to them, and to whom they feel close, though not always in

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<sup>104</sup>Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 31.

<sup>105</sup> *Ibid.*, at p. 64

<sup>106</sup> *Ibid.*, at p. 32.

<sup>107</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

a custodial role.<sup>110</sup>

While all children suffer some emotional harm, the nature, extent and duration can vary. There are several factors that might affect adjustment:<sup>111</sup>

- The age of the child at the time of the abduction;
- The child's treatment by the abducting parent (and/or significant others);
- The abduction duration;
- Lifestyle during the abduction; and
- The nature and extent of the support and therapy received after recovery.<sup>112</sup>

The 2006 **reunite** found that all children experienced a sense of stress and insecurity following the abduction, which often manifested in physical symptoms (sickness, headaches, crying, bed-wetting and clinginess).<sup>113</sup> However, the abduction of younger children (those under five years) does not appear to have as strong an emotional effect as the abduction of an older child.<sup>114</sup> If younger children's basic needs are met, they usually adjust quite readily. Older children do not react to the abduction in the same way. Abduction "taxes a child's moral growth."<sup>115</sup> Older children may:

- Blame themselves for the separation or divorce and the upheaval in the family;
- Think they have caused the abduction;
- Feel guilty for not telling someone or not trying to contact the left behind parent;
- Feel torn between the duty to protect the abducting parent's location and their need to communicate with the left-behind parent; and

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<sup>110</sup> Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 63.

<sup>111</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>112</sup> Developed by Michael Agopian (1981). *Parental Child Stealing*. Lexington: Lexington Books, cited in Dalley, 2007 RCMP Study, note 8 above. See also Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59.

<sup>113</sup> Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 23.

<sup>114</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>115</sup> Ibid.

- If they were told the other parent died or did not want to see them anymore, they feel rejected or may grieve.<sup>116</sup>

Children abducted by their primary caregivers usually do not perceive the experience as one of abduction, but when abducted by their non-primary caregivers, they do.<sup>117</sup> Nonetheless, very few children seem to be afraid during the times away, even if they are not with their primary caregiver.<sup>118</sup>

The 2006 **reunite** study found that the abduction was often presented as a holiday and as such was not initially traumatic for most children.<sup>119</sup> However, when the holiday became a more permanent arrangement, dawning realisation that the child was to live with the abducting parent, came to feel like a betrayal or a deception.<sup>120</sup> This, together with anxiety about the left-behind parent, had long lasting, adverse consequences for all children studied. Even those who did not see themselves as being abducted felt angry and confused with the court battle and the insecurity of their living arrangements. Their trust in one or other of their parents, or sometimes both, was compromised.<sup>121</sup>

All of the children studied under the 2006 **reunite** project, experienced dislocation and stress. “It was the uncertainty, insecurity and conflict between their parents that caused the most distress.”<sup>122</sup> Children who felt that their parents had explained the situation seemed a little happier about the event itself than those who thought that they had been deceived by the abducting parent into believing that they were going on an outing or holiday.<sup>123</sup> For all children, their dependence on their caregivers was such that they felt that they had to align themselves with the person who was primarily responsible for that care at any given time, no matter how unhappy they may have felt.<sup>124</sup>

The 2006 **reunite** study considered the question of contact with the left-behind parent and family and concluded that when that contact is denied, more difficulties may be experienced as doubts begin to enter the child’s mind about the justification of being away from home and the well-being of the left behind parent.<sup>125</sup> This was echoed in the 2012 reunite study, where several of the left-behind parents reported that certainty as to custody and contact allowed children to recover more quickly.<sup>126</sup>

#### *b. Other Kinds of Harm*

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid

<sup>118</sup> Ibid.

<sup>119</sup> Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 60

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid, at p. 62.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 63

<sup>126</sup> Trevor Buck, 2012 **reunite** Study, above, note 55 at p.83.

Physical and sexual abuse occurs, but is far less common than emotional abuse.<sup>127</sup>

*c. Severe Physical Harm or Death*

Most often, the abducting parent has the best interests of the child in mind, be they real or perceived, and will go to any length to protect the child. Nevertheless, on rare occasions the abducting parent might severely physically harm or kill the child to get revenge on the other parent.<sup>128</sup>

## **2. After Reunification**

Upon their return, children are prone to difficulties attaching to the let-behind parent. The most common psychological disorders identified were:

- Post-traumatic stress disorder
- Reactive attachment disorder
- General anxiety disorder
- Separation anxiety disorder, and
- Learned helplessness.<sup>129</sup>

The 2006 **reunite** study concluded that it is the return of the child that seems to produce a pattern of more profound effects, some of which may be long lasting.<sup>130</sup> The **reunite** report suggests that the abduction incident creates an additional dimension to the difficulties which these families face and which are “then thrown into this already boiling cauldron.”<sup>131</sup> Children may fear re-abduction, and they want to be safe.<sup>132</sup> This is supported by Edelson and Lindhorst’s study, which found that parents rated their children as showing significantly more problems at post-abduction and even post-resolution, when compared to pre-abduction.<sup>133</sup>

The Canadian, US and UK studies identified some observable changes in children after they returned home. In Edelson and Lindhorst’s study, the following were sometimes noticed: nightmares; sleeplessness, lack of concentration and difficulty making friends; some insecurity, anxiousness and fear.<sup>134</sup> The 2006 **reunite** study said that many children suffer from headaches, stomach cramps and high

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<sup>127</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 63.

<sup>131</sup> Ibid.

<sup>132</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>133</sup> Above, note 69, p. 18.

<sup>134</sup> Ibid, at p. 36.

temperatures, which do not appear to have an organic cause and have been medically diagnosed as anxiety related.<sup>135</sup>

Difficulties in trusting others after the abduction were also identified in both the Canadian and UK studies.<sup>136</sup> It can take considerable time for the child to trust others and feel comfortable with the new custody arrangement.<sup>137</sup> The 2012 **reunite** study found the most significant disruption to the child's trust and wellbeing after a return, occurred when either parent tried to align the child in opposition to the other parent.<sup>138</sup>

The 2006 **reunite** study concluded that children often choose not to talk about their abduction.<sup>139</sup> It is suggested that caution should be used in interpreting this as meaning that there are no unresolved problems for children. For some, it is just as likely to be as a result of embarrassment or a disinclination to engage in some areas of conflict, which the abduction raises in their minds.<sup>140</sup> These children may represent an 'at risk' population for emotional and possibly physical problems as they enter late adolescence and young adulthood.<sup>141</sup> The 2006 **reunite** study also determined that lack of contact with the left behind parent, not only during the abduction, but after the return, can be problematic. After saying that all that can be done must be done to prevent abduction, the study says:

...Where [abductions] do occur, it is crucial to ensure that contact is maintained (footnote omitted) (both during the time and after the return) between the abducted child and the important people in her life...<sup>142</sup>

Both the 2006 and 2012 **reunite** studies emphasise the importance of involving children in decisions, discussions upon return and even mediation (which will be discussed later in this paper). Judges in the UK and Singapore have asserted that undertakings by *both* parents (to maintain contact, to undergo psychological treatment or to provide child support payments, for instance) can ease a return for both parents and child, demonstrate good faith and ultimately lead to improvements in the child's welfare.<sup>143</sup> The 2006 **reunite** study also concluded that children might find it more beneficial to discuss what happened with their family, than with a qualified counsellor.<sup>144</sup>

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<sup>135</sup> Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 49.

<sup>136</sup> *Ibid*, at p. 64; Dalley, 2007 RCMP Study, above, note 8.

<sup>137</sup> Dalley, 2007 RCMP study, above, note 8.

<sup>138</sup> Trevor Buck, 2012 **reunite** Study, above, note 55 at p. 72.

<sup>139</sup> Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 49.

<sup>140</sup> *Ibid*, at p. 50

<sup>141</sup> *Ibid*, at p. 49 and 50.

<sup>142</sup> *Ibid*, at p. 65.

<sup>143</sup> See Butler-Sloss LJ in *C v. C (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654, [1989] 2 All ER 465, [1989] 1 FLR 403, [1989] Fam Law 228 at 659-660 and *BDU v. BDT* [2014] SGCA 12, para 53.

<sup>144</sup> Marilyn Freeman for **reunite**, *International Child Abduction: The Effects*, above, note 59 at p. 61. See also Amanda Wade and Carol Smart (2002) *Facing Family Change: Children's Circumstances, Strategies and Resources* <http://www.jrf.org.uk/sites/files/jrf/1842630849.pdf>

Finally, the long-term effects of abduction are just beginning to be studied. In a 2012 article, Professor Carol Bruch describes the possible links between abrupt parental separation (amongst other adverse childhood experiences) and myriad physical and psychological consequences later in life, including: heart disease; cancer; shortened life span; depression; substance abuse and even suicide.<sup>145</sup> A 2013 study of former abductees found that a majority of participants had experienced PTSD symptoms, emotional regression and difficulty establishing trust in relationships.<sup>146</sup>

#### **D. Harm to Children – Domestic Violence and Child Abuse**

Domestic violence compounds the problems that abducted children may experience during and after an abduction has taken place. There is a significant connection between the existence of domestic violence and effective parenting – the former may distinctly harm the ability to do the latter. A 2012 RCMP report states that witnessing family violence is as harmful as experiencing it directly. Children who witness family violence suffer the same consequences as those who are directly abused. In other words, a child who witnesses intimate partner violence is experiencing a form of child abuse.<sup>147</sup>

Dr Linda Neilson<sup>148</sup> emphasises the links between domestic violence, parental abduction and harm to children. She notes that:

1. Engaging in violence is associated with enhanced rates of child abuse (psychological, emotional, financial, physical and sexual);
2. The risk of physical child abuse increases with frequency and severity of domestic violence; and
3. Child sexual abuse and incest rates are higher among men who engage in domestic violence than among the general population.

Neilson concludes that emotional, physical and sexual child abuse rates are higher in domestic violence cases than other family law cases.<sup>149</sup> Coercive domestic violence in particular is highly correlated with child abuse. A 2011 WHO multi-country study also found that a history of childhood abuse, amongst other factors, consistently associated with a high risk of intimate partner violence later in life, for both sexes.<sup>150</sup>

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<sup>145</sup> C. Bruch, *Protecting Children Who are Abducted by a Parent*, <http://www.law.ucdavis.edu/Faculty/Bruch/files/protecting-children-who-are-abducted-by-a-parent.pdf> p. 11

<sup>146</sup> Mary Jo Gibbs, W. Paul Jones, Shannon D. Smith, Pamela A. Staples and Gerald R. Weeks - "The Consequences of Parental Abduction: A Pilot Study with a Retrospective View from the Victim." *The Family Journal* 21.3 (2013): 313-7 at p. 316.

<sup>147</sup> RCMP (2012), *The Effects of Family Violence on Children – Where does it hurt?* <http://www.rcmp-grc.gc.ca/cp-pc/chi-enf-abu-eng.htm>

<sup>148</sup> *Domestic Violence and Family Law in Canada*, above, note 67.

<sup>149</sup> *Ibid*, at 12.5.6 and Chapter 9.

<sup>150</sup> T. Abramsky, C.H. Watts, C. Garcia-Moreno, K. Devries, L. Kiss, M. Ellsberg, H. Jansen and L. Heise, "What Factors are Associated with Recent Intimate Partner Violence? Findings

In a seminal Canadian article dealing with domestic violence,<sup>151</sup> Dr. Peter Jaffe, and Professors Claire Crooks and Nicholas Bala point out that it has been only in the last decade that legal and mental health professions have acknowledged that domestic violence is relevant to parenting. They provide a number of reasons why this is the case:

- a. Spousal abuse does not end with separation;
- b. There is a high overlap between spousal violence and child abuse;
- c. Perpetrators of spousal abuse are poor role models;
- d. Victims of spousal abuse may be undermined in their parenting role, and
- e. Perpetrators may use litigation as a form of ongoing control and harassment.

In a later article<sup>152</sup>, Jaffe, Crooks and Bala add that:

- a. Domestic violence may negatively impact the victim's capacity to parent, and
- b. In extreme cases, domestic violence following separation may be lethal. This risk of domestic homicide applies to children as well as parents.

#### **IV. RISK FACTORS FOR ABDUCTION**

##### **A. General Risk Factors**

Given the significant consequences of child abduction to all concerned, especially children, everything that can be done should be done to prevent abductions from happening. This is particularly true since serious obstacles to return are reported regularly, even when children are abducted to states that are signatories to the *Hague Convention*.<sup>153</sup> A child's return can be even more difficult when abduction is

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from the WHO Multi-Country Study on Women's Health and Domestic Violence, <http://www.biomedcentral.com/content/pdf/1471-2458-11-109.pdf> at p. 13.

<sup>151</sup> Peter G. Jaffe, Ph.D., C. Psych., Claire V. Crooks, Ph.D C. Psych. and Nicholas Bala, LL.B. LL.M. *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices*, prepared in 2005 for the Federal Department of Justice.

<sup>152</sup> Peter G. Jaffe, Claire V. Crooks and Nicholas Bala, "A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes" *Journal of Child Custody* (2009) 6:3 169-188 at p. 172.

<sup>153</sup> *Domestic Violence and Family Law in Canada*, above, note 67, 12.6.1. See fn. 51 of Chapter 12: When children are abducted to jurisdictions outside of Canada, proceedings to obtain their return are expensive and not always successful. The Hague Conference on International Private Law (2005) [Guide to Good Practice Child Abduction Convention: Part III - Preventive Measures \(United Kingdom: Family Law\)](#). See also: Justice Kay (2004) "The Hague Convention: Order or Chaos?" Updated paper for National Judicial Institute International Judicial Conference on [Hague Convention on International Child Abduction on the Civil Aspects of International Child Abduction July 24, 2004 at La Malbaie, Quebec, Canada \(Family Court of Australia\)](#).

to a country that is not a signatory.<sup>154</sup> Even in Canada, the return of children between provinces or territories can be challenging.<sup>155</sup>

Checklists and profiles exist to assist in identifying potential abductors. These are guides based on the research done to date and more comprehensive research still needs to be done. They can nevertheless be useful tools for judges.

Justice Jim Garbolino, in *Recognising Potential Abductions*<sup>156</sup>, provides lists of factors to consider, as well as suggested intervention techniques, using the following headings: Potential Indicators for Abduction; Distinguishing Features of Abduction Families; Behavioural Indicators common to all; Abuse allegations with social support; Paranoid delusional Parent; Sociopath; Foreigners with ties to homeland; and Disenfranchised with social support (under which poor, ethnic minorities and domestic violence victims may be found).

In 2001, Johnston, Sagatun-Edwards, Blomquist and Girdner, supported by the United States Department of Justice, developed several profiles of parents at-risk of abducting their children. The following table is a compilation of those risk profiles for abduction from *Recognising Potential Abductions*, and the checklist from the Government of Canada handbook, *International Child Abduction: A Guidebook for Left-Behind Parents*<sup>157</sup>:

Risk Profile	Behavioural Indicators
Profile 1: There was a <b>prior threat</b> of, or an actual abduction.	<ul style="list-style-type: none"> <li>• Threatens to take child, has a history of hiding child, refuses visits or snatches child.</li>   <li>• Has no financial or emotional ties to area.</li> </ul>

<sup>154</sup> 12.6.1. See fn. 52 of Chapter 12: Problems with timely return of children occur even from countries endorsing the *Hague Convention*: Justice Kay (2004) note 51; Consular Affairs Canada (2005) [International Child Abduction a Manual for Parents \(Government of Canada\)](#); Government of Canada (2004) *National Missing Children Services 2004 Reference Report*; J. Kiedrowski & M. Dalley “[Parental Abduction of Children: An Overview and Profile of the Abductor](#)” (Government of Canada); J. Chiancone, L. Girdner, P. Hoff (2001) [Issues in Resolving Abduction of Children by Parents \(Department of Justice, US\)](#); U. S. Department of State (2010) Report on Compliance with The [Hague Convention on the Civil Aspects of Child Abduction](#). The Hague Conference on International Private Law website offers useful and current information on the international operation of the [Hague Convention on International Child Abduction on the Civil Aspects of International Child Abduction](#).

<sup>155</sup> *Domestic Violence and Family Law in Canada*, above, note 67, at 12.6.1.

<sup>156</sup> The Honorable James Garbolino, *Recognising Potential Abductions*, prepared for the National Judicial Institutes Hague Convention and the Civil Aspects of Child Abduction, July 9 and 10, 2004, La Malbaie, QC. Based on study by Dr. Janet Johnson, Inger Sagatun-Edwards, Martha-Elin Blomquist and Linda K. Girdner. *Early Identification of Risk Factors for Parental Abduction* US Department of Justice <https://www.ncjrs.gov/pdffiles1/ojdp/185026.pdf>

<sup>157</sup> *International Child Abduction: A Guidebook for Left-Behind Parents*, 2014. [http://travel.gc.ca/docs/publications/int\\_child\\_abduct-en.pdf](http://travel.gc.ca/docs/publications/int_child_abduct-en.pdf)

	<ul style="list-style-type: none"> <li>• Has resources to survive in hiding or help from others to do so; has liquidated assets or has made maximum withdrawals of funds against credit cards.</li> <li>• <i>Has closed bank accounts, is gathering records or seems to be preparing for a move (Guidebook).</i></li> <li>• <i>Has abducted the child before (Guidebook).</i></li> <li>• <i>Has made major life changes, such as quitting a job or selling a home (Guidebook).</i></li> <li>• <i>Has threatened (directly or indirectly) to take or harm the child, you, or himself or herself (Guidebook).</i></li> </ul>
<p>Profile 2: The parent suspected or believed <b>abuse</b> had occurred and friends and family members supported these concerns.</p>	<ul style="list-style-type: none"> <li>• Has a fixed belief that the child is abused, molested or neglected and that authorities will not take charges seriously and will dismiss them as unsubstantiated.</li> <li>• Has the support of family and friends.</li> <li>• Makes repetitive allegations and is increasingly hostile; distrust between parents exists.</li> </ul>

<p>Profile 3: The parent was <b>paranoid delusional</b>. These parents held markedly irrational or psychotic delusions.</p>	<ul style="list-style-type: none"> <li>• Is flagrantly paranoid and irrational and makes allegations.</li> <li>• Has a history of hospitalisations for mental illness and has delusions of mind control.</li> <li>• Engages in bizarre forms of domestic violence; boundary confusion observable between parent and child.</li> <li>• Makes threats of murder/suicide.</li> <li>• <i>Repeatedly raises unreasonable concerns about the child's safety and well-being while in the care of the other parent (Guidebook).</i></li> </ul>
<p>Profile 4: The parent was a severe <b>sociopath</b>.</p>	<ul style="list-style-type: none"> <li>• Has multiple arrests and convictions and a blatant contempt for court orders.</li> <li>• Stalks, makes threats of domestic violence, manipulates and controls, or initiates vexatious litigation.</li> <li>• Has self-serving, exploitative and self-aggrandizing relationships.</li> <li>• <i>Harasses or behaves obsessively (Guidebook).</i></li> </ul>
<p>Profile 5: The parent, who was <b>citizen of another country</b>, terminated a mixed-cultural marriage.</p>	<ul style="list-style-type: none"> <li>• Idealises own family, homeland and culture after dissolution of mixed-cultural marriage and deprecates American culture; rejects or dismisses child's mixed heritage.</li> <li>• Feels separation and divorce are severe loss/humiliation.</li> </ul>

	<ul style="list-style-type: none"> <li>• Feels homeland offers more emotional/financial support.</li> <li>• Is particularly high risk if from a non-Hague country.</li> <li>• <i>Has citizenship in or strong ties to another country (Guidebook).</i></li> <li>• <i>Shows interest in moving or returning to a country other than Canada (or your child talks about a possible move) (Guidebook).</i></li> <li>• <i>Is angry about a decision (Guidebook).</i></li> </ul>
<p>Profile 6: The <b>parent felt alienated from the legal system</b> and had family and social support in another community.</p>	<ul style="list-style-type: none"> <li>• Is undergoing severe economic hardship, is poorly educated and never married.</li> <li>• Is a member of an ethnic minority group, has language barriers, and has cultural beliefs regarding custody contrary to (U.S.) legal norms.</li> <li>• Is a victim of domestic violence and is alienated from major social institutions.</li> <li>• Has family/social support in another geographic area.</li> <li>• <i>Has immigration problems in Canada (Guidebook).</i></li> </ul>

Factors that repeatedly appeared in both tables included:

- The parent dismisses the value of the other parent for the child.
- The child is very young or vulnerable to influence.
- The abductor has family and social support.
- Deep-seated anger about a decision - be it by the other parent or an external body (i.e. a custody order).

## B. Domestic Violence Cases

In *Domestic Violence and Family Law in Canada: A Handbook for Judges*<sup>158</sup>, Dr. Linda C. Neilson emphasises that domestic violence is one of the indicators of risk of parental child abduction and states that the risk is particularly acute at the time of separation or divorce. She suggests the following checklist, noting that checklists are not fool proof.<sup>159</sup> Though the checklist emphasises domestic violence, it contains questions that also apply to other cases:

- Has the parent even threatened (directly or indirectly) or attempted to abduct the child?
- Has the parent ever issued a threat (direct or indirect) of death/suicide or harm to the child?
- Is there evidence of domestic violence?
  - Is the domestic violence a pattern? Is it escalating?
  - Alternatively, was the abuse or violence minor and isolated (or a reaction to domestic violence or to the separation)?
- Is the litigation acrimonious? (For example, does it involve acrimony, hostility and distrust between the parties?)
- Do either of the parents have a record of failure to comply with court orders? (For example, protection orders or support orders.)
- Does the parent have a fixed belief (despite rigorous investigation discrediting such beliefs) that the child has been abused, sexually molested or neglected by the other parent, combined with a belief that authorities and the legal system are not taking such issues seriously?<sup>160</sup> (Note: intentionally false child abuse claims are rare, as are intentionally false claims of domestic violence<sup>161</sup>).

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<sup>158</sup> Dr. Linda C. Neilson (2010-2011) *Domestic Violence and Family Law in Canada*, above, note 67.

<sup>159</sup> *Ibid.*, at 12.6.2.

<sup>160</sup> *Ibid.* See fn. 53 in Chapter 12: In some cases this belief may be well founded; in other cases it may be irrational. In still other cases, spurious claims are a perpetrator litigation tactic to gain control.

<sup>161</sup> Credibility of allegations may be questioned when survivors are unable to provide documentation of DV. However, abused women often do not report DV to police or health care professionals prior to separation and may have difficulty providing evidence required by courts to substantiate their allegations. See Peter Jaffe. Department of Justice: Research and Statistics Division, and Canada. Department of Justice: Family, Children and Youth Section. 2006. *Making appropriate parenting arrangements in family violence cases: Applying the literature to identify promising practices*. Vol. 2005-FCY-3E. Ottawa: Family, Children and Youth Section, Dept. of Justice Canada. False allegations of sexual abuse are said to occur at a rate of 5-8%. For a useful checklist, see American Prosecutors Research

- Does the parent exhibit lack of clarity about parent-child boundaries? (For example, does the parent require the child to meet adult needs such as needs for intimate companionship or for revenge against the other parent?)
- Does the parent dismiss the other parent's importance to the child despite lack of DV and a positive relationship?
- Is the child young (i.e. pre-school age)?
- Has the parent demonstrated intense jealousy or intense anger (for example, in connection with the other parent's new relationship)?
- Has the parent made a series of irrational allegations against the other parent?
- Does the parent have a history of mental illness?
- Does the parent have a transitory, peripatetic lifestyle?
- Does the parent have dual citizenship?
- Does the parent have a cultural affliction or strong ties with another culture?
- Is the parent's employment flexible as to location?
- Does the parent lack social ties within the jurisdiction?
- Has the parent collected or attempted to collect papers such as birth certificates, passports, identity papers?
- Has the parent made preliminary visits to another jurisdiction and/or received visits from another jurisdiction?
- Has the parent liquidated assets or made cash withdrawals with credit cards?

Does the parent have access to financial resources sufficient to provide economic support in another jurisdiction?

## **V. EVOLVING ISSUES**

### **A. 'Grave Risk'/'Serious Harm' Exceptions**

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Institute (2005) - [https://www.missouristate.edu/assets/swk/Module-12\\_Handout-2\\_Fact\\_Sheet\\_Divorce\\_and\\_Allegations.pdf](https://www.missouristate.edu/assets/swk/Module-12_Handout-2_Fact_Sheet_Divorce_and_Allegations.pdf). See also Knott, Trocmé, and Bala – *False Allegations of Abuse and Neglect*. Centre of Excellence for Child Welfare. <http://cwrp.ca/sites/default/files/publications/en/FalseAllegs13E.pdf>. The authors allege that in the small percentage of cases where an intentional false claim is made by a parent, the claim is 4 times more likely to have been made by the non-custodial parent (usually the father) than by the custodial parent (usually the mother).

## 1. Generally

Article 13(b) of *The Hague Convention* provides an exception that a judge may invoke to prevent the return of a child to its place of habitual residence:

### Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the request State is not bound to order the return of the child if the person, institution or other body, which opposes its return, establishes that –

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

...

In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Both domestic and international child abduction disputes have seen an increase in the use of the Article 13(b) exception to justify non-returns, particularly where domestic violence is alleged. However, courts have not always applied a uniform set of criteria that will activate a 13(b) defence. On the one hand, the exception appears to be in contradiction to the spirit of the Convention, which favours the return of the child as a means of restoring the status quo, allowing the place of the child's habitual residence to make best interest decisions generally, and with respect to domestic violence in particular. Doing so is said to discourage parents from crossing borders in search of a more sympathetic forum.<sup>162</sup> On the other hand, Article 13(b) protects the best interests of the abducted child by preventing the return in the specific circumstance when there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

## 2. Domestic Violence – Conflicting Views

There appear to be two main opinions when it comes to domestic violence allegations and *Hague Convention* cases. Although all scholars have called for an interpretation of 13(b) that protects those genuinely fleeing violent relationships, there is a question of how best to use *The Hague Convention* to achieve this. On the one hand, some favour an objective analysis of the general circumstances surrounding 13(b) cases and support a close application of Convention principles.<sup>163</sup>

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<sup>162</sup> *Re B (A Minor) (Abduction)* [1994] 2 FLR 249 at 260

<sup>163</sup> *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996); Peter Ripley, A Defence of the Established Approach to the Grave Risk Exception in the Hague Convention Child Abduction Convention (2008). *Journal of Private International Law*. 443-477.

On the other hand, some researchers suggest that it would better fit the ‘best interests’ of the child concerned, if there were to be a full-scale investigation to assess the veracity of domestic violence allegations.<sup>164</sup>

Brown-Williams advocates for a standalone amendment to cover instances of domestic violence. She suggests that this would avoid a reliance on evolving case law and clarify the balance between narrow Convention proceedings and broader social science concerns regarding Article 13(b).<sup>165</sup>

Professor Carol S. Bruch<sup>166</sup> is of the view that sight has been lost of the overall scheme of the *Hague Convention*. She argues that the Convention recognizes that sometimes the removal of a child can be justified by objective reasons. Cases of domestic violence may therefore objectively justify a non-return.<sup>167</sup> The Convention itself does not provide for undertakings as a way of returning children who might otherwise be harmed, to their country of habitual residence. Those children, she argues, are entitled to the protection of the Article 13(b) defence.<sup>168</sup> Professor Bruch has been critical of the Convention’s focus on the automatic return of children, particularly when to do so would expose the child or the abductor (often, as noted, the primary caregiver) to risk. She suggests that:

“Defences should be honoured when proven, and the original Convention rule, which placed the inconvenience of travel for custody litigation on noncustodial parents, should be recognized as a common sense protection for children and – also – for their caregivers.”<sup>169</sup>

In order to properly assess the veracity of possible defences, Bruch calls for a “faithful application” of Convention principles and exceptions in order to best protect both primary caretakers and children from harm.<sup>170</sup>

In contrast, Professor Linda Silberman<sup>171</sup> says that the kind of full scale hearing that would be required to properly assess allegations of spousal and or child abuse

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<sup>164</sup> John Caldwell, Child Abduction Cases: Evaluating Risks to the Child and the Convention, 23 *New Zealand Universities Law Review* 161, 164 (2008). Caldwell notes the trend among “a number of legal academics” that advocate for a broader interpretation of Article 13(b); Merle H. Weiner, International Child Abduction and the Escape from Domestic Violence, 69 *Fordham Law Review* 593 at p. 651. Weiner argues that a broader interpretation of the grave-risk exception would better protect domestic-violence victims. See also Sudha Shetty and Jeffrey L. Edleson. Adult Domestic Violence in cases of International Parental Child Abduction. 2005. *Violence Against Women* 11 (1): 115-38

<sup>165</sup> Brown-Williams, above, note 64 at p.77

<sup>166</sup> Carol S. Bruch, *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Cases*, 2005-2005, 38 *Fam. L.W.* 529.

<sup>167</sup> *Ibid.*, at p. 545.

<sup>168</sup> *Ibid.*

<sup>169</sup> C. Bruch, “The Promise and Perils of a Protocol to the Civil Aspects of International Child Abduction” in in 1 *Festschrift Ingeborg Schwenzer* 237 (Andrea Büchler and Markus Müller-Chen eds. 2011),

[http://www.law.ucdavis.edu/Faculty/Bruch/files/Bruch\\_au\\_FS\\_Schwenzer.pdf](http://www.law.ucdavis.edu/Faculty/Bruch/files/Bruch_au_FS_Schwenzer.pdf) at p. 245.

<sup>170</sup> *The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Cases*, note 165 above at p. 545.

allegations would frustrate the objective of *The Hague Convention*. She argues that rather than taking it upon itself to hear expert testimony to sort out whether the allegations are true and what the impact is on the child, a court hearing the application should determine whether a threat of harm to the child can be averted if a return order is made, and should direct its efforts to fashioning return arrangements. The distinctions between Silberman and Bruch's arguments have been described as "the perennial tensions in the law between the universal and the particular; between the need for certainty and predictability on the one hand and the need for flexibility and fairness on the other".<sup>172</sup>

Justice Chamberland of the Quebec Court of Appeal considers some of the solutions that have been advanced to deal with the fact that mothers constitute the "vast majority of abductors" and that in more than half of the cases they say they have resorted to abduction to flee from domestic violence.<sup>173</sup> After looking at various solutions, including adding a defence dealing specifically with domestic violence, he says that:<sup>174</sup>

Domestic violence is a real problem; it would be irresponsible to act as if it did not exist in the context of international child abduction. The present situation is unsatisfactory. The concepts embodied in the Convention when it was designed do not allow for an easy taking into consideration of this reality. It is essential to explore other avenues...

The Hague Permanent Bureau has been and continues to explore solutions to this difficult problem.

### **3. Domestic Violence – Judicial Approaches**

One presentation to the United States Senate Committee on Foreign Relations, made on February 27, 2014, suggests that there is a growing tendency for courts in return cases to undertake in-depth welfare inquiries before a return is contemplated:<sup>175</sup>

The purpose of the Hague Convention is to achieve the speedy, summary return of abducted children to their countries of habitual residence where the courts of those countries make the determination as to proper custody.

Yet, there are a growing number of courts that are undertaking in-depth examinations of the entire family situation surrounding the child and

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<sup>171</sup> Professor Linda Silberman (2000), *The Hague Child Abduction Convention turns Twenty: Gender Politics and other Issues*, *International Law and Politics*, Vol. 33:221 at p. 235-6.

<sup>172</sup> *BDU v. BDT* [2014] SGCA 12, para 31.

<sup>173</sup> Justice J. Chamberland, JA, *Domestic Violence and International Child Abduction: Some Avenues for Reflection*, *International Child Protection, the Judges' Newsletter*, Volume 10, Autumn 2005 at p. 71.

<sup>174</sup> *Ibid*, at p. 77.

<sup>175</sup> Ernie Allen, President and CEO, The International Centre for Missing and Exploited Children, *International Parental Child Abduction*. [http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_X1&PagelId=5075](http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&PagelId=5075) at p. 7-8.

considering a wide range of factors before ordering the child's return. Their rationale is that they have an obligation to consider seriously allegations regarding "grave risks to the child" and make rulings regarding the full circumstances of the case. Thus, in some instances courts in countries to which the abducted child has been taken are effectively retrying the issue of custody in direct contravention of the underlying purpose of the Hague Convention.

While a full analysis of international judicial approaches to the grave risk of harm exception is beyond the scope of this paper, we consider selected Canadian decisions, two decisions of the Grand Chamber of the European Court of Human Rights, two decisions of the UK Supreme Court and a decision of the Singapore Court of Appeal.

a. Canada

The two leading cases in the Canadian Supreme Court that address a 13(b) defence are *Thomson v. Thomson*<sup>176</sup> and *W. (V.) v. S. (D.)*.<sup>177</sup> They support the view that the Convention requires that children should most often be returned to the jurisdiction of their habitual residence; undertakings and other methods can and should be used to protect their safety. In *Thomson* LA Justice La Forest stated that it would only be in "the rarest of cases" that the test would be met.<sup>178</sup>

Those cases were decided in 1994 and 1996 respectively. Dr. Linda Neilson notes that neither of these cases involved the return of a child to a parent alleged to have "perpetrated" domestic violence. She states, "It is not known, at this time, if the Supreme Court would endorse (or fail to endorse) additional considerations in DV [domestic violence] return cases".<sup>179</sup>

In 1999 the Ontario Court of Appeal dealt with the exception in a case where domestic violence was at issue, in *Pollastro v. Pollastro*,<sup>180</sup> Reversing an initial decision that there was not a grave risk of harm, the Court concluded that reference must be made to the interests and circumstances of the particular child involved in the proceedings:

[28] LaForest J. [in *Thomson*, above] does not, however, state that the interests of the particular child before the court are irrelevant for all purposes under the Hague Convention, including Article 13(b). Indeed, it is difficult to see how the assessment required under Article 13(b) of risk, or harm, or of whether a situation is intolerable, can be made without reference to the interests and circumstances of the particular child involved in the proceedings.

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<sup>176</sup> [1994] 3 SCR 551, 6 RFL (4<sup>th</sup>) 290.

<sup>177</sup> (1996) 2 SCR 108, (1996) 134 DLR 4th 481.

<sup>178</sup> At para 124.

<sup>179</sup> *Domestic Violence and Family Law*, above, note 67 at 12.1.1.1.

<sup>180</sup> [1999] O.J. 911.

[33] Although every case depends on its own facts and the onus remains on the person resisting the child's return, it seems to me as a matter of common sense that returning a child to a violence environment places that child in an *inherently* intolerable situation, as well as exposing her or her to a serious risk of psychological and physical harm.

In 2011, in *A.M.R.I v. K.E.R.*,<sup>181</sup> the Ontario Court of Appeal overturned the decision of the hearing judge who had ordered the return of a child to Mexico. The case involved allegations by the child of abuse by the mother in Mexico. The child had been declared a Convention refugee in Canada. The Court concluded that in those circumstances, a rebuttable presumption arises that there is a risk of persecution on return of the child to his or her country of habitual residence, which "clearly implicates the type of harm contemplated by art. 13(b) of the Hague Convention."<sup>182</sup>

The Ontario Court of Appeal also considered the question of whether there should have been an oral hearing and concluded that there should have been one. Though reinforcing the general need for prompt return of children and the fact that exceptional circumstances are required for a *viva voce* hearing,<sup>183</sup> the Court concluded that where "serious issues of credibility are involved, fundamental justice requires that those issues be determined on the basis of an oral hearing..."<sup>184</sup> This applies, the Court said, with equal force to determining serious credibility issues in Hague applications involving refugee children.<sup>185</sup>

In 2012 the Ontario Court of Appeal upheld the hearing judge's decision not to return a child to Peru in a case involving allegations of domestic violence in *Husid v. Daviau*.<sup>186</sup> That case did not involve a Convention refugee. The hearing judge<sup>187</sup> conducted a thorough review of the varied case law on Article 13(b) in Canada and internationally, before following the interpretive framework of *Thomson*. He concluded that that Article 13(b) would be activated as an exception in the following circumstances:<sup>188</sup>

The evidence must be clear and convincing, the risk must be substantial, the harm must be substantial or severe (if not intolerable), an intolerable is one this particular child in these particular circumstances should not be expected to tolerate and there is not to be an expansive application of article 13(b) focusing on Shelli's [the child's] best interests...

In that case there was a "full blown trial."<sup>189</sup> The Court of Appeal observed that a "determination of whether article 13(b) applies to any given case requires a global assessment of all the available evidence..."<sup>190</sup>

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<sup>181</sup> 2011 ONCA 417.

<sup>182</sup> At para. 74.

<sup>183</sup> At para 124.

<sup>184</sup> At para 125.

<sup>185</sup> At para 125.

<sup>186</sup> 2012 ONCA 655 (CanLII)

<sup>187</sup> 2012 ONSC 547, Perkins J.

<sup>188</sup> *Ibid*, at para 104.

<sup>189</sup> *Ibid*, at para 98.

In 2011, the Quebec Court of Appeal, in *Droit de la famille 111062*,<sup>191</sup> upheld the decision of the hearing judge not to return a child to Mexico. The Court acknowledged that exceptions such as the grave risk exception must be interpreted narrowly.<sup>192</sup> However it concluded that the evidence showed that the mother and child could not be protected in Mexico as the father was abusive towards the mother, at times in the presence of the child, had kidnapped the child on one occasion, showed strong hostility towards the mother, and had lied to Mexican courts to punish the mother. In an earlier case, Justice Chamberland noted that:<sup>193</sup>

The Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children from one country to another. However, it is also, in my view, a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would compromise its efficacy.

An earlier decision of the Ontario Court of Justice, cited with approval (and thanks) by the hearing judge in *Husid v. Daviau*, also comprehensively addresses the Article 13(b) defence. In *Achakzad v. Zemaryalai*<sup>194</sup> the Judge was dealing with an application under the 1980 *Hague Convention* for a return to California. She concluded that based on the facts of the case before her, the allegations were so serious and undertakings would be so ineffective that there was a grave risk if the children were returned.

The father was prepared to enter into a number of undertakings and a safe harbour order. The Judge correctly concluded that Canadian law does not say that undertakings can always mitigate a grave risk of harm so that, in every case, a return order is to be made, noting that “such a reading [of the Convention] would ignore the text of the Convention.”<sup>195</sup> For her, the issue was whether the father’s future behaviour could be adequately managed and controlled by the judicial system in California.<sup>196</sup> She applied the following test:<sup>197</sup>

No one doubts that the California courts are vigilant in guarding the interests of victims of domestic violence and their children.

However, Canadian and U.S. courts, as well as the courts of other Hague signatories, have recognized that in some Article 13(b) cases, a return order simply cannot safely be made

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<sup>190</sup> 2012 ONCA 655, at para 33.

<sup>191</sup> 2011 QCCA 729.

<sup>192</sup> *Ibid*, at para 4.

<sup>193</sup> *R. F. v. M.G.*, 2002 Can LII 41087.

<sup>194</sup> 2010 ONCJ 318, Murray J. For another helpful decision by Murray J. see *G.B. v. V.M.*, 2012 ONCJ 745.

<sup>195</sup> *Ibid*, at para. 92.

<sup>196</sup> *Ibid*, at para. 95.

<sup>197</sup> *Ibid*, at para. 96 and 97

A review of the case law indicates that return orders will be refused when past violence has been severe and it likely to recur; when past violence has been life-threatening; or when the record shows that the applicant for the return order has not been amenable to control by the justice system. Such an interpretation reflects a narrow construction of Article 13, while still giving appropriate meaning to the text of the Convention.

b. The European Court of Human Rights

Recent decisions by the European Court of Human Rights (ECtHR) have shown that the court may be taking the Article 13(b) defence in a slightly different direction, *Neulinger and Shuruk v. Switzerland*<sup>198</sup> that has been interpreted as requiring an in-depth analysis in a return application in which an Article 13(b) defence has been raised. Article 8 of the European Convention on Human Rights (ECHR), which requires respect for private and family life, was engaged. Paragraph 139 of the judgment has been cited in this respect:

139. In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully (see *Tiemann*, cited above, and *Eskinazi and Chelouche v. Turkey* (dec.), no. [14600/05](#), ECHR 2005-XIII (extracts)). To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin (see *Maumousseau and Washington*, cited above, § 74).

The ECtHR reconsidered its *Neulinger* stance in *X v. Latvia*.<sup>199</sup> The mother, originally from Latvia, had moved to Australia and given birth to a child in 2005. At the time of the birth paternity was uncertain and the mother was married to a man who she did not believe was the child's father. The mother and father lived together for several years, but when the relationship deteriorated the mother left Australia for Latvia, taking the child with her. The father filed a return request under the Convention. Latvian courts determined that the child should be returned to Australian jurisdiction and the Latvian Central Authority assisted the father in removing the child to Australia. The mother then brought a claim against Latvia in the ECHR alleging a violation of her Article 8 rights.

While the Court, by a vote of 9 to 8, found a violation of her Article 8 rights, it was unanimous in "clarifying" its earlier comments in paragraph 139 of the *Neulinger* decision. The Court noted that the case has been read as requiring an in-depth analysis.<sup>200</sup> It moved away from such a need for an in-depth inquiry, stating that the

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<sup>198</sup> No. 41615/07, 8 January 2009, [INCADAT cite: HC/E/ 1323]

<sup>199</sup> No. 27853/09, 26 November 2013, [INCADAT cite: HC/E/ 1146]

<sup>200</sup> *Ibid*, at para 104.

finding in that paragraph “does not in itself set out any principle for the application of the Hague Convention by the domestic courts”.<sup>201</sup>

Instead, the Court concluded that a harmonious interpretation of the Hague Convention and the ECHR can be achieved when two conditions are met.<sup>202</sup> First, when exceptions are raised, including the Article 13(b) exception, the question must “genuinely be taken into account by the requested court.”<sup>203</sup> The court must then “make a decision that is sufficiently reasoned” to enable the European Court of Human Rights to verify that those questions have been effectively examined.<sup>204</sup> Second, “these factors must be evaluated in light of Article 8 of the Convention.”<sup>205</sup> In particular the Court:

1. ...considers that Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child’s return, the courts must not only consider arguable allegations of a “grave risk” for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly (see *Maumousseau and Washington*, cited above, § 73), is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.

The Grand Chamber concluded that the words “grave risk” cannot be read, in light of Article 8, as “as including all of the inconveniences necessarily linked to the experience of return: the exception provided for in Article 13 (b) concerns only the situations which go beyond what a child might reasonably bear.”<sup>206</sup> Based on the particular facts of the case it concluded that the Latvian courts should have carried out “meaningful checks” to either confirm or exclude that existence of a grave risk.<sup>207</sup>

It also addressed the important question of safeguards that need to be in place in the country to which a child is returned. The judges stated that “the courts must satisfy themselves that adequate safeguards are convincingly provided in that country, and, in the event of a known risk, that tangible protection measures are put in place.”<sup>208</sup>

### c. *The UK Supreme Court*

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<sup>201</sup> Ibid, at para 105.

<sup>202</sup> Ibid at para. 106.

<sup>203</sup> Ibid at para 106.

<sup>204</sup> Ibid at para 106.

<sup>205</sup> Ibid at para 106 and 107.

<sup>206</sup> Ibid at para116.

<sup>207</sup> Ibid at para116.

<sup>208</sup> Ibid at para 108.

While there has been no major UK decision since the ECtHR decided *X. v. Latvia*, the UK cases decided before the Latvia case have not supported the *Neulinger* approach. . In *Re T*<sup>209</sup> an abducting mother claimed that her three children should not be returned to Italy because of the grave risk that resulted from the physical, sexual and emotional abuse that she had suffered for many years at the hands of their father. The UK Supreme Court discounted *Neulinger*, stating that it “does not bring about a sea change in the way that these cases should be approached.”<sup>210</sup> The Court acknowledged the tension between the broad best interests test laid out in *Neulinger* and the purpose of *The Hague Convention*, prioritised UK precedent over that of the ECtHR and noted that following the *Neulinger* test would “defeat the very purpose” of the *Hague Convention*.<sup>211</sup>

The UK Supreme Court cemented this stance in *Re E*<sup>212</sup>, pointing out that *The Hague Convention* and an ECHR country’s Article 8 obligations should be read together to ensure that children are reunited with both parents. The Supreme Court reinforced the distinction between the *Neulinger* stance and the stance outlined in *The Convention*, suggesting that *Neulinger* should not signal “a change in direction”.<sup>213</sup> The Court also accepted, as had the Court of Appeal in the same case, that it was not for the ECtHR to decide the requirements of *The Hague Convention*.<sup>214</sup> Finally, in *Re S (A Child)*<sup>215</sup> the Supreme Court once again reiterated that it did not intend to use a *Neulinger*-style test and expressed disappointment that the first ECtHR Chamber in *X v. Latvia* had chosen to follow the *Neulinger* stance.<sup>216</sup>

#### **4. Senate Hearings in Canada on Parental Child Abduction**

Senate hearings in Canada have recently taken place to discuss the complexities of parental child abduction. The *Neulinger* case was one of the queries raised during those hearings. The Honourable Justice Jacques Chamberland, of the Quebec Court of Appeal, the Quebecois representative for Canada in the International Hague Network of Judges and a prominent figure in matters of international parental abduction, expressed the opinion during the hearing that the *Neulinger* precedent was now “settled” following *X. v. Latvia*.<sup>217</sup> It remains to be seen what approach Canadian courts will take in the future when squarely faced with an analogous Article 13(b) defence in a parental child abduction domestic violence case.

#### **5. Other Exceptions under 13(b)**

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<sup>209</sup> [2010] ECHC 3177 (Fam)

<sup>210</sup> *Ibid*, at para 35.

<sup>211</sup> *Ibid*, at Appendix 3, paras 9-17.

<sup>212</sup> [2011] UKSC 27, [2012] 1 AC 144

<sup>213</sup> *Ibid*, at para 25.

<sup>214</sup> *Ibid*.

<sup>215</sup> [2012] UKSC 10, [2012] 2 A.C. 257

<sup>216</sup> *Ibid*, at postscript, para 38.

<sup>217</sup> The Senate Standing Committee on Human Rights: Evidence, April 7<sup>th</sup>. 2014.

<http://www.parl.gc.ca/content/sen/committee/412/RIDR/51326-E.HTM>

It is important that Article 13(b) retains the breadth with which it was created, applying to “myriad fact situations”<sup>218</sup> and not becoming the ‘domestic violence defence’<sup>219</sup>. The social context of domestic violence in parental abductions is significant, but it is not the only use for a 13(b) defence. In *Friedrich* the US Court of Appeal held, inter alia, that a grave risk of harm could only exist when the return would put the child in imminent danger *prior to* the resolution of a custody dispute, for instance by returning the child to a war zone or famine area.<sup>220</sup>

*Raban v. Romania*<sup>221</sup> concerned a maternal abductor who had removed her children from Israel to Romania in violation of a joint custody agreement issued by Israeli courts. The husband filed a Hague petition in Romania and a first instance court in Romania ordered the children returned. In a 2-1 decision the appellate court reversed, finding that the possibility of terrorist attacks in Israel created a “grave risk of exposing the children to intolerable physical harm.” The father, on his own behalf and on behalf of his children raised a case under Articles 6 and 8 of the *European Convention on Human Rights* (ECHR). The European Court stated that its task was to “ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature”.<sup>222</sup> The court emphasised that it did not intend to re-evaluate the information given to the domestic courts, unless there was “clear evidence of arbitrariness”<sup>223</sup>, which in this case was not present. The Court did not choose to address the issue of ‘grave risk of harm’ as it applies to a war zone, instead adopting a wide ‘best interests’ test, as it had in *Neulinger*. It has been criticised for this choice and for failing to take a stance that runs closer to Convention principles.<sup>224</sup>

The UK Court of Appeal has stated that in cases of war, the risk of harm must be specific to the particular child. A ‘general’ risk of harm will not suffice. In *Re S (A Child)*<sup>225</sup>, which also concerned the return of a child to Israel, Ward LJ asserted that: “The issue is not whether there is a state of war in Israel but whether there is a grave risk of harm to this child if she is to be returned there. If conditions of war do exist then the risk of harm is amplified. What is actually happening on the ground determines the extent of the risk, not the label which is given to that prevailing state of affairs”.<sup>226</sup>

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<sup>218</sup> *BDU v. BDT*, above, note 172, para 47.

<sup>219</sup> Some argue that a way to circumvent this would be to create a standalone provision for domestic violence victims. See: Roxanne Hoegger. What if she leaves? Domestic Violence Cases under The Hague Convention and the Insufficiency of the Undertakings Remedy. *Berkeley Women's Law Journal* 2003. 18: 181.

<sup>220</sup> *Friedrich*, above, note 163.

<sup>221</sup> No. 25437/08, 26<sup>th</sup> October 2010 [INCADAT cite: HC/E/ 1330]

<sup>222</sup> *Ibid*, at para vii.

<sup>223</sup> *Ibid*, at para 38.

<sup>224</sup> See Silberman, above, note 171; Jeremy Morley. The Hague Abduction Convention and Human Rights: A Critique of The Neulinger Case 2012 *International Academy of Matrimonial Lawyers*, [http://www.iaml.org/cms\\_media/files/the\\_hague\\_abduction\\_convention\\_and\\_human\\_rights\\_a\\_critique\\_of\\_the\\_neulinger\\_case\\_revised.pdf](http://www.iaml.org/cms_media/files/the_hague_abduction_convention_and_human_rights_a_critique_of_the_neulinger_case_revised.pdf)

<sup>225</sup> (2002) 1 WLR 3355; (2002) 2 FLR 815; [2002] EWCA Civ 908

<sup>226</sup> *Ibid*, at para 54.

The Canadian Supreme Court has not yet faced a case where a 13(b) defence provision has been raised with regard to a war zone or site of high rates of terrorism. However, in *Cornfeld v. Cornfeld*<sup>227</sup>, the Ontario Superior Court of Justice addressed the potential grave risk of harm caused by the return of three children from Canada to Israel, their country of habitual residence. The abducting mother alleged that the return of her daughters would expose them to terrorist attacks. In reaching its decision to order the return, the court noted that the mother and the father had lived in Israel since 1976 and the children had lived there all of their lives. Despite continuous violence in the country the mother had never sought to remove the children from that environment. The court concluded that the mother failed to establish by clear and convincing evidence that the violence in Israel constituted a grave risk of harm under Article 13(b).

## **B. Mediation and the Court Process**

Mediation has become increasingly popular as a means of reconciling parental abduction cases, functioning either as a standalone form of alternate dispute resolution, or a process that runs concurrently with court proceedings. Mediation may not always be possible in cases of parental child abduction – parents' views may be too polarised, or there may be safety concerns for either partner or the child.<sup>228</sup> However, the Special Commission at The Hague Permanent Bureau has welcomed the increasing use of mediation to secure an amicable resolution to abduction cases within the time limits specified by *The Hague Convention*.<sup>229</sup>

Mediation may be a particularly controversial option in cases where domestic violence is alleged to have occurred. On the one hand, the power imbalance in cases of domestic violence is considered to be so significant that even highly trained mediators cannot level it.<sup>230</sup> Mediation may also create a dangerous situation and *exacerbate* tensions, rather than diffusing them.<sup>231</sup> On the other hand, alternative forms of dispute resolution have been encouraged by family court judges in the UK<sup>232</sup> and by the US State Department.<sup>233</sup> There is reason to believe that effectively conducted mediation can have preventative benefits that diminish the likelihood of abduction, as well as providing workable solutions when abduction has occurred.<sup>234</sup>

The UK charity **reunite** conducted a research project in 2012 to evaluate the long-term effectiveness of mediation in parental abduction cases.<sup>235</sup> The overall conclusion of their research was that cases involving mediation usually led to a more

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<sup>227</sup> *Cornfeld v Cornfeld* Superior Court of Justice Ontario, File No 01-Fa-10575 dated 30/11/01

<sup>228</sup> Trevor Buck, 2012, **reunite** Study, above, note 55.

<sup>229</sup> Conclusions and Recommendations Adopted by the Special Commission, 2011, para 57, [http://www.hcch.net/upload/concl28sc6\\_e.pdf](http://www.hcch.net/upload/concl28sc6_e.pdf)

<sup>230</sup> Albert R. Roberts (2002), 'Handbook of Domestic Violence Intervention Strategies: Policies, Programs and Legal Remedies' p. 142

<sup>231</sup> *Ibid.*

<sup>232</sup> See *Mann v. Mann* [2014] EWHC 537 (Fam) (05 March 2014) and *S-K (A Child)* [2013] EWCA Civ 1247

<sup>233</sup> See <http://travel.state.gov/content/childabduction/english/from/mediation.html>

<sup>234</sup> Reunite, 'Mediation Service', <http://www.reunite.org/pages/mediation.asp>

<sup>235</sup> Trevor Buck, 2012, **reunite** Study, above, note 55.

positive outcome for all parties: parents were often able to drop *Hague Convention* cases altogether and deal with one another in an emotion-free, business-like way<sup>236</sup> and children were more likely to have positive relationships with both parents.<sup>237</sup> The **reunite** model relied on the establishment of a Memorandum of Understanding (MoU), which both parents drafted and were expected to adhere to. In the majority of resolved cases the MoU was significant in diffusing threats of further litigation<sup>238</sup> and an inability to draft an MoU was flagged as a key reason for breakdowns in the mediation process.<sup>239</sup> The Hague Permanent Bureau noted similar benefits in a 2012 document, *Mediation: Guide to Good Practice*.<sup>240</sup> The guide highlights the importance of mediated agreements between parents, noting that expeditiously agreed solutions achieved through mediation are likely to be sustainable and allow parties to develop their own strategies to overcome conflicts in the long-term.<sup>241</sup>

In the 2012 **reunite** study, both taking and left-behind parents felt that it would be fairer to have mediation running concurrently with court proceedings rather than relying entirely on the courts.<sup>242</sup> The benefits of this may be felt not only by parents and child(ren), but also by the judiciary. The guide released by The Hague Permanent Bureau also emphasises that mediation processes should be a compliment to legal processes, not a substitute, and should into account relevant national and international laws.<sup>243</sup> The development of a network of qualified mediators could alleviate the burden on the judicial system and address more in-depth questions about the child's welfare that judges are not able to attend to in summary hearings. The Permanent Bureau has set central contact points for international family mediation<sup>244</sup> and has emphasised the importance of mediation for non-*Hague Convention* countries through *The Malta Declarations*.<sup>245</sup> It would be beneficial to judges to support and make use of these contacts.

### C. The Right of the Child to be heard<sup>246</sup>

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<sup>236</sup> Ibid, at p. 85.

<sup>237</sup> Ibid, at p. 86.

<sup>238</sup> Ibid, at p. 85.

<sup>239</sup> Ibid, at p. 49.

<sup>240</sup> *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction*, [http://www.hcch.net/upload/guide28mediation\\_en.pdf](http://www.hcch.net/upload/guide28mediation_en.pdf)

<sup>241</sup> Ibid, at p. 21.

<sup>242</sup> Trevor Buck, 2012, **reunite** Study, above, note 55, at p. 11.

<sup>243</sup> *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction*, above, note 240.

<sup>244</sup> See [http://www.hcch.net/index\\_en.php?act=publications.details&pid=5360&dtid=52](http://www.hcch.net/index_en.php?act=publications.details&pid=5360&dtid=52)

<sup>245</sup> <http://www.hcch.net/upload/wop/abduct2012info08e.pdf> - The Malta Declarations initially supported inter-state cooperation through the setting up of Central Authorities as points of contact and to facilitate access to legal and administrative procedures. Now that Central Authorities are well established in the majority of *Hague Convention* countries, the focus for the Malta Judicial Conferences of 2009 and 2006 focused attention on the development of mediation as additional options for parents seeking post-abduction assistance. See also note 240 above.

<sup>246</sup> For more on this issue, see Hon. Justice Donna Martinson. *Children's Legal Rights to be Heard in Canada in Cross-Border Child Abduction Cases* (2014). Prepared for the NJI Atlantic Courts Education Seminar for Federally Appointed Judges: Cross-Border Child Abduction and Other Relocation Issues, Moncton, New Brunswick, November 1, 2011.

One of the co-authors of this paper has written a separate paper considering children’s participatory rights in child abduction cases.<sup>247</sup> By way of summary, she notes that most of the discussion relating to the rights of children to be heard in these cases have focused on Article 13 of the Hague Convention, which gives a judge the discretion to refuse to order a return if the court finds that “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”. Yet, children, including those involved in Hague proceedings, have much broader participatory rights. The United Nations Convention on the Rights of the Child, in Article 12, gives all children “who are capable of forming their own views the right to express those views in all matters affecting the child” and in particular in judicial proceedings. In addition, the child has the right to have the views given “due weight in accordance with the age and maturity of the child.”

The ultimate decision in a return application, as well as decisions on the issues that must be decided in reaching the ultimate decision, unquestionably affect the child. These include decisions such as: where the child habitually resides; whether the child is, after a year, settled in the child’s new environment; and whether there is a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. These are distinct issues from the one of whether the child objects to the return. The views of the child on such issues may or may not support a return order.

It is also noteworthy that there are many cases of child abduction to which *The Hague Convention* does not apply. It does not apply if a child is over the age of 16. It does not apply when a child is taken to a non-signatory country, and it does not apply when a child has been taken to another province or territory within Canada.

Researchers have commented on Article 13 objections. For example, Carol Bruch advises caution in using a child’s objections to defeat an otherwise appropriate return order, finding that cases have revealed both “inappropriate attention to the wishes of young children”<sup>248</sup> and concurrently, refusals to consider the custody wishes of older children, even where abuses are alleged to have occurred.<sup>249</sup>

The requirement that children’s voices be heard can positively affect the treatment of children; they may be treated with greater respect and empowered.<sup>250</sup> Conversely, not involving children may lead them to feel isolated, helpless and anxious. **Reunite** specifically identify the increased participation of children in mediation as a focus for their future research.<sup>251</sup> Their report stated a “substantial majority” of their (adult)

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<sup>247</sup> The Hon. Donna Martinson. *Children’s Legal Rights to be Heard in Canada in Cross-Border Child Abduction Cases* (2014). This is an updated version of a paper prepared for the NJI Atlantic Courts Education Seminar for Federally Appointed Judges: Cross-Border Child Abduction and Other Relocation Issues, Moncton, New Brunswick, on November 1, 2011.

<sup>248</sup> Bruch, *The Unmet Needs of Domestic Violence Victims*, above, note 166, p. 535, fn 23-24.

<sup>249</sup> *Ibid.*

<sup>250</sup> Linda D. Elrod. “Please Let Me Stay”: Hearing the Voice of the Child in Hague Abduction Cases. *Oklahoma Law Review* 63: 663-691 at p. 666.

<sup>251</sup> Trevor Buck, 2012, **reunite** Study, above, note 55 at p. 93.

interview subjects had said they would consent to their children taking part in the process if the environment was 'safe', if the interviewer was sufficiently skilled and if the child was comfortable.<sup>252</sup>

It is also important to note that children are making increasing use of social media and modern technologies to express their opinion on custody and residence outside of the courts. The question of whether or not this should be taken into account in a court is something that is beginning to be discussed. In a 2012 article in *Family Law Week*<sup>253</sup>, Emma Pinder comments on the Australian case, *Department of Communities (Child Safety Services) & Garning*.<sup>254</sup> The case concerns an Australian mother who is contesting the right for her children to be removed to Italy, their country of habitual residence. As a result of court proceedings the four children involved, aged between 8 and 15 years, have created a Facebook page entitled "Kids Without Voices", in which they express a desire for their opinion to be heard and emphasise their wish to continue to live with their mother in Australia. Pinder suggests that the use of social media may complicate cases, as it becomes impossible to judge the motive behind the medium, or even accurately assess whether opinions expressed through social media are emanating from the children themselves. On the other hand, the ubiquity of social media for children of all ages means that platforms like Facebook and Twitter can be used creatively to enhance advocacy, stimulate contact between parents and children and provide insight for counsellors or court representatives, as to the child's state of mind.<sup>255</sup>

#### **D. The Impact of Refugee Proceedings**

In international cases the intersection of child abduction proceedings and refugee proceedings has been a challenge in the past, and it is expected to become an even more significant issue in the future. Two recent cases, one from Ontario, *A.M.R.I. v. K.E.R.*,<sup>256</sup> and one from British Columbia, *Kubera v. Kubera*,<sup>257</sup> illustrate some of the questions that can arise.

In *A.M.R.I. v. K.E.R.*, a judge of the Ontario Superior Court of Justice granted an application under the *Hague Convention* to have a then thirteen year old child, who had been recognized as a Convention refugee by the Immigration and Refugee Board of Canada, returned to Mexico, which was said to be her habitual residence. The child was returned to Mexico.

On appeal, motions to intervene were brought by the United Nations High Commissioner for Refugees, the Canadian Council for Refugees, and the Canadian Civil Liberties Association. On March 11, 2011 intervener status was granted, subject to conditions. The appeal itself was heard on April 13, 2011. Chief Justice Winkler described the issues for which status was granted this way:

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<sup>252</sup> Ibid, p. 94.

<sup>253</sup> E Pinder, "Social Media and the Voice of the Child in Hague Convention Cases" (2012) <http://www.familylawweek.co.uk/site.aspx?i=ed98651> (Accessed 20/04/2014)

<sup>254</sup> [2011] FamCA 485

<sup>255</sup> See C. Bruch, above, note 169, at p. 243.

<sup>256</sup> 2011 ONCA 417. See also *Issasi v. Rosenzweig*, 2011 ONCA 302.

<sup>257</sup> 2008 BCSC 1340, appeal den'd 2010 BCCA 118.

[5] The appeal raises questions about the proper relationship between The *Hague Convention*...and the federal *Immigration and Refugee Protection Act*, which incorporates provisions of international law that prohibit the refoulement of refugees.

The Ontario Court of Appeal directed that a new *Hague Convention* hearing be held. The father challenged the constitutional validity of s 46 of the Ontario *Children's Law Reform Act*<sup>258</sup> [CLRA], which incorporated the *Hague Convention*, on the ground it conflicted with Canada's obligations under s 115 of the *Immigration and Refugee Protection Act*<sup>259</sup> [IRPA]. The Court of Appeal concluded that there is no operational conflict between s 115 of the IRPA and s 46 of the CLRA and s 46 of the CLRA does not frustrate Canada's obligations under s 115 of the IRPA. Section 44(1)(a) of the *Extradition Act*,<sup>260</sup> together with common law and *Charter* due process requirements, prevent surrender of a refugee where to do so would offend principles of fundamental justice. Articles 13(b) and 20 of the *Hague Convention* must be interpreted in a manner that takes into account the principle of "non-refoulement," which prohibits the removal of refugees to a territory where they run a risk of being subjected to human rights violations. When a child has been recognized as a Convention refugee, a rebuttable presumption arises that there is a risk of persecution on the child's return to the country of their habitual residence.

The Court of Appeal said the IRPA process does not trump the *Hague Convention* regime and an aggrieved custodial parent of a refugee child cannot apply to vacate the decision allowing the child's refugee claim. The Court of Appeal held that the application judge erred by failing to undertake an assessment of the risk of persecution if the child was returned, as mandated by the child's refugee status, the evidentiary record and the child's s 7 *Charter* rights. In view of her age and refugee status, the application judge erred in not properly considering her views.

In *Kubera* the British Columbia Supreme Court was faced with a return application to Poland by the father after the mother and child came to British Columbia for a visit, did not return and successfully applied to be declared Convention Refugees in British Columbia. The mother alleged in the Convention Refugee proceedings that the father had physically, mentally and sexually abused both her and the child. The Court concluded that the decision of the refugee tribunal could not trump Canada's international obligations under the *Hague Convention*:

[63] Ms. Kubera argued that, among other factors, Julia's habitual residence changed as a result of the fact that she became a convention refugee in May 2006. She, however, became a convention refugee after her wrongful retention so that fact is not relevant. In any case, I agree with Mr. Kubera that, in this respect, the decision of that tribunal cannot trump Canada's international obligations under the *Hague Convention*.

[64] Mr. Kubera was not entitled to notice of those proceedings and had no right to participate. Different rules of evidence apply. He denies the allegations of domestic violence upon which the decision was based. He

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<sup>258</sup> RSO 1990, c. 12.

<sup>259</sup> SC 2001 c. 27.

<sup>260</sup> SC 1999, c 18.

points out that counsel advised the tribunal that there was no *Hague Convention* issue before the Supreme Court of British Columbia when the reality was that the Court left open that question. In *Kovacs v. Kovacs*, (2002), 212 D.L.R. (4th) 711, 59 O.R. (3d) 671 (Sup. Ct. J.), the Court found that an order could be made for the immediate return of a child under the *Hague Convention* while there was a pending claim on his behalf for status as a convention refugee in Canada. See also *Toiber v. Toiber* (2006), 25 R.F.L. (6<sup>th</sup>) 44, 208 O.A.C. 391 (C.A.).

While the Supreme Court judge found that the decision of the refugee tribunal could not trump Canada's international obligations under the *Hague Convention*, she concluded that the child's status as a Convention refugee was a factor to be considered in determining whether the child was settled in British Columbia.<sup>261</sup>

[101] This case is complicated by the fact that as at May 24, 2006, [the child] acquired the status of a convention refugee in Canada based on allegations of domestic violence. While those proceedings were instigated by her mother, [the child] had an independent claim for refugee status and had her own counsel. While I have found her status as a convention refugee is not relevant to the habitual residence analysis, the fact remains that she has that status in Canada. While it cannot be the deciding factor, it is one factor to consider in determining whether she is now settled in her new environment.

The British Columbia Court of Appeal<sup>262</sup> upheld the hearing judge's decision that though the child was wrongfully retained, the application was made well after a year after the wrongful retention, and the child was "now settled" in her new environment, as provided for in Article 12 of the *Hague Convention*. The Court of Appeal did not specifically deal with the question of whether the decision of the refugee tribunal could trump Canada's international obligations under the *Hague Convention*. The only comment the court made about the significance of the child's refugee status was to note, in its "now settled" analysis, that the "chambers judge also found [the child's] status as a convention refugee to be relevant to the question of whether she was settled."<sup>263</sup>

In a recent case, *Borisovs v. Kubiles*<sup>264</sup> the Ontario Court of Justice followed the *A.M.R.I.* precedent, recognizing the tension between the *Hague Convention's* purpose to deter child abduction with Canada's international obligation to protect refugee children from removal to a territory where they run a risk of being subjected to human rights violations. The Court found that there was sufficient evidence that Latvian authorities could not protect the child and declared that "[o]rdering the child's return in these circumstances is not permitted by fundamental Canadian principles relating to the protection of human rights and fundamental freedoms".<sup>265</sup>

## VI. CONCLUDING OBSERVATIONS

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<sup>261</sup> 2008 BCSC 1340 at 101, referred to by the Court of Appeal at 2010 BCCA 118 at 72.

<sup>262</sup> 2010 BCCA 118.

<sup>263</sup> At para 72.

<sup>264</sup> 2013 ONCJ 85.

<sup>265</sup> *Ibid.*, at para 49.

In Canada the most common form of child abduction is by a parent or guardian. Irrespective of the reason, parental abductions have significant impacts on both parents and children. We have argued that social context information about such abductions can aid judges in the decision making process by providing background information about the reality of the lives of the people, including children, who are involved. We respectfully suggest that information about the dynamics of domestic violence, and its impact on all family members, is relevant. So too is information about the disproportionate and negative impact domestic violence has on women and children.

All such information is important for return applications that raise the grave risk of harm exception, not because it deals with broad best interest inquiries relevant to the ultimate custody decision, which do require an in-depth hearing, but because it is relevant to the assessment of risk to the child, an assessment required by the exception found in Article 13(b). A hearing must be conducted to decide whether the person opposing the return has proven that the exception applies.

Such social context information, however, must be used appropriately, and can never take the place of an actual analysis of the facts of a particular case.<sup>266</sup> Rather, such information forms a part of the total information judges have accumulated, based on their education and life experience. And Judges do not have to, and indeed should not, accept social context information at face value. It should be evaluated in the same way that they evaluate other information they receive.<sup>267</sup>

With increasingly complicated court processes, the growing use of mediation tools and potential refugee proceedings to consider, the social context of cross border parental child abduction is evolving and becoming more complicated. There are also gaps in social science research into parental abductions. Governmental changes to data collection and agency responsibilities across Canada have compounded the difficulties of investigating this issue. We suggest that the long-term consequences of abduction should be analysed, as should the growing emphasis on the right of the child to be heard.

Challenging questions arise for judges making decisions about the nature of return hearings, the evidence that will be permitted, and the ways in which children's participatory rights will be addressed. These decisions must be made keeping in mind the broader goals of ensuring timely decisions and deterring child abductions. It is likely that more court and other resources will be required to do this effectively. Ongoing educational programming for judges and lawyers on legal and social

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<sup>266</sup> Chief Justice McLachlin, *Judging: the Challenges of Diversity*, above, note 4 at p. 16.

<sup>267</sup> The Honourable Donna Martinson and Dr. Margaret Jackson, "Judicial Leadership and Domestic Violence Cases –Judges Can Make a Difference", prepared for the NJI National Judges Conference: Managing the Domestic Violence Case in Family and Criminal Law, October 29 – November 2, 2012, Vancouver, British Columbia and Trial Courts and the British Columbia National Judicial Institute Education Program: Trial Courts and the Rule of Law Judges Education Conference, November 2012, Vancouver, British Columbia, at p. 10. <http://fredacentre.com/wp-content/uploads/2010/09/NJI-Final-Judicial-Leadership-and-Domestic-Violence-Cases.pdf>

context issues will be important. However, meaningful access to justice for children who may be at significant risk of harm, requires doing all of these things. They deserve no less.

