

CANADA / JUDGMENT

J.N.C. v. A.G.H.

2024 BCSC 1783

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1783 J.N.C. v. A.G.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.N.C. v. A.G.H.,

2024 BCSC 1783

Date: 20240927

Docket: E241527

Registry: Vancouver

Between:

J.N.C.

Petitioner

And

A.G.H.

Respondent

Before: The Honourable Justice Hamilton

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

August 26-30, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 27, 2024

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Introduction

- [1] This is an application pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983 No. 35 (entered into force 1 December 1983) [Hague Convention] by the petitioner father for the return of a four-and-a-half-year-old child to Mexico.
- [2] The parties and the child are Canadian citizens but have temporary residence visas in Mexico. For the past three years, the parties and the child spent the majority of their time in Mexico and established a life there.
- [3] The issues before the Court are whether the child's habitual residence is Mexico or Canada and, if the child's habitual residence is Mexico, whether the Court should decline to order the child's return to Mexico based on a grave risk of harm to the child.
- [4] The respondent mother and the child are Indigenous and the respondent invites the Court to change the test established by the Supreme Court of Canada in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 [Balev] to make indigeneity the primary factor in deciding an Indigenous child's habitual residence and in determining whether there would be grave risk of harm in returning the child.
- [5] As is set out in greater detail in these reasons, there is already ample space within the existing test in *Balev* to consider a child's indigeneity in determining both habitual residence and whether there is a grave risk of harm, and I decline to create a new test. The test for habitual residence requires the court to consider the entirety of a child's situation without being restrained by rigid rules or presumptions. The list of relevant factors is purposefully not closed. A new test weighing one factor above all others would be contrary to principles of harmony, would encourage forum shopping in cases of international abduction and be problematic in practice.
- [6] Considering all circumstances in this case, I find that the child is a habitual resident of Mexico and order the return of the child to Mexico. The respondent has not discharged the onus to show there would be a grave risk of harm in returning the child.

Facts

Affidavits and Admissibility

- [7] There are 29 affidavits filed in this matter, filling three large binders. The parties each provided multiple affidavits with many exhibits: the petitioner (J.C.) submitted four of his own affidavits, and the respondent (A.H.) submitted two. The parties texted each other frequently during their relationship and post-separation and the respondent regularly posted on social media regarding contemporaneous events. Many of these texts and posts are exhibited to the parties' affidavits. There are also many affidavits of mutual and individual friends of the parties, relatives, school administrators and others. The petitioner submitted an affidavit of a lawyer in Mexico about the law in Mexico. There is also an agreed statement of facts.
- [8] Unfortunately, in the rush to prepare materials urgently, many of the affidavits contain hearsay, opinion, and irrelevant information such as the affiant's feelings about these proceedings. Some of the affidavits made by the respondent's friends and relatives are clearly partisan and have little to offer by way of direct observation. A.H.'s counsel withdrew the 2nd affidavit of his legal assistant A.O. and the affidavit of D.E., and a correction was made by consent to a date contained in the affidavit of K.S. because she meant to refer to Halloween 2022, not 2023.
- [9] Other than the withdrawn affidavits, counsel invited me to accept the affidavits into evidence and decide what weight if any to give the evidence, subject to one exception. The petitioner seeks to exclude the 2nd affidavit of J.F. from the evidence other than paragraphs 12, 13, 14 and 16 which he accepts are admissible. The respondent concedes that paragraphs 11 and 15 are inadmissible. Counsel made submissions regarding the balance of the paragraphs in the affidavit and I reserved my ruling on admissibility until now.
- [10] I agree with the petitioner that the balance of the paragraphs of the 2nd affidavit of J.F. ought to be excluded from evidence. Paragraphs 5, 6, 7, 8, 9 and 17 of the affidavit are not in the nature of a reply. Further, paragraphs 17 and 18 contain highly prejudicial allegations based on hearsay evidence that were not raised by either party nor were they raised by J.F. in her first affidavit. Paragraphs 5, 6 and 7 contain improper opinion evidence. Paragraphs 7 and 8 contain irrelevant observations regarding litigation being difficult and emotionally challenging. For these reasons, other than paragraphs 12, 13, 14 and 16 which are admitted by consent, the second affidavit of J.F. is excluded as inadmissible.

Parties and Their Relationship

- [11] The petitioner, J.C., and the respondent, A.H., are parents of A.
- [12] A.H. is Canadian. A.H. is also Indigenous. Her mother is Gitksan, and her father has Shuswap ancestry.

- [13] Gitxsan culture is matrilineal, and A.H. is a registered member of the Gitwangak Indian Band, which is part of the Gitxsan Nation. A is therefore also Gitxsan.
- [14] A.H.'s mother swore an affidavit in these proceedings noting that her grandfather was taken from his Gitxsan village to the Alert Bay residential school. She notes that she, her family and her people have had their traditions interrupted in many ways. She also deposes that many Gitxsan people remained on Vancouver Island after residential school and that she and A.H. have many ties to the Vancouver Island area.
- [15] A.H.'s mother also deposes that she has been claimed and named by "Coast Salish family" on Vancouver Island and that A.H. and A have also been claimed.
- [16] A.H. completed an Indigenous health administration and leadership program through UBC, and obtained a holistic doula certificate from Pacific Rim College. In addition, she is a certified hypnobirthing childbirth educator. She is interested in supporting Indigenous women with their health and nutrition, including by being a doula supporting Indigenous mothers. She has also, at times and over the years, tree planted, taught yoga and sold crafts. As discussed in greater detail later, she has also run a home-based natural food production business.
- [17] J.C. is Canadian, and also has American citizenship.
- [18] J.C.'s mother was born in San Diego, but lived in Mexico for the first five years of her life. J.C.'s mother now lives on Hornby Island, British Columbia for part of the year on property owned by a family company. J.C.'s mother speaks Spanish and does so with A.
- [19] J.C. is an investor, including in real estate. He owns property in San Francisco from which he derives rental income, owns two lots in Mexico, and also has an interest in the family property on Hornby Island. At one time he also owned property in Victoria and in Cumberland.
- [20] J.C. and A.H. met in October 2018 when they were both living in British Columbia. The parties bonded over a joint love of travel. A.H. is described by her close friend as having always been a globetrotter.
- [21] In 2019, the parties spent time together living on Hornby Island, where J.C.'s family owns property, including a large five-bedroom house, a four-bedroom guest house, and 400-square-foot unit built over a trailer, which the parties refer to as the "Caravan."
- [22] The parties discussed living and giving birth on Hornby Island, but ultimately decided to move to Cumberland.
- [23] On September 16, 2019, they began living together in Cumberland, in a house purchased by J.C.

Birth of Child

- [24] The parties' child, A, was born in December 2019, in Cumberland.
- [25] A is Canadian. As noted above, A is also Indigenous.
- [26] Just prior to A's birth, A.H., A.H.'s mother and their friends gathered for a ceremony she referred to as a "Blessing Way" that celebrated and commemorated the sacred rite of passage into motherhood. In her affidavit, A.H.'s mother noted that celebrating rites of passage is an integral part of their Indigenous cultures.
- [27] After A's birth, the parties spent the majority of the first nine months of A's life in Cumberland.
- [28] In her affidavit, A.H. refers to singing and drumming for A, bringing A to a rally to support Indigenous land protectors, and attending cedar bough brushing and smudging ceremonies at their home in Cumberland. A.H. noted the special importance she places on drumming for A and how she travels everywhere with her drum.
- [29] The parties decided to spend the winter of 2020 some place warm. They discussed the possibility of travelling to Bali, but ultimately decided on Mexico.

Travel between Mexico and British Columbia

- [30] In October 2020, J.C. and A.H. went to Puerto Escondido, Mexico, with A. A.H. had travelled prior to meeting J.C. and knew of Puerto Escondido.
- [31] The parties booked one-way tickets to Mexico and rented out the Cumberland property.
- [32] The parties dispute whether they intended to live in Puerto Escondido, or were going for an extended visit.
- [33] As I will discuss in greater detail below, in general, over the course of the last three years, J.C., A.H. and A lived in Puerto Escondido for the majority of the year including during fall and winter, and returned to live in British Columbia for extended summers staying in various locations including the Cumberland property and Hornby Island.
- [34] For the first several months in Puerto Escondido during the winter of 2020 and 2021, J.C., A.H. and A stayed in a number of different rental accommodations.
- [35] In November 2020, J.C. hired a nanny for A in Puerto Escondido, Valeria. Valeria was A's full-time nanny for approximately three and a half years, until the date of removal.
- [36] In February 2021, J.C. purchased two adjoining lots in Puerto Escondido. The parties made plans to build a house for the family on one of the lots, and a rental house on the other lot.
- [37] During this time, the parties also met and became friends with other families who were living and working in Puerto Escondido. In particular, the parties met Luisa and Paul and their child. J.C. ended up hiring Paul to be the architect and general contractor to build their first house in Puerto Escondido on the purchased lots.

- [38] Through Luisa, the parties learned about a Waldorf-based private school ("School") attended by the children of local and expatriate families living in the area, as Luisa was then the head administrator of the School. The School is for children aged three through twelve, and runs from September through June.
- [39] In April 2021, after having been in Mexico since October 2020, the parties travelled back to British Columbia with A.
- [40] While in British Columbia, they stayed at various places including the Caravan on Hornby Island for two months, at the Cumberland property for two months, and also stayed on Hornby Island and Cortes Island.
- [41] When the parties were not staying at the Cumberland property, they rented it on Airbnb.
- [42] During this time A, who was then approximately 18 months old, took some gymnastic and swimming lessons in the Comox Valley and attended drop-in programs. A spent time with family members and attended various family and community events.
- [43] The parties rented the Cumberland property to long-term renters from October 2021 to April 2022.
- [44] In October 2021, the parties travelled to Mexico with A.
- [45] Construction on the first lot purchased by J.C. in Puerto Escondido began in November 2021.
- [46] The plan was to start with building a smaller house on the first lot, which would initially serve as the family home and eventually be a rental property. The second lot would be developed into a larger family home.
- [47] While A.H. submits that both lots were in the nature of investment properties, I find that her involvement in the design choices suggest that the house on the first lot was to be the family home until the second lot was developed, and that she was aware of and a part of this plan. A.H. provided input including about the type of material that ought to be used for the floors and countertops, about how A would enjoy an open breezy layout, and about various furniture choices, including those that would allow them to host visitors.
- [48] In February 2022, the parties were also discussing the potential of enrolling A in the School, as enrollment started at age three. A.H. attended an open house hosted by the School and, in a social media post, expressed gratitude for being a part of the School's community. They also attended fundraising events for the School.
- [49] In April 2022, the parties moved into the completed house on the first lot.
- [50] At the end of April 2022, the parties received their Mexican temporary residence visas, which are valid until the end of April 2026.

- [51] Alberto Ortiz, a lawyer in Mexico who swore an affidavit in these proceedings, states that temporary residence visas allow the parties as well as A to remain in Mexico and also to enter and depart Mexico as many times as they wish. As Mr. Ortiz deposes, while both parties applied for such visas, had J.C. been the only one to have applied, both A.H. (as his common law spouse) and A (as his child) could remain in Mexico and enjoy unlimited entry and exit from Mexico. The temporary residence visa also provides the holder the possibility of working for remuneration.
- [52] While A.H.'s evidence is that they obtained temporary residence visas so J.C. could buy investment properties and to avoid hassles at the border when they travelled back and forth, this does not explain why A.H. applied for temporary residence as well. J.C.'s evidence, which I accept, is that obtaining temporary residence visas was an important step towards the parties obtaining permanent residence in Mexico.
- [53] In early May 2022, the parties attended interviews arranged with the School in the hopes of enrolling A. At the end of May 2022, the parties paid the deposit for A to start attending the School in January 2023 at age three.
- [54] There is evidence of an incident between the parties in the spring of 2022. The parties' narratives conflict, but they each say they had a disagreement and then went to sleep in different rooms. They also say that later on that night A woke up and needed to be tended to. What happened next is disputed.
- [55] J.C. says that he and A.H. were both in the hallway after A.H. had tried to continue their earlier argument which woke up A. He claims that A.H. started hitting him on the head and he pushed her away in defence causing A.H. to fall.
- [56] A.H. says that she and J.C. bumped into each other in the hallway and J.C. then pushed her and she fell. A.H. maintains that she suffered concussion symptoms later and that J.C. prevented her from seeking medical help in British Columbia as would not agree to return until June 3, 2022. J.C. denies preventing A.H. from obtaining medical care and explains that the reason they could not return to British Columbia until June 3, 2022 was because they had not been vaccinated for COVID as required by Canada.
- [57] On June 3, 2022, the parties went to British Columbia with A to spend time with family and friends. They stayed for approximately five months. A was not yet attending the School as she was not yet three years old.
- [58] A.H. did not visit a doctor for over a month and a half after returning to British Columbia. The doctor's notes for the visit indicate that A.H. reported having fallen and was experiencing concussion symptoms, but was also wondering if her symptoms related to having had COVID. It is common ground that A.H. was never diagnosed with a concussion.
- [59] I do not find A.H.'s version of the spring 2022 incident to be credible, at least in respect of her claim that J.C. prevented her from seeking medical care. If A.H.'s narrative that J.C. forced her to stay in Mexico while she wanted to get back to Canada to seek medical care for

a concussion (a narrative also endorsed by A.H.'s father P.H.) were true, I would have expected her to seek medical care sooner than a month and a half after arrival. While there may be other reasons for a delay in seeking or obtaining medical attention, I do not agree that J.C. blocked A.H. from seeking medical care.

- [60] The parties spent some of their time in British Columbia in the summer of 2022 at the Cumberland property, and also stayed at various other places including Hornby Island, Cortes Island, and Nanaimo.
- [61] In the summer of 2022, during the time the parties were on Hornby Island, A.H. and P.H. state that A attended preschool but do not specify a time frame. I prefer J.C. and D.C.'s evidence that A attempted pre-school on Hornby island but only for one or two days.
- [62] On October 2, 2022, A.H. and J.C. celebrated A by burying her placenta at the Caravan on Hornby Island and planted a cedar tree there. In her affidavit, A.H. described this as a deeply moving Indigenous ceremony representing A being permanently connected to, or planted in, the land and having a home to which she would always return. A.H.'s mother deposed she had been taught the placenta burying ceremony by a Coast Salish elder, and then passed on this teaching to her daughter.
- [63] In October 2022, J.C. returned to Puerto Escondido to purchase a vehicle there. A.H. and A stayed in British Columbia slightly longer.
- [64] During the fall of 2022 in British Columbia, A.H. and A visited with friends and family, celebrated birthdays and other events.
- [65] In November 2022, A.H. and A returned to Puerto Escondido.
- [66] In January 2023, A began attending the School in Puerto Escondido.
- [67] In February 2023, A.H. began a natural food business in Mexico. It was based primarily on bone broth made from bison raised on a farm in the Puerto Escondido area. In an advertisement, A.H. referred to feeling blessed to be able to run a little business from home with her child by her side, and looking forward to what the future held for this business. Her products grew to be carried in seven local stores and she progressed to having professional packaging and labelling.
- [68] A.H. maintains that making and selling bone broth was just a hobby, not a business she intended to build. She says she planned to let her friend Veronika take over and make a business out of it. However, A.H.'s narrative is not consistent with the documentary evidence which demonstrates that A.H. was clearly proud of growing the business and earnestly sought marketing assistance from others.
- [69] The parties sold their Cumberland home in May 2023 with a closing date in September 2023.
- [70] On June 4, 2023 the parties went to British Columbia with A.

- [71] During the summer of 2023 in British Columbia, the parties and A stayed for a few weeks in Cumberland preparing it for sale and spent a month at the Caravan on Hornby Island.
- [72] During this time, A attended family gatherings and birthdays. The parties also took A to gymnastic classes and drop-in programs.
- [73] In September 2023, the sale of the Cumberland property completed and the parties each received half of the proceeds, or approximately \$122,000 each.
- [74] On September 25, 2023, the parties and A travelled to Mexico. A returned to School.
- [75] During the fall of 2023, the relationship between the parties deteriorated.
- [76] In December 2023, A.H. told J.C. that she wanted to separate due to incompatibility. A.H.'s Notice of Family Claim states that the parties separated on December 8, 2023 and J.C. accepts that is their separation date.
- [77] In mid-December 2023, A celebrated her birthday with a joint celebration with her friend L at a water park in Mexico. Many of A's friends attended.
- [78] On December 18, 2023, A.H. and A went to British Columbia for Christmas during A's Christmas school break.
- [79] The parties also exchanged texts with each other on December 18, 2023, first threats and insults from A.H. followed by vile insults from J.C. Overall, this exchange seems to be an anomaly within the vast amounts of texts produced between the parties over the course of their relationship and post-separation. J.C.'s evidence is that he felt significant remorse afterwards, apologized to A.H. and did not repeat such behaviour.
- [80] On December 23, 2023, A.H. held a second celebration for A's birthday in British Columbia.
- [81] On December 24, 2023, J.C. travelled to British Columbia to spend Christmas with A.H., A, and his family on Hornby Island even though the parties were separated.
- [82] The parties exchanged texts on and around December 29, 2023 in which A.H. set out what she wanted and needed to stay in Mexico. A.H. specifically noted that she wanted a house for herself and A., and would need rental accommodation for several months until she had her own house. J.C. indicated a willingness to help A.H. find rental accommodation and a permanent home in Mexico.
- [83] On January 1, 2024, J.C. returned to Puerto Escondido.
- [84] Shortly thereafter, J.C. located rental accommodation for A.H. in Puertecito, a community roughly 30 minutes from Puerto Escondido, and 20 minutes from the School. J.C wrote to the prospective landlord and indicated that A.H. wanted to rent on a long-term basis, and if she travelled to Canada in the summer of 2024 it would only be only briefly. A.H.'s confirmed that J.C.'s text to the landlord was "perfect."

- [85] On January 9, 2024, A.H. and A returned to Puerto Escondido. A.H. moved into the rental accommodation in Puertecito. The parties shared parenting time equally, with each of them taking care of A for approximately half of each week.
- [86] By January 15, 2024, A.H. had found and decided to purchase a lot in Puertecito. In messages to J.C., A.H. described the lot and Puertecito as "Paradise" and a "Hidden gem."
- [87] A.H. asked the parties' mutual friend, Jorge, to help her purchase the lot by registering it in his name because only Mexican citizens could purchase property within a certain distance from the ocean. On January 30, 2024 A.H. texted Jorge to thank him for "allowing me to make a life in your country."
- [88] In or around January 2024, A adopted a pet cat from a local café in Puerto Escondido. A had previously had a pet rabbit in Puerto Escondido, who died in 2023.
- [89] J.C.'s evidence which I accept is that in mid-March 2024 the parties reached an oral agreement that they would return to British Columbia for the period from May 15, 2024 to August 1, 2024, and that in Puerto Escondido A would return to School.
- [90] In or around March 2024, the relationship between J.C. and A.H. deteriorated. The parties discussed consulting a mediator in Mexico.
- [91] At the end of March 2024, A.H. texted and emailed J.C. and other family members advising that she intended to travel with A to British Columbia.
- [92] In or around this time, while at J.C.'s house, A began packing her suitcase, indicating to J.C. that she was soon going to Canada.
- [93] J.C. consulted a lawyer in Mexico about whether A.H. could relocate with A without his consent. J.C. advised A.H. that he had consulted a lawyer.
- [94] On March 25, 2024, in a text message sent to J.C., as well as J.C.'s mother and A.H.'s father, A.H. referred to giving her "two week notice" that she would be returning with A to British Columbia. She claimed to have minimal support in Mexico, and no opportunities to make enough money to survive or thrive. She noted there was a need for doulas in Canada, and there may be an opportunity to work on Denman Island and to enroll A in preschool there.
- [95] In the March 25, 2024 text message, A.H. noted that she had consulted a lawyer in Canada who "made me very aware what type of support I deserve". A.H. stated that in British Columbia she and A will be surrounded by aunties, friends and grandparents and be in a "legal system that sees the value in mores [sic] and the support they deserve and need."
- [96] J.C. twice responded that A.H. did not have his consent to relocate A. J.C. referred to such a move as not being in A's best interest and the risk that such a move would traumatize her.
- [97] On March 30, 2024, A.H. emailed J.C. stating: "I am going to Canada and I'm going for everything I can get."

- [98] On April 3, 2024, A.H. alleged in a text message to J.C. that he was holding her hostage, and asked that he provide her with CDN \$3,000 per month until their lawyers could reach an agreement. J.C. denied that he was holding A.H. hostage, reiterated that he did not agree to her relocating A, but agreed to send A.H. \$3,000 per month.
- [99] On April 7, 2024, A.H. emailed J.C. disputing that Mexico was A's habitual residence. She took issue with J.C. "getting the Mexican courts involved" and "going through the Mexican court system." A.H. sought agreement for her to leave Mexico on May 1, 2024, and noted she would agree to return to Mexico once the parties' separation and custody agreement was finalized.
- [100] On April 9, 2024, A.H. attended, unexpectedly, at J.C.'s house in Puerto Escondido noting she was there to take A to the airport. J.C. told A.H. that A was playing at her friend's house, and the parties began to argue.
- [101] In his affidavit, J.C. says that he went to leave on his scooter, and that A.H. pulled him off the scooter and started scratching and hitting him. J.C. eventually drove away. A.H. denies touching J.C. She says, instead, that she grabbed his keys because she thought he was going to get A. A.H. says that J.C. then grabbed the keys from her and when he pulled them out of her hands, he hit himself with them. He then pushed A.C. to the ground and drove away.
- [102] On April 11, 2024, A.H.'s father left a voicemail message for J.C. noting that he had told A.H. not to leave Mexico with A.
- [103] The parties admit, by way of the agreed statement of facts, that they each exercised rights of custody and equal parenting time of A after separation until the removal of A from Mexico, and that this arrangement has continued to the present.
- [104] On April 21, 2024, A.H. travelled with A to British Columbia without J.C.'s consent.
- [105] That same day, A.H. emailed J.C. confirming that she had taken A to Canada, and that she was not restricting or restraining J.C. from seeing A. In this April 21, 2024 email A.H. also referred to her impression of her legal and financial situation. She stated:

The Mexican legal system I've be [sic] warned by many is not one you want to be a part of especially as a mother/woman dealing with a man who has an abundance of resources.

Therefore, as a predominantly English speaking, indigenous Canadian woman, who is financially dependent on you, I would not get a fair chance protecting mine and [A's] rights in Mexico. Going through a messy separation is hard enough but even harder when one party is financially reliant on the other and isolated from family and close friends during it. I have a better opportunity to create the financial means working in Canada [sic] that would allow me to obtain a lawyer. Since you have informed me you have hired one of the top lawyers in BC.

And being indigenous to Canada it will also give me better access to the fair legal aid I deserve.

- [106] On April 25, 2024, A.H. served J.C. with a Notice of Family Claim that was filed in the Nanaimo registry of the BC Supreme Court.
- [107] J.C. consulted an international family law lawyer who wrote to A.H. on April 27, 2024, demanding that she return A to Mexico immediately and unconditionally, and stating that he had recommended that J.C. file an application with the authorities in Mexico under the Hague Convention seeking A's immediate return to Mexico. The letter also informed A.H. that J.C. intended to initiate a case for custody in Mexico.
- [108] On June 3, 204, the British Columbia Central Authority filed a Notice on behalf of J.C. pursuant to Article 16 of the Hague Convention.
- [109] On June 21, 2024, J.C. filed a petition in the BC Supreme Court, applying for an order that A be returned forthwith to Mexico, pursuant to the Hague Convention. He also applied for a declaration pursuant to Article 12 of the Hague Convention that A has been wrongfully removed by A.H. from Mexico.

Credibility

- [110] The legal principles relating to credibility of witness testimony are equally applicable to an assessment of credibility based on affidavit evidence (*Gill v. Gill*, 2024 BCSC 346 at para. 130 [Gill (BCSC)]).
- [111] In *Gill* (BCSC), Justice Fleming (as she then was) reviewed the applicable legal principles:
- [131] Credibility or truthfulness and reliability or accuracy are related but distinct concepts. A truthful witness, for example, may be mistaken about what they observed or in their recollection. Also, credibility and reliability are not all or nothing concepts. I may believe some, all, or none of a witness', here a deponent's, evidence and attach different weights to different parts of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.
- [132] The basic approach to the assessment of the truthfulness of any interested witness was discussed many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.) at 357:

In short, the real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [133] *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, identified several factors that may be considered in assessing credibility and reliability. Relevant here are: the capacity and opportunity of the witness to observe the events at issue; the witness's ability to remember those events; the ability of the witness to resist being influenced by their interest in recalling those events; internal and external inconsistency in the witness's evidence, meaning did their evidence change between direct and cross-examination (here

between affidavits) or between prior statements and their evidence; whether the witness's evidence harmonizes with, or is contradicted by other evidence, particularly independent or undisputed evidence; and whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case.

- [134] Related to the last factor, which captures the Chorny principle, judges are permitted if not expected to rely on their common sense and life experience in assessing reasonableness and plausibility. However, the law prohibits stereotypical reasoning or speculation about human behaviour from affecting the assessment of credibility. Bearing in mind the disputed allegations of family violence, it is well recognized that there is no typical victim, typical perpetrator or typical ways in which a victim or perpetrator will behave.
- [135] It follows perhaps that the credibility of a witness (deponent) must be assessed in the context of the evidence as a whole. Lastly, credibility is not a numbers game. The fact that more witnesses say one thing and less say another, is not determinative. Instead it is the force of the evidence of any given witness or deponent that counts.
- [112] I generally found J.C.'s evidence to be credible. In his own evidence, J.C. appears generally to resist being influenced by his own legal interests. J.C.'s affidavits are extremely detailed including, for example regarding the parties' and A.'s friends, relationships, community, life and plans in Mexico. J.C. also attaches documentary evidence to support his evidence such as text and email communications from A.H., A.H.'s social media posts and reports from the School which are consistent with his evidence. His evidence appeared generally reasonable, fair/balanced and reliable with two exceptions addressed below.
- [113] J.C. also adduced helpful evidence from those who were friends with both parties in Mexico and from the School. The affidavits from J.C.'s own friends and his mother D.C. do not appear partisan or influenced by the legal issues at stake in the proceedings. They appear fair, balanced and reliable. The affiants on whose evidence J.C. relies spoke about interactions and events they personally observed or that were within their realm of experience, supported their statements with documentary evidence, and generally refrained from commenting negatively about A.H.
- [114] However, there were two areas of J.C.'s evidence that cause me concern. One is his statement that he no longer has a vehicle in British Columbia. While J.C. sold his car in British Columbia, he had A.H.'s mother buy a vehicle for him to use, and also had the use of his mother's car. I give no weight to J.C.'s evidence regarding a lack of vehicle in British Columbia. The other more significant concern with J.C.'s evidence is in the area of A.H. and A's connections with Indigenous practices, cultures, people and communities. J.C. either understates or is unaware of the extent of and importance of A.H. and A's connections with Indigenous practices including the significance of A.H.'s singing and drumming to A. I prefer A.H. and her mother J.H.'s evidence to J.C.'s evidence with respect to A.H. and A's connections with Indigenous practices, cultures, people and communities where the evidence differs.

- [115] I do, however, have significant concerns about A.H.'s credibility in other areas, some of which evidence I have mentioned above. Much of A.H.'s affidavit evidence appears tainted by her interest in having proceedings remain in Canada. In addition, I have concerns about how A.H. and some of her supporters such as her friend J.F., her father P.H., and her mother J.H. have sought to minimize the facets of the parties' and A's life in Mexico. This, combined with some of their exaggerations of the parties' life in British Columbia, leads me to view her evidence as less reliable than J.C.'s evidence, subject to the two exceptions I mentioned above.
- [116] As an example of where I have concerns regarding A.H.'s evidence, in her affidavit, A.H. repeatedly refers to the School as a "daycare". The School accepts children from ages three to twelve, and runs from September until June, the usual school year. In text and social media postings A.H. referred to the School as a school, and also referred to being a part of the School community. In my view, reframing the School as a daycare is an attempt by A.H. to minimize its importance in A's life and/or to equate it with the drop-in programs A has attended in British Columbia or her occasional attendance at preschool on Hornby Island. I approach this evidence with some caution.
- [117] As mentioned above, I am also struck by A.H.'s descriptions in her affidavit material of the parties' residence in Puerto Escondido as an investment as opposed to the parties' home. This is a place the parties and A lived for months at a time starting in April 2022 through to December 2023. In addition, this is a place that they designed and built, and both parties had significant input into its design, amenities and furnishings. I find that the parties viewed this residence as their home as opposed to simply an investment. Indeed, on December 24, 2022, A.H. posted a family photo to social media with the caption "Our first Christmas Eve dinner together at our home in Oaxaca." The parties had already spent Christmas of 2020 and 2021 in Mexico, but Christmas in 2022 was punctuated with the remark that this was their first Christmas celebration in their "home."
- [118] Elsewhere, A.H. has described the residence in Puerto Escondido as a "winter home", although this is a place the parties tended to reside from September/fall through to May/spring over the last few years. By contrast, A.H. does not describe the Caravan as a "summer home" even though the evidence is that the parties spent significantly less time at this location. Again, I see this as an attempt to minimize the parties' and A's connection to Mexico, and leads me to approach A.H.'s evidence with some caution.
- [119] A.H. has also sought to describe her Puertecito property as an "investment". However, as discussed above, in communication with J.C. and with Jorge, A.H. referred to her plans to build a home there, and one that would be relatively close to A's School and Puerto Escondido. Again, in my view, this is an attempt to minimize her connection to Mexico.

- [120] In her affidavits, A.H. denies that she, A or the family had good friends in Mexico. A.H. says that she has only one or two friends in Mexico and that the friendships that she and A have in Mexico are shallow, transient and pale in comparison to their connections with people in British Columbia.
- [121] I accept that A.H. feels a closer connection to friends in British Columbia whom she has known for longer and with whom she has cultivated deeper connections. However, there is considerable evidence of the friends that both she and A have made in Mexico, and of the connections A.H. has fostered in her community in Mexico. In addition to friends, A.H. also had a personal trainer/yoga teacher in Mexico, a chef, a gardener, Spanish language teachers and a nanny.
- [122] A.H. was highly involved in the School and also her mothers' group of six women. Her social calendar was full. The parties entertained many friends at their home. A.H. went to retreats and concerts with her friends in Mexico right up until April 21, 2024. In addition, A.H. became close with A's nanny Valeria over the years, and A spent time with Valeria's own child. A became close with her nanny. A also became "good pals" with a number of other children in Mexico. A had many friends in the School, and A even referred to a few of her friends/classmates, including L and K as being her sisters.
- [123] A.H. claims that A was not enjoying attending the School and was being bullied there. However, the evidence from the School officials, reports and other parents is to the contrary. The School reports that A is thriving at School, has friends and is well-suited to the Waldorf model. There is some evidence of a minor issue at the School regarding children taking other children's toys. However, A did not appear to be a specific target and this issue does not in my view rise to the level of bullying. As well, the issue resolved.
- [124] A.H. also stated in her affidavit materials that A's close friend L had moved away from Puerto Escondido with her family and L was not returning to the School this fall. However, J.C. produced an affidavit from L's mother who stated that the family spent the summer away but planned to return to Puerto Escondido and the School in the fall. A.H.'s evidence was unreliable in this regard as well.
- [125] The pictures and descriptions of A's friends and connections in the numerous affidavits submitted by J.C. are detailed and show that A has made a number of strong connections and friendships at the School and in the community and regularly attended School events, activities such as children's yoga, swimming, and soccer, birthday parties, playdates with friends and gatherings in Mexico.
- [126] These affidavits are from individuals with first-hand knowledge of the parties' and A's life in Mexico, who generally presented in an objective manner with supporting exhibits.

[127] Finally, and in comparison, I note that many of the affidavits submitted by A.H.'s friends and family in British Columbia contain hearsay and comment on incidents or dynamics they have not witnessed themselves. They seek to paint J.C. as an uninterested and uninvolved father, which does not accord with the other evidence before me. For these reasons too, I approach A.H.'s evidence with some caution and tend to find it less reliable than that of J.C.'s.

Issues

[128] The primary issue raised by this application is whether this Court should order the return of A to Mexico under the Hague Convention. In the first stage of that analysis, the Court must determine whether A was a "habitual resident" of Mexico. If I find that A's habitual residence was Mexico, then I must order A's return to Mexico, unless I find that one of the exceptions applies. The exception to be considered here is whether there is a grave risk that returning the child to Mexico would expose the child to physical or psychological harm or place the child in an intolerable situation.

[129] A secondary issue raised by A.H. which permeates the primary issues is whether this Court should apply an "Indigenous Lens" when considering the legal tests developed in Canadian law for applications made under the Hague Convention, and in particular for determining a child's habitual residence, and/or whether the grave risk of harm exception applies.

Legal Framework

[130] Both Canada and Mexico are "Contracting States" or signatories to the Hague Convention. The Hague Convention has the force of law in British Columbia pursuant to s. 80 of the Family Law Act, S.B.C., c. 25.

[131] The objects of the Hague Convention, as set out in Article 1, are:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[132] An order for the return of a child under the Hague Convention is not a custody order. Rather, it is an order designed to restore the status quo that existed before the wrongful removal or retention, and to deprive the "wrongful" parent of any advantage that might otherwise be gained by that action: Balev at para. 24; Gill v. Gill, 2024 BCCA 140 at para. 20 [Gill].

- [133] In determining whether there has been a wrongful removal or retention of a child under Article 3 of the Hague Convention, the court must first determine where the child was "habitually resident" immediately before the removal or retention. If the child's habitual residence is not in the state of the parent seeking return (here Mexico), then the Hague Convention does not apply: *Balev* at para. 36; *Gill* at para. 21.
- [134] Of note, the concept of "habitual residence" is not defined in the Hague Convention.
- [135] In *Balev*, Chief Justice McLachlin endorsed using a "hybrid approach" to determining habitual residence, as opposed to a "parental intention" or "child-centered" approach. At paras. 42-44 she reasoned as follows:
- [42] Finally, the hybrid approach holds that instead of focusing primarily or exclusively on either parental intention or the child's acclimatization, the judge determining habitual residence under Article 3 must look to all relevant considerations arising from the facts of the case at hand.
- [43] On the hybrid approach to habitual residence, the application judge determines the focal point of the child's life -- "the family and social environment in which its life has developed" -- immediately prior to the removal or retention: *Pérez-Vera*, at p. 428; see also *Jackson v. Graczyk* (2006), 2006 CanLII 52861 (ON SC), 45 R.F.L. (6th) 43 (Ont. S.C.J.), at para. 33. The judge considers all relevant links and circumstances -- the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.
- [44] Considerations include "the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State" and the child's nationality: *Mercredi v. Chaffe*, C-497/10, [2010] E.C.R. I-14358, at para. 56. No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances: see *Droit de la famille* -- 17622, at para. 30. Relevant considerations may vary according to the age of the child concerned; where the child is an infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of": *O.L. v. P.Q.* (2017), C-111/17 (C.J.E.U.), at para. 45.
- [136] The hybrid approach is fact-bound, practical and unencumbered with presumptions or rigid rules (*Balev* at para. 47). It requires the court to look at the entirety of the child's situation, recognizing that the list of potentially relevant factors for determining habitual residence is not closed.
- [137] The hybrid approach was adopted by the Supreme Court of Canada because it conforms to the text, structure and purpose of the Hague Convention, but also because it is supported by the principle of harmonization and the desire to establish uniform practices across Hague Convention jurisdictions.

[138] If the requirements of Article 3 of the Hague Convention are established, Article 12 requires the court to order "the return of the child forthwith" unless certain exceptions apply. Those exceptions include, inter alia, when there is a grave risk that return would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 13(b)).

[139] In *Ludwig v. Ludwig*, 2019 ONCA 680 [Ludwig], the Ontario Court of Appeal set out the analytical framework for Hague Convention proceedings. At para. 40, Justice Tulloch (as he then was) summarized the framework as follows:

Stage One: Habitual Residence

- 1) On what date was the child allegedly wrongfully removed or retained?
- 2) Immediately before the date of the alleged wrongful removal or retention, in which jurisdiction was the child habitually resident? In determining habitual residence, the court should take the following approach:
 - a) The court's task is to determine the focal point of the child's life, namely the family and social environment in which its life has developed, immediately prior to the removal or retention.
 - b) To determine the focal point of the child's life, the court must consider the following three kinds of links and circumstances:
 - i) The child's links to and circumstances in country A;
 - ii) The circumstances of the child's move from country A to country B; and
 - iii) The child's links to and circumstances in country B.
 - c) In assessing these three kinds of links and circumstances, the court should consider the entirety of the circumstances, including, but not restricted to, the following factors:
 - i) The child's nationality;
 - ii) The duration, regularity, conditions and reasons for the child's stay in the country the child is presently in; and
 - iii) The circumstances of the child's parents, including parental intention.

End of Stage One: Two Outcomes

- 1) If the court finds that the child was habitually resident in the country in which the party opposing return resided immediately before the alleged wrongful removal or retention, then the Hague Convention does not apply and the court should dismiss the application.

- 2) If the court finds that the child was habitually resident in the country of the applicant immediately before the wrongful removal or retention, then the Hague Convention applies and the court should proceed to stage two of the analysis.

Stage Two: Exceptions

At this stage, the court shall order the return of the children unless it determines that one of the following exceptions applies:

- 1) The parent seeking return was not exercising custody or consented to the removal or retention (Article 13(a));
- 2) There is grave risk that return would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 13(b));
- 3) The child of sufficient age and maturity objects to being returned (Article 13(2));
 - a) Has the party opposing return met the threshold to invoke the court's discretion to refuse return?
 - i) Has the child reached an appropriate age and degree of maturity at which the child's views can be taken into account; and
 - ii) Does the child object to return?
 - b) Should the court exercise its discretion to refuse to return the child? In considering whether to exercise its discretion to refuse return, the court should consider:
 - i) The nature and strength of the child's objections;
 - ii) The extent to which the objections are authentically the child's own or the product of the influence of the abducting parent;
 - iii) The extent to which the objections coincide or are at odds with other considerations relevant to the child's welfare; and
 - iv) General Hague Convention considerations.
- 4) The return of the child would not be permitted by fundamental human rights and fundamental freedoms of the requested state (Article 20); or
- 5) The application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment (Article 12).

[140] Evidence that a child has established connections to a jurisdiction following an unlawful removal is irrelevant and cannot be considered (*De Oliveira v. Campbell*, 2019 BCSC 623 at para. 40 [*De Oliveira*]). It is only the time prior to the date of wrongful removal that a child's links to each country are considered for the purpose of determining habitual residence.

- [141] In these proceedings, if A's habitual residence is found to be Mexico, the only potential exception is that set out in Article 13(b) of the Hague Convention - the question of whether there is a grave risk that returning A to Mexico would expose her to physical or psychological harm or place her in an intolerable situation. The other exceptions are not applicable in this case.
- [142] If A's habitual residence is found to be Mexico, the burden is on A.H. to establish that A would be exposed to a grave risk of harm if returned to Mexico. The physical or psychological harm must be substantial and not trivial, and the risk must be greater than would normally be expected from taking a child away from one parent and passing them to another (*Thomson v. Thomson*, [1994] 3 S.C.R. 551 [Thomson]).
- [143] The Court's assessment of harm is highly individualized and focuses on the particular circumstances of the child, rather than on a general assessment of the society to which the child would be returned (*De Leon Saldierna v. Shergill*, 2023 BCSC 257 at para. 181).

Parties' Positions

Father's Position on Habitual Residence

- [144] J.C. takes the position that the parties moved to Puerto Escondido, Mexico, and that A was a habitual resident of Mexico at the time of her removal on April 21, 2024. He argues that A's connections in Mexico are significant and strong.
- [145] He points to the parties spending the majority of their time in Mexico since October 2020, having sold the family home and other properties in British Columbia, purchasing land and building a home in Mexico, and hiring a nanny for A in Mexico. J.C. notes that A's nanny was considered a part of the family, and someone they trusted to take A out of the home on a regular basis.
- [146] J.C. also refers to A's enrollment and attendance at the School in Puerto Escondido and how she and A.H. developed bonds with other families and children in their community. He notes the various ways in which A.H. and A became part of the school's community, and regularly attended social events and fundraisers for the school.
- [147] He notes that A.H. became close friends with a number of the other parents and A became close with a number of children. A.H. and A attended various events, both School-related and non-School related. J.C. notes that A had many playdates with her classmates and other friends, attended many birthday parties in Mexico and that she celebrated all four of her birthdays in Mexico.
- [148] He points out that A.H. started and was growing a natural food business in Mexico.

- [149] J.C. says their returns to British Columbia were more in the nature of vacations to visit family and friends, and they would stay at various locations including in Cumberland and on Hornby and Cortes islands. He argues that when they stayed at the Caravan on Hornby Island this was akin to camping.
- [150] J.C. says that when in British Columbia, A only occasionally took part in activities such as drop-in playtime, swimming and daycare.
- [151] J.C. says that A.H. has significantly downplayed their connections in Mexico.

Mother's Position on Habitual Residence and Indigeneity

- [152] A.H. submits the parties' intentions were to engage in a life of travel throughout the world. Puerto Escondido, Mexico, was the first place they went as part of this life. British Columbia, however, remained their "enduring home."
- [153] A.H. counters J.C.'s view that there had been a decision to relocate completely to Mexico. She says the parties' time in Mexico was a "sojourn" not a "full-throated move" and that there was no intentional termination of their residential connection to Canada. A.H. says that the residence in Puerto Escondido was an investment or, at best, a second home, and that A's friendships and relationships in British Columbia are of a better quality than those developed in Mexico.
- [154] A.H. says that when she returned with A to British Columbia, she was returning A to her habitual residence.
- [155] Counsel for A.H. urges the Court to resist colonial preoccupations and underlying cultural assumptions about property ownership and to avoid taking a narrow, geographically fixed and Eurocentric view of habitual residence.
- [156] The main focus of A.H.'s argument in responding to this petition relates to A's indigeneity. A.H. takes the position that A's identity as an Indigenous child ought to be a separate and primary consideration when the Court is looking at A's circumstances and connections to British Columbia.
- [157] A.H. urges this Court to adopt a reformulation of the analysis set out in *Balev and Ludwig* for determining a child's habitual residence, when the child at issue is Indigenous. A.H.'s counsel submits that, before considering the child's links to and circumstances in countries A and B, the Court must remember that:
- a) the child is a member of a distinct legal, social, cultural, religious and racial entity in Canada, here belonging to the Gitwangak, which is part of the Gitxsan Nation;
 - b) the child requires ongoing connections to her Indigenous heritage, and that ties to Indigenous peoples, lands and languages should be honoured;

- c) Indigenous people have suffered significant harms and intergenerational trauma as a result of colonial and assimilationist policies (including residential schools) that disconnected people from their traditions, cultures, values, beliefs, languages, people and traditional territories (which he defines as "Indigenous Connections");
 - d) the Court should take judicial notice of this history of colonialism and displacement and its ongoing harms and traumas; and
 - e) the Court should be mindful that an order returning the child to Mexico would "at least facially - sanction the removal of [the child] from the geographical locus of her Indigenous Connections, thereby repeating historical wrongs of forced relocation and dispossession - in effect, if not in intent."
- [158] A.H.'s counsel proposes to modify the Balev/Ludwig test for habitual residence by having the Court give primary weight to the child's Indigenous Connections when assessing and determining the child's habitual residence.
- [159] A.H.'s submissions focussed on the ways in which she, as A's mother, sought to strengthen A's Indigenous identity. This included the holding of a Blessing Way ceremony to celebrate and commemorate A.H.'s rite of passage into motherhood; burying A's placenta on Hornby Island according to Indigenous cultural practices shared with A.H. by her mother to represent her permanent connection to and being planted in the land; singing traditional songs to and drumming for A; participating in smudging ceremonies and cedar bough ceremonies; and instilling in her values important to Indigenous people, such as the need to protect the land.
- [160] A.H. urges the Court to consider the above and conclude that A is habitually resident in Canada, not Mexico.
- [161] A.H. argues that this approach - taking an "Indigenous Lens" - is what is required by the United Nations Declarations on the Rights of Indigenous Peoples [UNDRIP], by the United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14 [Federal DRIPA], by Canada's commitment to reconciliation, and by Canadian common law.
- [162] A.H. argues that, for decades, courts have taken judicial notice of the harms done to Indigenous peoples by colonial assimilationist policies including residential schools, even if Canada's commitment to reconciliation and the implementation of UNDRIP has only begun to be reflected in legislation. A.H. relies on a variety of cases dealing with a range of issues (from cases dealing with the sentencing of Indigenous offenders, to Charter challenges, to child protection cases, and others) to emphasize the ways in which Courts have taken into account the circumstances of Indigenous people and sought to further reconciliation, and to prompt this Court to revise the habitual residence test and grave risk of harm test in Balev to make Indigenous Connections the primary focus.

- [163] A.H. says that, given the endorsement of UNDRIP, its implementation in federal and provincial legislation, and the Supreme Court of Canada's determination in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 [Reference] that UNDRIP now forms a part of Canada's positive law, any application pursuant to the Hague Convention, where the effect of an order may be to sever an Indigenous child from her Indigenous Connections, must be viewed through an interpretive lens that focuses specifically and primarily on the purposes and principles of UNDRIP.
- [164] In the alternative, and in the event that in stage one of the analysis I find that A is habitually resident in Mexico, A.H. says I should then consider A's Indigenous Connections and adopt an Indigenous lens at stage two when considering whether an exemption applies such that A ought not be returned to Mexico.
- [165] Specifically, A.H. says an order for A's removal to Mexico ought not be made owing to a grave risk of serious psychological harm. A.H. says returning A to Mexico would risk forced assimilation, deprive A of her Indigenous identity, dispossess her from Gitxsan territory, deprive her of the right to belong to an Indigenous community or nation, and deprive her of the right to access an education in her own culture and language. A.H. urges me to conclude that allowing A to return to Mexico will expose her to a grave risk of psychological harm in the form of the perpetuation of intergenerational trauma.

Father's Position on Indigeneity

- [166] In reply to A.H.'s submissions that the Court should adopt an "Indigenous Lens", J.C. says this would fundamentally change the *Balev* test and would incorporate a best interest of the child analysis into what ought to be a determination of proper forum.
- [167] Moreover, argues J.C., modifying the test to make one factor - cultural connection - the primary consideration to be given utmost weight, would encumber the hybrid approach with rigid rules and would overlay the factual concept of habitual residence with legal constructs, something the Supreme Court of Canada has warned against. The Hague Convention, says, J.C., is a "fragile tool" and the Court should be wary of grafting new public policy exceptions on to it.
- [168] J.C. also says that UNDRIP, and the federal and provincial laws affirming its application, provide a framework for governments to engage in reconciliation and to ensure their laws are consistent with UNDRIP, but do not require the judiciary to modify existing laws to ensure they comply with UNDRIP.
- [169] J.C. says that sentencing cases and child protection cases are very different than the case at hand. In sentencing, s. 718.2(e) of the Criminal Code, R.S.C., 1985, c. C-46 mandates that the court pay particular attention to the "circumstances of Aboriginal offenders." In child protection cases and in cases under the Family Law Act, the courts must consider the best interests of the child including the child's indigenous connections. By contrast, the case law

for Hague Convention matters specifically mandates the Court not to do an analysis of the best interests of the child nor focus primarily on any given factor above others.

Analysis

Indigenous Connections

[170] It is not contested that A is Indigenous.

[171] That said, and although counsel for A.H. has focussed much of his argument on the importance of considering A's indigeneity in the analysis I must undertake, there is very little evidence before me about the traditions, cultures, values, beliefs, languages, people and traditional territories of the Gitxsan, Shuswap and Coast Salish peoples, the nations and communities to which A is said to be connected. The evidence provided by A.H., her mother, her father, and friends about A and A.H.'s connections to Indigenous nations and communities in British Columbia is brief and, in some respects, vague.

[172] I recognize that one reason for this may be that A and her ancestors have been disconnected from their Indigenous heritage, communities, and lands through colonial assimilationist policies and their ongoing effects. The experience of A.H.'s great-grandfather in being taken to residential school off the coast of Vancouver Island is an example of that. In addition, the Chief of the Gitwangak Indian Band has communicated to A.H., through counsel, that "colonization has removed the majority of our people from our ancestral lands over time."

[173] These factors make my consideration of whether and how to take into account Indigenous Connections in these proceedings that much more difficult.

UNDRIP

[174] A.H.'s submissions urging the Court to adopt an "Indigenous Lens" when considering and applying the Balev test draws on the importance of UNDRIP having been "incorporated into the country's domestic positive law" as noted by the Supreme Court of Canada, in obiter, in the Reference at para. 15.

[175] Understanding this argument requires some background on UNDRIP, as well as on the provincial and federal acts that affirm the application of UNDRIP.

[176] On September 13, 2007, the General Assembly of the United Nations adopted UNDRIP.

[177] UNDRIP delineates the individual and collective rights of Indigenous peoples. UNDRIP recognizes rights to self-determination (Article 3), not to be subjected to forced assimilation or destruction of their culture (Article 8), to belong to an Indigenous community or nation (Article 9), not to be forcibly removed from lands or territories (Article 10), to practice and revitalize cultural traditions and customs and to protect and develop the past, present and future manifestations of their cultures (Article 11), to revitalize, use, develop and transmit to future generations histories, languages, oral traditions, philosophies (Article 13), and

many other rights. These rights are noted as constituting "minimum standard for the survival, dignity and well-being of the Indigenous peoples of the world" (Article 43).

- [178] In addition, UNDRIP's preamble recognizes, inter alia, the right of Indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child.
- [179] Article 38 of UNDRIP requires states, in consultation and cooperation with Indigenous peoples, to take appropriate measures, including legislative measures, to achieve the ends of UNDRIP.
- [180] In May 2016, Canada announced its formal endorsement of UNDRIP. The endorsement did not result in an immediate change to the domestic laws of Canada (*Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 at para. 437 [*Gitxaala*], citing *Ross River Dena Council v. Canada*, 2017 YKSC 59 at para. 302).
- [181] In the years following its formal endorsement, the government of Canada started to reflect its commitment to implementing UNDRIP in federal legislation. For example, An Act respecting First Nations, Inuit and Metis children, youth and families, S.C. 2019, c. 24 [FNIM Act], which was enacted on June 21, 2019, notes that the government of Canada "is committed to implementing [UNDRIP]" (preamble), and that one of the purposes of the FNIM Act is to contribute to the implementation of UNDRIP (s. 8).
- [182] On November 28, 2019, the British Columbia government passed the Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c. 44 [BC DRIPA] into law.
- [183] The purposes of the BC DRIPA, as set out in s. 2, are:
- (a) to affirm the application of the Declaration to the laws of British Columbia;
 - (b) to contribute to the implementation of the Declaration; and
 - (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.
- [184] Section 3 of the BC DRIPA provides that the provincial government, in consultation and cooperation with the Indigenous peoples of British Columbia, "must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."
- [185] Section 4 of the BC DRIPA requires the provincial government to prepare and implement an action plan to achieve the objectives of UNDRIP.
- [186] On June 21, 2021, Parliament enacted the United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14 [Federal DRIPA]. The purposes of the Federal DRIPA are similar, though not identical, to those set out in the BC DRIPA. Section 4 of the Federal DRIPA states that the purposes are to:
- (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and

(b) provide a framework for the Government of Canada's implementation of the Declaration.

[187] Section 5 of the Federal DRIPA, like section 3 of the BC DRIPA, provides that the Government of Canada must, in consultation and cooperation with Indigenous peoples, "take all measures necessary to ensure the laws of Canada are consistent with the Declaration." Section 6 sets out the requirement to prepare and implement an action plan, and the elements of such a plan.

[188] The legal effect of Canada's endorsement of UNDRIP and the Province's enactment of the BC DRIPA was raised in *Gitxaala*, which was a challenge to the province's mineral tenure system brought by two First Nations. The First Nations argued, among other things, that the provincial Mineral Tenure Act, R.S.B.C. 1996, c. 292, was inconsistent with UNDRIP and with the BC DRIPA.

[189] In his reasons, Justice Ross recognized that his analysis of whether the BC DRIPA implemented UNDRIP into the domestic laws of British Columbia, and whether the BC DRIPA created justiciable rights would likely represent the first in a long progression of judicial considerations of UNDRIP and the BC DRIPA (para. 435). Indeed, the petitioner First Nations are pursuing an appeal, and months after *Gitxaala*, the Supreme Court of Canada issued its reasons in the Reference.

[190] Justice Ross undertook a careful statutory analysis of the BC DRIPA, referring to the "broad and imprecise" language used in the purpose clause (para. 462), and to the fact that it refers to "contribut[ing] to" the implementation UNDRIP, as opposed to "accomplish[ing]" that feat (para. 464). The Court noted that ss. 4-5 of the BC DRIPA placed prospective obligations on the provincial government to align the laws of BC with UNDRIP, and to create an action plan for legislative reform in consultation with Indigenous groups.

[191] Justice Ross concluded that the BC DRIPA did not implement UNDRIP into domestic law:

[466] On the basis of the analysis above, I find that a correct, purposive interpretation of DRIPA does not lead to the conclusion that DRIPA implemented" UNDRIP into domestic law. Instead, DRIPA contemplates a process wherein the province, "in consultation and cooperation with the Indigenous peoples in British Columbia" will prepare, and then carry out, an action plan to address the objectives of UNDRIP.

[192] Justice Ross then went on to consider if the BC DRIPA, and in particular s. 3, created justiciable rights. Here the First Nations argued that that if a court were to find that a law of BC is inconsistent with UNDRIP, the court should issue a declaration requiring the government to take all measures to remedy the inconsistency.

[193] Justice Ross agreed that courts have the institutional capacity and legitimacy to determine whether the laws of British Columbia are "consistent" with the rights set out in UNDRIP, but disagreed that s. 3 of the BC DRIPA invited judicial intervention. The Court noted that the BC DRIPA contemplated that the government, in consultation with Indigenous peoples, would work to ensure consistency of provincial laws with UNDRIP. He reasoned that the

provision contemplates "ongoing cooperation between the government and Indigenous peoples" (para. 489), and did not call upon the courts to adjudicate the issue of consistency.

- [194] The status of UNDRIP was also discussed by the Supreme Court of Canada in the Reference, in the course of discussing the context in which the FNIM Act was enacted.
- [195] The Reference was a challenge brought by the Attorney General of Quebec to the constitutionality of the FNIM Act. As noted earlier, the FNIM Act was one of the federal laws enacted to contribute to implementing UNDRIP. The other purposes of the FNIM Act are: to affirm the inherent right of self-government, which includes jurisdiction for Indigenous groups in relation to child and family services; and to set out the principles applicable, on a national level, for the provision of child and family services in relation to Indigenous children. Section 20 of the FNIM Act sets out a mechanism for Indigenous governing bodies to make laws regarding child and family services and to enter into coordination agreements relating to the effective exercise of this legislative authority. Section 21 gives such laws made by Indigenous bodies the force of law as federal law, and section 22 deals with conflicts with provincial laws.
- [196] The Quebec Court of Appeal held that the FNIM Act was constitutionally valid except for ss. 21 and 22(3). In the Reference, the Supreme Court of Canada concluded that the whole of the FNIM Act was constitutionally valid.
- [197] The Supreme Court of Canada reasoned that binding the federal government to the affirmation set out in s. 18(1) of the FNIM Act (that the inherent right of self-government recognized by s. 35 of the Constitution Act includes jurisdiction in relation to child and family services), establishing national standards, and facilitating the implementation of the laws of Indigenous peoples and groups were all measures that are within Parliament's powers under s. 91(24) of the Constitution Act, 1867. Further, the Supreme Court of Canada repeatedly referred to Parliament, in enacting the FNIM Act, as having embarked on a process of "legislative reconciliation", which it noted may be a practical way of advancing reconciliation with Indigenous peoples and avoiding prolonged litigation (paras. 6, 17, 76-79).
- [198] In the introduction section of its reasons, the Supreme Court of Canada observed that UNDRIP has been incorporated into the country's positive law by the Federal DRIPA:
- [4] While the Declaration is not binding as a treaty in Canada, it nonetheless provides that, for the purposes of its implementation, states have an obligation to take, "in consultation and cooperation with indigenous peoples, . . . the appropriate measures, including legislative measures, to achieve the ends" of the Declaration (art. 38). Recognized by Parliament as "a universal international human rights instrument with application in Canadian law", the Declaration has been incorporated into the country's positive law by the United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14 ("UNDRIP Act"), s. 4(a). This statute recognizes that the Declaration "provides a framework for reconciliation" (preamble); s. 5 of the same statute requires the Government of Canada, in

consultation and cooperation with Indigenous peoples, to take "all measures necessary to ensure that the laws of Canada are consistent with the Declaration". The statute's preamble expressly provides that the implementation of the Declaration in Canada "must include concrete measures to address injustices" facing, among others, Indigenous youth and children.

[Emphasis added.]

- [199] In the context section at para. 15, the Supreme Court of Canada again noted that UNDRIP is incorporated into the country's domestic positive law through the Federal DRIPA:
- [15] In 2021, Parliament enacted the UNDRIP Act, s. 4(a) of which affirms the Declaration "as a universal international human rights instrument with application in Canadian law". It is therefore through this Act of Parliament that the Declaration is incorporated into the country's domestic positive law. In s. 4(b), the statute states that its purpose is also to "provide a framework for the Government of Canada's implementation of the Declaration". In s. 5, it provides that the "Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration". Further, s. 6(2)(b) provides that the minister responsible for the statute must prepare and implement an action plan, which must include "measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration". More generally, in the preamble to this statute, Parliament emphasized the Government of Canada's commitment to "taking effective measures -- including legislative, policy and administrative measures -- at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration". Parliament also referred in the preamble to the call for it to implement the UNDRIP made by the Truth and Reconciliation Commission in its calls to action and by the National Inquiry into Missing and Murdered Indigenous Women and Girls in its calls for justice.
- [200] At the same time, in both paras. 4 and 15, the Supreme Court of Canada noted that the Federal DRIPA provided a framework for reconciliation and implementation, and summarized some of the steps needed for government to ensure that Canada's laws are consistent with UNDRIP. The Supreme Court of Canada noted that Canada's commitment to implementing UNDRIP included taking legislative and policy measures on an international level.
- [201] Counsel for A.H. submits that because the Supreme Court of Canada has now noted that UNDRIP is incorporated into Canada's domestic positive law, this Court is required to adjust the common law tests developed to consider and apply the Hague Convention to ensure consistency with UNDRIP. And he proposes how the test should be reformulated.

- [202] I acknowledge that UNDRIP guarantees Indigenous people the right to belong to their community, practice their cultural traditions, and for Indigenous children, in particular, the right to have access to an education in their own culture. The rights set out in UNDRIP are human rights and UNDRIP is incorporated into Canadian law.
- [203] However, I do not agree that the Supreme Court of Canada's observation that UNDRIP is incorporated into Canadian domestic law, the Federal DRIPA, the BC DRIPA or the cases on which A.H. relies, requires this Court to reformulate the Balev test as advocated for by A.H. I say this for several reasons.
- [204] First, the Hague Convention is an international/multilateral treaty that needs to be interpreted in accordance with the principle of harmonization. This was emphasized by Chief Justice McLachlin in Balev at para. 33:
- [33] A clear purpose of multilateral treaties is to harmonize parties' domestic laws around agreed-upon rules, practices, and principles. The Hague Convention was intended to establish procedures common to all the contracting states that would ensure the prompt return of children: see preamble. The objective of multilateral treaty making "would be seriously weakened if the courts of every country interpreted [the treaty at issue] without any regard to how it was being interpreted and applied elsewhere": Connaught Laboratories Ltd. v. British Airways (2002), 2002 CanLII 4642 (ON SC), 61 O.R. (3d) 204 (S.C.J.), at para. 46. To avoid frustrating the harmonizing purpose behind the Hague Convention, domestic courts should give serious consideration to decisions by the courts of other contracting states on its meaning and application: see Vienna Convention, Article 31(3)(b); Thibodeau v. Air Canada, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 50; Stag Line, Limited v. Foscolo, Mango and Co., [1932] A.C. 328 (H.L.), at p. 350; Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446 (H.L.), at p. 471; Air France v. Saks, 470 U.S. 392 (1985), at pp. 403-4; L.K. v. Director-General, Department of Community Services, [2009] HCA 9, 237 C.L.R. 582, at para. 36.
- [205] Later on, at para. 49, Chief Justice McLachlin stated that the principle of harmonization is a "prime consideration" in interpreting treaties, given that the aim of a treaty like the Hague Convention is to establish uniform practices in adhering countries. Courts are to prefer the interpretation of the Hague Convention that has gained the most support in other courts, as that is what will best ensure uniformity of state practice across Hague Convention jurisdictions.
- [206] I have not been provided with any case law from other contracting states where courts have held that when determining the habitual residence of an Indigenous child under the Hague Convention, their indigeneity and connections to Indigenous culture, lands and languages must be the primary consideration.
- [207] In my view, the principle of harmonization weighs strongly against reformulating the test for habitual residence, as urged by A.H. Prioritizing one factor, indigeneity, over all other factors when determining habitual residence would be inconsistent with the approach taken in this country and others interpreting and applying the Hague Convention. For this

Court to step away from the hybrid approach required by *Balev*, and to add new primary considerations, and weight one factor above all others, would in my view undercut the uniformity called for by the Hague Convention.

- [208] The approach urged by A.H. of prioritizing indigeneity also creates other problems and questions. For example: If Canadian law were to develop to prioritize indigeneity, would this increase the potential for forum shopping? Would prioritizing indigeneity mean that an Indigenous child could never be considered habitual resident in a country other than where the Indigenous group to which they belong resides? Would prioritizing indigeneity effectively require a court to ignore all the other circumstances tying the child to a different country? How would the reformulated approach work in a situation where a child is a member of two Indigenous groups in two contracting states? How would the approach work where a child is a member of an Indigenous group whose territory straddles two countries?
- [209] As well, the Canadian jurisprudence on habitual residence recognizes that courts are to consider the "entirety" of the child's circumstances, that the list of factors is not closed, and that "no single factor" is to dominate the analysis (*Balev* at paras. 44 and 47). In my view, there is already ample space within the *Balev*/Ludwig framework for the Court to consider A's indigeneity and her Indigenous Connections when considering her habitual residence, without reformulating the test.
- [210] A new formulation of the test is not required in order for me to properly take into account A's indigeneity. In my view, A's indigeneity and her connections to Indigenous family members, culture and lands must be taken into account when looking at the entirety of the child's situation, per *Balev*. Numerous cases have discussed the importance of considering the social and family environment of the child when determining habitual residence (*Laranjeira e Silva v. Virco*, 2024 BCCA 164 at para. 66) and others have also taken into account a child's ethnicity both in considering habitual residence and in assessing grave risks of harm (*G.B. v. V.M.*, 2012 ONCJ 745).
- [211] That said, it is also important to remember that the determination currently before the Court is not a substantive determination of custody/access or parenting time. My assessment of habitual residence is to determine the jurisdiction that is the most appropriate for the determination of custody and access. It is, essentially, a question of forum.
- [212] There is proper opportunity, in the jurisdiction where the child was habitually resident before the unlawful removal, to consider the best interests of the child and determine questions of custody and access. The law is clear that in an application made under the Hague Convention, the courts are not to consider the best interest of a child in the same manner as in a custody hearing (*Thomson* as cited in *Viltman v. Borovskaia*, 2022 BCSC 381 at para. 54; see also *Paschel v. Paschel*, 2017 ONSC 6952 at paras. 50-54).

- [213] Questions about the best interest of the child in the determination of custody and access will and do allow for the consideration of the child's indigeneity and the importance of maintaining connections with the child's Indigenous heritage and nurturing the child's cultural identity (see, for example, *Pasco v. Pasco*, 2015 BCSC 1412 at paras. 149-159).
- [214] I am not convinced that an order returning A to Mexico would, as A.H. says, have the effect of severing A from her Indigenous Connections. In A.H.'s submissions, she acknowledges that her intention was to engage in a life of travel and discovery throughout the world, wherever that took her. The parties chose to travel with A to Mexico and to live there. There is no suggestion that the parties' choice to live in Mexico for much of the last three years severed A's ties to her Indigenous Connections.
- [215] In addition, over the last several years, A.H. has continued to grow A's Indigenous Connections while in British Columbia and while in Mexico. A.H. has created opportunities for A to connect with Indigenous family and friends in both places, continues to sing and drum for A, and participates in Indigenous events. Further, some of A.H.'s Indigenous relatives and friends have travelled to Mexico to spend time with A.H. and A.
- [216] An order returning A to Mexico would not remove A from A.H. and would not stop her from teaching A about her indigeneity and growing her Indigenous Connections, though I accept that these connections need to be fostered in Mexico until the parenting issues are resolved.
- [217] Another difficulty with A.H.'s submissions relating to UNDRIP and the argument that the court is required to take particular action when it comes to Indigenous children is that they overlook the critical role that governments have in this area. Both Justice Ross' decision in *Gitxaala* regarding the BC DRIPA, and the Supreme Court of Canada's decision in the *Reference* focus on initiatives undertaken by governments to make laws consistent with UNDRIP, and the additional steps governments have bound themselves to take to continue to align laws with UNDRIP, in consultation with Indigenous peoples.
- [218] The focus of the Supreme Court of Canada's decision in the *Reference* was on initiatives undertaken by the federal government to make Canadian law more consistent with UNDRIP. The Supreme Court of Canada did not comment on the implications for the courts of Parliament having incorporated UNDRIP into domestic positive law through the Federal DRIPA. J.C. argues that nowhere in the *Reference* does it say that all existing laws are to be modified by the judiciary to ensure they comply with UNDRIP.
- [219] There will continue to be efforts by governments to align statutes with UNDRIP. Indeed, both the BC DRIPA and the Federal DRIPA require governments, in consultation and cooperation with Indigenous groups, to prepare action plans to address the objectives of UNDRIP and to begin the process of aligning statutes with UNDRIP. This is a long-term project. Courts do not need to wait for that work to be completed to begin interpreting UNDRIP and considering the cases before them through an UNDRIP lens. In my view, the Supreme Court of Canada's remarks in the *Reference* case that UNDRIP is incorporated into

domestic law provide an opening for courts to incrementally start considering the principles and rights set out in UNDRIP, when appropriately raised in proceedings.

Sentencing and Other Cases

- [220] In addition to relying on UNDRIP and the Reference case, A.H. relies on cases dealing with the sentencing of Indigenous offenders and s. 718.2(e) of the Criminal Code, (including *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Ipeelee*, 2012 SCC 13; and *R. v. Kehoe*, 2023 BCCA 2), to argue that there has been a transformation in Canadian case law towards recognizing and considering the traumatic effects of Canada's colonial history and assimilationist policies. A.H. says this obligation now crosses across all areas of the law.
- [221] Section 718.2 of the Criminal Code identifies a number of important sentencing principles, a number of which promote restraint in sentencing. There is a statutory requirement, in s. 718.2(e), that a court that imposes a sentence must, in considering all available sanctions, pay "particular attention to the circumstances of Aboriginal offenders." The Supreme Court of Canada has made clear that this provision was intended to deal with the continuing crisis of over-representation of Indigenous offenders in the Canadian criminal justice system (*Gladue* at para. 33; *Ipeelee* at para. 59; *Kehoe* at para. 36).
- [222] In *Ipeelee*, the Court noted that courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Indigenous people in Canadian society. The Court emphasized, at para. 60, that courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools, and how that history continues to affect Indigenous people today, including through lower levels of income, employment and education, and higher levels of substance abuse, suicide, and incarceration. These matters, on their own, do not justify a different sentence for Indigenous offenders, but rather provide "the necessary context" for evaluating the case-specific information presented (emphasis in original).
- [223] In *Kehoe*, Justice Marchand (as he then was) considered what role s. 718.2(e) of the Criminal Code and the *Gladue* principles should play when an offender (there a Métis man) has been disconnected from their heritage, community and culture. In allowing the accused's appeal, the Court of Appeal noted that in many cases involving the sentencing of Indigenous offenders, Canada's assimilationist policies have been so successful that the offender may be largely or completely disconnected from their Indigenous culture, community and support (at para. 46). However, there is nevertheless a need to evaluate relevant information about the significance of a person's Indigenous identity and their circumstances as an Indigenous person during sentencing (at paras. 46, 50-61).

- [224] These cases dealing with the sentencing of Indigenous offenders make clear why it is that there is a requirement in the Criminal Code to consider the unique circumstances of Indigenous offenders, clarify the appropriateness of taking judicial notice of the history of colonialism and assimilation as critical context in sentencing, and explain the processes by which their circumstances are brought before the Court, usually in the form of a Gladue report.
- [225] In criminal cases, Parliament and the courts have long recognized that historical injustices as a result of colonization, dispossession of Indigenous peoples from their lands, and removal of Indigenous children from their families have resulted in the overrepresentation of Indigenous people in prisons. Counsel for A.H. says that this recognition now crosses all areas of law.
- [226] In addition to criminal sentencing cases, counsel relies on cases such as *Servatius v. Alberni School District No. 70*, 2020 BCSC 15, aff'd 2022 BCCA 421; *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada*, 2020 CHRT 20; *Flette et al. v. The Government of Manitoba et. Al.*, 2022 MBQB 104; and *British Columbia (Children and Family Development) v. R.T.*, 2024 BCPC 41 to demonstrate that courts in a wide variety of contexts have taken judicial notice of Canada's history of colonialism and its resulting displacement of Indigenous peoples (including and especially children) from their lands and cultures, of the harms and intergenerational trauma suffered by Indigenous people from colonial and assimilationist policies including residential schools and child welfare systems, and of the needs of Indigenous children to have ongoing connections to their people, lands and languages.
- [227] Indeed, in many areas including but not limited to criminal sentencing, Charter challenges, funding disputes between government bodies, child welfare matters and family law matters, courts have taken judicial notice of Canada's colonial history and its effects on Indigenous peoples. This can provide important context in which a court can analyze the relevant information before it.
- [228] However, I disagree that these cases stand for the broad proposition argued by A.H. that the courts now have an obligation in cases across all areas of the law to ameliorate the grievous harms and injustices brought about as a result of Canada's colonial history. The role of the court is to adjudicate the claims brought before it fairly and justly, taking into account all relevant facts and circumstances and applying the law. Nor do these cases require or expect the court to fundamentally alter the test for habitual residence based on the child's Indigenous Connections.
- [229] I do agree that Canada's history of colonialism and its effects, including displacement of Indigenous peoples from their lands and the associated loss of culture, traditions and community can offer context for the court's analysis in a Hague Convention matter in determining an Indigenous child's habitual residence pursuant to the test set out in *Baley/Ludwig*. The same context can be useful in the analysis of whether there is grave risk of

harm in returning a particular Indigenous child. However, while these factors can offer context for each of these steps of the analysis, they ought not to dictate or determine the outcome. The analysis is fact-specific based on the individual child, whether or not the child is Indigenous.

- [230] It must also be noted that the cases relied on by counsel all deal with entirely different matters than the case at hand. International child abduction cases such as the case before me - even when the child is an Indigenous child - are not at all similar to child welfare matters. In Hague Convention matters, the court must determine habitual residence of the child in order to determine the proper forum for the substantive determination of custody and access which occurs later. The focus in determining the proper forum under the Hague Convention is habitual residence, not best interests of the child. The court applies an international treaty and the case law developed with the principle of harmony in mind.
- [231] The specific sentencing and other cases relied on by A.H. are all distinguishable and not applicable to this matter, save for my comments regarding offering context for considering the relevant facts in the analysis of A's habitual residence and whether A is at grave risk of harm if returned. I will now turn to that analysis.

Date of Wrongful Removal / Exercising Custodial Rights

- [232] I start with the first stage of the Ludwig framework: determining the date of the alleged wrongful removal.
- [233] There is no dispute that A was removed from Mexico on April 21, 2024. This is one of the facts set out in the parties' agreed statement of facts.
- [234] Nor do the parties dispute that they were both sharing custodial rights and care of A at the time of the removal.
- [235] Mr. Ortiz's affidavit confirms that J.C. exercises the paternal-filial rights conferred on him by law in Mexico with respect to A. Article 264 of the Family Code of Oaxaca describes parental authority as the rights and duties the law imposes on parents to provide for the upbringing, protection and education of their children, and to promote the integral development of their potential. Article 264 notes that parental authority is a matter of public policy and is exercised in the best interest of the child and involves mutual respect between parents and children. Article 267 of the Family Code of Oaxaca establishes that parental authority shall be jointly exercised by the mother and father.
- [236] I find that J.C. was exercising rights of custody at the time of the removal.

Habitual Residence

- [237] I must now consider in which jurisdiction A was habitually resident immediately before April 21, 2024.

- [238] The task per Ludwig is to determine the "focal point" of A's life, namely the family and social environment in which her life developed immediately prior to her removal from Mexico.
- [239] To determine the focal point of A's life, I must consider three kinds of links and circumstances: A's links to and circumstances in Canada; the circumstances of A's move from Canada to Mexico; and A's links to and circumstances in Mexico.
- [240] In assessing these three kinds of links and circumstances, I am to consider the entirety of the circumstances, including, but not restricted to: A's nationality; the duration, regularity, conditions and reasons for A's stay in Mexico; and the circumstances of A's parents which may include parental intention.
- [241] Given A's age - she is no longer an infant but is just now school aged - her environment has essentially been a family environment, determined with reference to her parents. In the circumstances, it is appropriate for me to assess A.H.'s and J.C.'s integration into the social and family environment. In this regard, the reasons for the move to Mexico and the parties' geographic and family origins may become relevant. See, for example, *Merecredi v. Chaffe*, C-497/10, [2010] E.C.R. I-14358, which was referred to by Justice Skolrood in *Laranjeira e Silva v. Virco*, 2024 BCCA 164 at para. 68:

52 In the main proceedings, the child's age, it may be added, is liable to be of particular importance.

53 The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.

54 As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of.

55 That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.

- [242] As part of considering A's links to and circumstances in Canada, and the entirety of the circumstances, I will consider A's identity as an Indigenous child and the ties that she and A.H. have to her Indigenous relatives and communities, as well as the dislocation her family members have experienced from their cultures.
- [243] One of the difficulties in assessing A's habitual residence is that the parties consider themselves global citizens and have, by choice, embraced a life of travel. From A's birth in December 2019 through to April 21, 2024 (the date of removal), A spent just over 50% of her life in Puerto Escondido, Mexico. From November 2022 to April 21, 2024, A has spent approximately 75% of her time in Mexico and 25% of her time in Canada. Of the time A spent in Canada, it was spent in a variety of locations in British Columbia. Of the time A spent in Mexico, it was spent primarily in Puerto Escondido.
- [244] This is not to say that the determination of habitual residence is simply an exercise in calculating the days and months spent in each location. Nor is the question whether A has ties to Canada - she clearly does. As is discussed below, I find that numerous factors indicate that the focal point of A's life and her habitual residence on April 21, 2024, was Puerto Escondido, Mexico.

Links and Circumstances in Mexico and Canada

- [245] I begin with A's family ancestry, nationality and permits.
- [246] A and A.H. are Canadian citizens and Indigenous. Both are Gitxsan.
- [247] A.H.'s mother, who is Gitxsan, and father, who has Shuswap ancestry, both live on Vancouver Island.
- [248] A.H.'s mother deposed that her grandfather was taken from his Gitxsan community when he was young and forced to attend residential school in Alert Bay, off the northeast coast of Vancouver Island. A.H. says this led to the dislocation of the generations that followed such that many of them reside on Vancouver Island and surrounding areas.
- [249] As mentioned earlier, there is little evidence in the affidavit materials before me of A.H.'s connections to the Gitxsan Nation, such as her ties to the territory of the Gitxsan people, Gitxsan culture or Gitxsan language. There is some evidence in the affidavit materials of A.H. and her mother's connections to Coast Salish people and culture. But this too is limited and vague.
- [250] A's father, J.C., has dual Canadian and American citizenship. J.C.'s mother was born in San Diego, in the United States, but lived in Mexico for the first five years of her life. J.C.'s maternal grandmother was Mexican, and J.C. has several relatives in Mexico.
- [251] J.C. and A.H. both applied for and obtained temporary residence visas for Mexico. These visas are valid until the end of April 2026, and give the parties and A the right to reside in Mexico, with unlimited entry and exit privileges.

Links and Circumstances in Canada

- [252] I now move to consider the parties' and A's links and circumstances in Canada, and specifically British Columbia.
- [253] A was born in British Columbia and lived in Cumberland for the first nine months of her life.
- [254] A.H.'s family lives in British Columbia - including her mother, father, and paternal uncle. The evidence is not clear how frequently A spent time with relatives in British Columbia but it is clear that A would visit with members of A.H.'s family while in British Columbia.
- [255] In addition to having family in British Columbia, A.H. has close friends who live in British Columbia including close Indigenous friends. Some of A.H.'s close friends had babies around the same time as A was born and they spent time together in British Columbia with their babies. The friends' children are friends with A. It is not clear how frequently A spent time with these friends but it is clear that A would visit with these friends when she was in British Columbia.
- [256] A.H. was educated in British Columbia. She has not had any significant employment or self-employment in British Columbia since A was born, but she has filed her taxes in Canada throughout.
- [257] J.C.'s family resides in British Columbia for parts of the year. His mother, brother and sister all spend part of the year on Hornby Island, with his sister spending the most time there. J.C.'s sister spends approximately seven or eight months of the year at the main home on Hornby Island.
- [258] J.C. has owned properties in British Columbia. He used to own a rental income property in Victoria which he sold to help pay for the lots he purchased in Puerto Escondido. J.C. purchased the Cumberland property in 2019 and the parties sold it in 2023. In addition, J.C. owns an interest in his family's property on Hornby Island and prior to the parties' relationship, J.C. built the Caravan as a small summer home as his own space on the property.
- [259] When in British Columbia, the parties stayed in multiple places with A, including in Cumberland until the property was sold, at the Caravan on Hornby Island, on Denman Island and on Cortes Island.
- [260] In the summers of 2021, 2022 and 2023, A attended some daycare, drop-in programs, lessons and preschool in British Columbia, but not on a regular full-time basis.

- [261] The parties and A have participated in important events and ceremonies in British Columbia, including, in late 2019, A's homebirth at the Cumberland property, which was preceded by a Blessing Way ceremony; in early 2020 a cedar bough brushing ceremony and smudge at the Cumberland property; and in 2022 a placenta burying ceremony at the Caravan on Hornby Island.
- [262] A.H. deposed, and I accept, that the cedar bough brushing and smudge as well as the placenta burying ceremony have roots in Indigenous traditions and teachings. A.H. deposed that burying A's placenta and planting a cedar tree at that place represented A's connection to and tie to the land as well as her responsibility to care for the land.
- [263] I accept that the parties and A have strong ties and attachments to British Columbia. These ties include those that are rooted in Indigenous traditions and connect them to people and places in and around Vancouver Island. However, the question before me is not whether the parties and A have ties to Canada (Luongo v. Luongo, 2023 ONSC 6013 at para. 52); the question is where A was habitually resident on April 21, 2024.

Move to Mexico and Links and Circumstances in Mexico

- [264] I now consider the parties' move to Mexico and the links and circumstances of the parties and A in Mexico.
- [265] The parties and A originally travelled from British Columbia to Puerto Escondido on one-way tickets, leaving in October 2020, during the height of COVID related restrictions and when A was nine months old. They were initially seeking sunshine and adventure. However, I find that shortly after they arrived, they liked Puerto Escondido, discussed and decided to move there, and took a number of steps solidifying that plan including building a family residence there and eventually selling their prior residence in British Columbia.
- [266] Shortly after arriving in Puerto Escondido, the parties hired a full-time nanny, Valeria, to care for A. Valeria was A's nanny from November 2020 through to 2024 and she and her child became more like friends or family members.
- [267] The parties and A engaged in the community in Puerto Escondido and sought to integrate into life in Mexico. A.H. and J.C. took Spanish lessons for several months, had a personal trainer/yoga instructor, and hired a chef and a gardener.
- [268] The parties adopted a pet rabbit, and later a pet cat for A in Puerto Escondido.
- [269] A.H. brought her drum made for her by her mother to Mexico so she could drum and sing to A as part of her Indigenous culture.
- [270] J.C. purchased land on which to build a home for the family in Puerto Escondido, and funded this in part by selling property in British Columbia. The parties started with developing the smaller lot, and made plans to build a bigger home for themselves on the second adjacent lot.

- [271] Both parties were engaged in designing and having the home built, and they moved into this residence in April 2022. A has lived at the home for most of the year from April 2022 to the end of December 2023, and then from January 2024 to April 21, 2024, on a part-time basis, when she was staying with J.C.
- [272] Family and friends regularly visited the parties in Mexico. Some of the visitors including A.H.'s father and J.C.'s mother spent extended periods of time in Mexico while visiting.
- [273] A.H. started a business in Mexico making bone broth from home and selling it to retail stores. She actively advertised and was proud of the growth she achieved and the development of professional packing and labelling. She asked others such as J.C. and her personal trainer for assistance in marketing her business.
- [274] The parties researched and enrolled A in the School. When the parties chose the School and interviewed for it, A was initially too young to attend. However, A has been enrolled full-time in the School since January 2023 when she was three. A attended the School regularly during the school year when in Puerto Escondido. Reports from the School are consistent with J.C.'s evidence that A was thriving at the School, had friends there including a best friend L, and was well-suited to the Waldorf model of education.
- [275] When A was still a toddler, and before she was attending the School, the parties visited British Columbia for several months over the summer. After A commenced school, the parties' visits to British Columbia were shorter (2023) or planned to be shorter (2024), from approximately June through September.
- [276] In addition to making friends through the School, A is friends with children in her neighbourhood in Mexico and through other activities. Some of these friends are close friends including L and K whom A has referred to as her sisters.
- [277] The School has a community of teachers, parents and students and A.H. was active in the community. A.H. had many friends and a full social calendar in Mexico. A. H. was also involved in a mom's group of six women who had children at the School who became friends who socialized outside of School events.
- [278] A.H. and J.C. applied for and in April 2022 obtained temporary residence visas to permit them to remain in Mexico until April 2026, enter and exit Mexico as often as they wished, open up the possibility of them working in Mexico and be a step toward possibly obtaining permanent residency.
- [279] Even after the parties separated, they confirmed their intentions to remain in Mexico. A.H. asked for J.C.'s help to find suitable long-term rental accommodation in neighbouring Puertecito, and she purchased a lot in Puertecito on which to build a home for her and A.
- [280] After the parties separated until April 21, 2021, the parties were sharing parenting time and care of A equally in Mexico. A spent half of the week with her mother and half of the week with her father.

[281] After separation when the parties' relationship further deteriorated, A.H. started making threats to move back to British Columbia with A. J.C. made it clear that he did not consent to A.H. relocating to British Columbia with A, although he did agree to them all visiting British Columbia during A's summer school break. A.H. continued to threaten to leave Mexico with A, but promised that she would return to live in Mexico once the parties negotiated and finalized a separation agreement.

Consideration of the Child's Links to Canada, the Move to Mexico and Links to Mexico

[282] In my view, the above is extensive and compelling evidence to show that A's habitual residence prior to her removal to British Columbia was in Mexico. The parties carefully chose where they wished to purchase land and live in Mexico. They discussed their plans for development of the two lots in Puerto Escondido, and both parties were involved in designing the family home. They moved into the home built on the first lot in April 2022, and this is where A has lived for the majority of her time in Mexico.

[283] I do not agree with A.H.'s submissions that the residence in Puerto Escondido was a mere investment or a winter residence. Rather, this was the parties' and A's home.

[284] The parties applied for and obtained temporary residence visas, giving them the opportunity to work in Mexico and potentially to apply for permanent residency.

[285] Even post-separation, A.H. indicated an intention to remain in Mexico, and purchased her own property in nearby Puertecito.

[286] Of note, the parties used the proceeds of the sale of properties in British Columbia, including the Cumberland property, to support the purchase and development of these properties in Mexico. In *Puggioni v. Puggioni*, 2023 CanLII 98036 at para. 43, the Court noted that a settled intention to "abandon" one's prior residence is a crucial part of acquiring a new one. The only remaining property in British Columbia is the Caravan on Hornby Island, which is small, not properly insulated and not suitable for year-round living.

[287] The parties and A were also actively engaged in a social community in Puerto Escondido, including one developed through the School and had active social calendars. A has a number of close friends including her best friends who she views like sisters to her in Mexico.

[288] Finally, as I noted earlier, since A turned three and started attending the School, the parties have spent the majority of their time living in Mexico. The duration of the parties' returns/ planned returns to British Columbia have decreased to better suit A's school breaks.

- [289] The parties maintained strong connections with their family and friends in British Columbia by visiting them when they were in British Columbia. A.H. also ensured that when she and A travelled to British Columbia, they attended Indigenous events and gatherings. As well, several of the parties' close friends and family members travelled to Mexico to see them. A.H.'s mother and father both visited Mexico as did some of A.H.'s friends. A.H.'s father P.H. visited them in Mexico repeatedly and for extended periods.
- [290] A.H. ensured that she continued to drum and sing for A in Mexico.
- [291] Taking into account all the circumstances, I conclude that the focal point of A's life immediately prior to April 21, 2024, was Mexico and that A was habitually resident there.

Exceptions: Grave Risk of Harm

- [292] I move now to the second stage of the analysis, namely considering the exceptions set out in the Hague Convention that would justify a court declining to order the return of a child notwithstanding a finding of wrongful removal or retention.
- [293] A.H. says that the exception that applies here is Article 13(b) which provides as follows:
- Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested 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 his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
- [294] The burden is on A.H. to establish that A would be exposed to a grave risk of harm or otherwise be placed in an intolerable situation if returned to Mexico (De Oliveira at para. 61, citing Thomson). The physical or psychological harm must be substantial and not trivial and the risk must be something greater than would normally be expected from taking a child away from one parent and passing them to another (F. v. N., 2022 SCC 51 at para. 79, citing Thomson).
- [295] The respondent must produce evidence that is both "credible and meets a high threshold" to prove that a child would be at grave risk of harm if returned (Batten v. Batten, 2021 BCSC 2507 at para. 55).
- [296] A.H. argues that, if removed from British Columbia, A would face significant psychological harm that would put her in an intolerable situation. One of the arguments that A.H. initially appeared to be making was that A would continue to be bullied at the School if she returned to Mexico. However, A.H. ultimately did not press this argument in her submissions. In any event, as mentioned above, the evidence before me does not demonstrate that A was in fact bullied at School.

- [297] There are two remaining submissions that A.H. makes in support of the grave risk of harm exception applying. First, A.H. submits that the Court should take into account J.C.'s controlling nature and past incidents of family violence when considering whether there is a grave risk of harm. Secondly and most importantly, A.H.'s submits that A would face significant psychological harm on a return to Mexico because she will experience a separation from, diminishment of or loss of her Indigenous Connections and culture.
- [298] I will address A.H.'s allegations regarding J.C. being controlling and abusive before I address the submissions regarding A.'s Indigenous Connections. There were three incidents of family violence referred to in the affidavit materials. One involves the December 18, 2023 text exchange of insults. I have addressed that incident above and indicated that it appears at least on the materials before me to be a one-time incident in which both parties insulted each other right around the time they separated. J.C. expressed remorse and apologized. There is no mention by either party that A was in any way exposed to the insults. The parties' communications attached to the affidavits that follow this text exchange seem relatively civil/amicable.
- [299] The two other incidents of family violence involve physical incidents between the parties taking place in the spring of 2022 when the parties were in their hallway at night and one in the spring of 2024 outside when J.C. was on a scooter. The parties offer different versions of events in which each maintains the other party was violent and denies being violent themselves. As mentioned above, I found that after the spring of 2022 incident, J.C. did not block A.H. from seeking medical treatment. However, it is not possible for me to make findings regarding whose version of the actual incident is correct for either the spring of 2022 or the spring of 2024 incidents on the basis of affidavit materials alone without cross-examination. I am also mindful that the parties will have a hearing on the substantial issues of custody/access/parenting time at a later date.
- [300] For the purpose of the analysis of grave risk of harm, I will assume for the purpose of the analysis only that A.H.'s versions of the two incidents are true. As such, I will assume for the purpose of the analysis that J.C. pushed A.H. down in the hallway in the spring of 2022 and pushed her onto the ground in the spring of 2024.
- [301] Even if I assume that A.H.'s versions of these events are true, there is no evidence that J.C.'s actions would put A in grave risk of harm. There is no evidence before me that A suffered any harm in relation to either of these two incidents occurring. A. was in her room during the hallway incident and was not a witness. A. was at a friend's place during the scooter incident. There is also no evidence before me that J.C. has been violent towards A, neglectful of A or caused A physical or psychological harm.

- [302] In terms of the allegations of J.C. being controlling, it is difficult for me to address these vague allegations. I also have some concern regarding making findings when the parties will have a more fulsome hearing on the substantive issues, including parenting, at a later date. However, I do make some observations in relation to the allegations of J.C. being controlling.
- [303] As mentioned previously, there is a large volume of written communication between the parties produced in the materials throughout their relationship and after their separation. There were several texts and emails in or around March and April 2024 before April 21, 2024 in which A.H. threatened to leave Mexico and return to British Columbia with A. A.H. did not, in this correspondence (or other correspondence between the parties), mention that she was leaving Mexico to escape J.C.'s controlling nature.
- [304] Instead, A.H. indicated she was concerned about her finances (including being financially reliant on J.C. in Mexico), perceived difficulties in navigating the Mexican legal system, and was of the view that her financial and legal opportunities were better for her in British Columbia. In terms of A.H.'s financial situation in Mexico, as mentioned previously, after separation, A.H. asked J.C. to help her rent a suitable place in Puertecito and to pay her CDN \$3,000 per month and J.C. appeared to readily agree to both requests. Clearly, A.H. chose where she wanted to live and she specifically sought out J.C.'s assistance to find a place there. A.H. was also the one to request the specific amount for monthly financial support.
- [305] Around that time, J.C. also agreed to attend mediation in Mexico to resolve all financial matters. A mediated settlement obviously requires both parties to be willing to negotiate as opposed to dictate a financial settlement. Further, at the time of removal, I understand that J.C. was honouring A.H.'s own financial requests on an interim basis pending final resolution. Objectively, it does not appear that J.C. was controlling A.H. or somehow 'starving her out' when he acceded to her requests.
- [306] As well, on April 7, 2024, A.H. specifically told J.C. that she would return to Mexico with A after the details of their separation had been settled. I would not expect A.H. to express her willingness to return to Mexico if she truly believed that A would face a grave risk of harm.
- [307] There is a lack of evidence from A.H. to substantiate her concerns regarding physical or psychological harm relating to the incidents or her allegations that J.C. is controlling and A.H. was willing to return to Mexico once a settlement was finalized. I do not find there is a grave risk of physical harm if A were to be returned to Mexico based on these allegations.
- [308] I move now to consider A.H.'s argument that removing A from British Columbia would result in psychological harm to A in the form of separation from, diminishment or loss of her Indigenous Connections and culture.

- [309] I accept that when A is in Mexico she is physically separated from British Columbia, and therefore from the lands to which she has Indigenous Connections. However, A.H. has been described by her close friend as always being a globetrotter, a descriptor which predates meeting J.C. A.H. travelled extensively before meeting J.C. and liked that she and J.C. both enjoyed travel. Further, there is evidence that A.H. wanted A to be raised as a global citizen. She was even interested in travelling with J.C. and A to Bali and Columbia in addition to Mexico. At the same time, despite her previous travels and her move to Mexico, A.H.'s evidence is that her own Indigenous Connections remain strong. A.H.'s evidence is that she also ensured that A's Indigenous Connections remain strong regardless of her move to Mexico.
- [310] There is no evidence in these proceedings that A's Indigenous Connections have been impacted or diminished to date by virtue of her time spent living in Mexico. Nor is there evidence that returning A to Mexico will present a risk of impacting or diminishing her Indigenous Connections, let alone resulting in serious psychological harm. I do not accept A.H.'s submissions that returning A to Mexico would be sanctioning the removal of an Indigenous child from that child's Indigenous Connections or would be akin to forced relocation or dispossession from their territory.
- [311] A.H. has, to date, sought to foster connections with A's Indigenous heritage in various ways, including through singing and drumming the Indigenous songs that have been passed on to her, participating in demonstrations with Indigenous land protectors, and fostering connections with her Gitxsan and Shuswap relatives, as well as with friends from other Indigenous nations. In my view, based on the evidence, these types of Indigenous Connections can continue even if A is not physically present in British Columbia or in the territories of the Indigenous peoples to whom she is related. Her family and Indigenous communities are also clearly dedicated to A's well-being, including ensuring that A's Indigenous Connections remain strong regardless of A being in Mexico or British Columbia.
- [312] I also note that A.H. did not raise, in her March and April 2024 correspondence with J.C., that one of the reasons she was taking A to British Columbia was to avoid any potential harm (psychological or otherwise) resulting from continued separation from her Indigenous Connections. And as noted above, A.H. indicated in her April 7, 2024 correspondence to J.C. that she and A would return to Mexico as soon as a separation agreement was finalized. A.H. is intimately aware of the importance of A's Indigenous Connections. I cannot imagine that A.H. would have agreed to return to Mexico if she thought that it would be harmful to A's Indigenous Connections.
- [313] Finally, as mentioned, this is not the substantive hearing on custody/access/parenting time. The parties will have further opportunity to address these issues in the context of that hearing which will be focused on A's more long-term best interests.

[314] In conclusion, I find that A.H. has not established that there is a grave risk that returning A to Mexico to address parenting issues there would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

Costs

[315] The petitioner seeks his costs under Article 26 of the Hague Convention, but has not set out the expenses he has incurred in relation to these proceedings. The relevant parts of Article 26 are:

Upon ordering the return of a child the judicial authorities may, where appropriate, direct the person who removed or retained the child to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

[316] In *Beatty v. Schatz*, 2009 BCSC 769 [Beatty], Justice Martinson noted that the objectives of Article 26 are to compensate the left-behind parent for costs incurred in locating and recovering the abducted child; to punish the abducting parent; and to deter other parents from attempting to abduct their children.

[317] The discretion given to the Court in Article 26 must be exercised judicially, taking into account the particular circumstances of the case (*Beatty* at para. 22; *De Oliveira* at para. 76).

[318] Given the disparity in incomes between J.C. and A.H., in my view making an order for costs could risk creating undue hardship for A.H. J.C. has property in San Francisco, which generates rental income, as well as the two lots in Puerto Escondido. In addition, he has an interest in his family's property on Hornby Island, and a cohabitation agreement with A.H. to protect his property. A.H. is not without resources. She received her share of the proceeds of the Cumberland property and used that to purchase property in Puertecito. She has also received some monthly payments from J.C. pending the negotiation of an agreement. There remains, however, significant disparity in their incomes and property holdings, and I accept that A.H. has fewer financial means than J.C.

[319] I am mindful that one of the purposes of Article 26 is to punish the abducting parent. In my view, that goal is achieved by these reasons and my order returning A to Mexico, and that an additional award of costs is not necessary to achieve this aim.

[320] In the circumstances, I decline to exercise my discretion to order costs under Article 26.

Order

[321] Pursuant to Article 12 of the Hague Convention, I declare that A has been wrongfully removed by the respondent from the jurisdiction of Mexico in accordance with the definitions in Article 3 of the Hague Convention.

[322] Pursuant to Article 12 of the Hague Convention, A shall be returned immediately to Puerto Escondido, Mexico.

[323] In the event that the respondent prefers that the petitioner return A to Mexico, the respondent shall do all such things and deliver all such documents that may be required to facilitate A's return to Mexico.

[324] Each party shall bear their own costs of these proceedings.

"Hamilton, J."

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