

CANADA / JUDGMENT

Price v. Srivastva

2020 BCSC 1109

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Supreme Court of British Columbia

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2020 BCSC 1109 Price v. Srivastva

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Price v. Srivastva,

2020 BCSC 1109

Date: 20200728

Docket: E193253

Registry: Vancouver

Between:

Alecia Marie Price

Claimant

And

Desh Deepak Srivastva

Respondent

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

June 26, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2020

Table of Contents

Introduction. 3

Procedural Background to the Joint Hearing. 4

Factual and Procedural Background. 5

Legal Framework. 10

Jurisdiction Simpliciter 10

Forum Non Conveniens Test 11

Issues. 14

Attornment 15

Forum Non Conveniens. 16

Location of the Evidence. 17

Existence of Ongoing Proceedings. 19

Bad Faith of the Claimant 21

Comparative Convenience. 22

Conclusion. 24

Next Steps. 25

Costs. 25

Introduction

- [1] This is a ruling on jurisdiction in a cross-border family dispute. The parties argued the issue of jurisdiction before this Court and the Superior Court of Washington in the County of Whatcom (the "Washington Superior Court") by way of a joint hearing of the two courts on June 26, 2020. The joint hearing was conducted by video, with me and Judge Garrett of the Washington Superior Court presiding over the proceedings. The parties were each represented by counsel in both jurisdictions, and each court must rule separately on the jurisdiction issue in accordance with the applicable law and jurisprudence in its jurisdiction. These are my reasons in the British Columbia proceedings.
- [2] The primary ongoing issue in this family dispute relates to parenting arrangements for the parties' two children. Since the parties separated in 2014, there has been a trial and numerous subsequent applications, hearings, and other legal proceedings concerning the children before the Washington Superior Court. There have also been legal proceedings before both the British Columbia Provincial Court and the British Columbia Supreme Court. All of the British Columbia proceedings have now been consolidated in this Court.
- [3] As a result of the parties pursuing issues related to parenting in both Washington State and British Columbia, conflicting orders in the two jurisdictions have arisen. As it currently stands, there is a protection order in force in British Columbia that suspends Mr. Srivastva's parenting time and prohibits him from communicating with Ms. Price or the children. The Washington Superior Court parenting orders, on the other hand, require that Ms. Price facilitate Mr. Srivastva's ongoing parenting time with the children, and Ms. Price has been held in contempt of that order in Washington State.
- [4] Until recently, Mr. Srivastva did not dispute this Court's jurisdiction and, indeed, consented to the filing of the parenting applications in the British Columbia Provincial Court in 2019 and, later, the consolidation of the parties' family proceedings in this Court in early 2020. However, because he had also sought contempt orders in Washington State against Ms. Price that were premised on the invalidity of the British Columbia Provincial Court orders, I required that he clarify his position as to jurisdiction.
- [5] On May 27, 2020, Mr. Srivastva filed a jurisdictional response disputing this Court's jurisdiction. He then brought an application seeking that this Court stay the family law proceedings in favour of proceedings in Washington State. Ms. Price opposes that application and brings a cross-application seeking that this Court declare that it has exclusive jurisdiction over this family matter and that this Court is the forum conveniens for the ongoing parenting proceedings.

- [6] At the joint hearing, Mr. Srivastva conceded this Court's territorial competence and proceeded only on the forum non conveniens issue. Therefore, the only issue before this Court is whether this Court should decline to exercise jurisdiction on the basis that the Washington Superior Court is the more appropriate forum to address the current and ongoing parenting issues between the parties. The joint hearing proceeded on the question of forum non conveniens alone.
- [7] On July 27, 2020 Judge Garrett issued reasons and an order with respect to the jurisdictional issue staying the family proceedings in the Washington Superior Court on certain conditions in favour of this Court.
- [8] I have found that the British Columbia Supreme Court is the more appropriate forum to address questions engaging the best interests of the children, including the outstanding parenting orders both parties seek to raise. I therefore decline to stay these family proceedings in this Court. These are my reasons for that decision.

Procedural Background to the Joint Hearing

- [9] The value of court-to-court communications and joint hearings with respect to jurisdictional matters relating to the best interests of children was discussed in *Hoole v. Hoole*, 2008 BCSC 1248 and in *S.R.L. v. K.J.T.*, 2014 BCSC 1562. These communications are encouraged by the Hague Conference on Private International Law, Permanent Bureau, *Direct Judicial Communications* (2013), and developed in the context of 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) [1980 Hague Convention], and the implementation of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children [1996 Hague Convention].[1]
- [10] In this case, Judge Garrett made an order on March 13, 2020 that communication between the two courts be established pursuant to Washington State law to discuss the issue of each courts' jurisdiction. No such order was applied for or sought in this Court (and indeed no jurisdictional issue had been raised in this Court at that time), but when I was appointed as the case management judge in May 2020, I directed that there be a Judicial Management Conference in order to hear submissions on that question. The parties were in support of that communication, and I ordered (by consent) that the protocol set out in this Court's Practice Direction 57 - Court-to-Court Communications in Cross-Border Cases (effective February 11, 2020), with appropriate modifications for the family law context, would apply to any such communications.
- [11] On June 11, 2020, after a joint preliminary hearing to determine how to proceed with respect to the issue of jurisdiction, both Judge Garrett and I ordered that the question of jurisdiction would be heard as a joint hearing on June 26, 2020, on the basis of sworn evidence to be filed in both courts.

Factual and Procedural Background

- [12] A great deal of the sworn evidence filed by the parties for the purposes of the joint hearing relates to their parenting dispute, including allegations of abusive behaviours. None of those factual issues need be resolved for the purposes of determining the jurisdictional issue, however. For the purposes of the jurisdictional question, a review of the relatively uncontentious procedural background will suffice.
- [13] The parties were married in December 2004 and separated in April 2014. They were living together in Washington State at the time of their separation. They have a son and a daughter who are now 12 and 8 years old, respectively.
- [14] In 2015, Mr. Srivastva entered a guilty plea and was convicted of assault against Ms. Price. Later in 2015, he was convicted of disorderly conduct for breaching a no contact order. Mr. Srivastva asserts that these convictions have created an ongoing impediment to his ability to enter Canada, his last attempt being in 2018, when he was turned away at the border.
- [15] In May of 2016, Ms. Price moved with the children to British Columbia. Ms. Price was born in Canada, and both of the children are dual Canadian-American citizens. Mr. Srivastva continues to live in the United States with his current partner and their young child.
- [16] After moving to Canada in 2016 and just prior to the trial scheduled in Washington State, Ms. Price sought to have the British Columbia Provincial Court exercise jurisdiction over the family dispute. On July 22, 2016, Judge Ferriss of the British Columbia Provincial Court declined to take jurisdiction over the parenting arrangements pursuant to s. 74 of the Family Law Act, S.B.C. 2011 c. 25 [FLA].
- [17] In October 2016, the parties went to trial in the Washington Superior Court. Judge Garrett presided over the trial. On September 26, 2017, Judge Garrett issued a Final Divorce Order, Findings and Conclusions about a Marriage, and a Final Parenting Plan. Her findings included the following:
- a) While Mr. Srivastva has a history of domestic violence as defined under Washington law, the children were not involved and the evidence does not establish that they were affected by the events at issue;
 - b) The children have strong relationships with both their parents, and both parents are capable of caring for them and meeting their needs; and
 - c) A strong relationship with both parents is in the best interests of the children.
- [18] The Final Parenting Plan made Ms. Price the primary custodian of the children and ordered that the children continue to live primarily with her in British Columbia. Mr. Srivastva was granted parenting time two out of every three weekends, and additional time during winter, spring, and summer holidays, which was to be exercised in Washington State.

- [19] After the final order (and even while it was pending), the parties continued to litigate. Mr. Srivastva estimates that there are "600 applications, petitions, motions declarations, affidavits, order and other fillings within the Superior Court proceedings", which Ms. Price says were primarily brought by Mr. Srivastva. Both parties have sought contempt orders against the other. Ms. Price has been found in contempt for withholding the children by not bringing them to Washington State for their scheduled parenting time with Mr. Srivastva. Mr. Srivastva has been found in contempt for not paying child support, and Ms. Price asserts that his arrears now exceed \$50,000 US.
- [20] In the spring of 2019, the parties began discussions about moving the family proceedings to British Columbia, and an application was filed to determine the British Columbia Provincial Court's jurisdiction. The hearing of that application was resolved when Mr. Srivastva consented to the filing of the Final Parenting Plan in the British Columbia Provincial Court. On May 10, 2019, the British Columbia Provincial Court, by consent, ordered that the Final Parenting Plan be recognized in the law courts of British Columbia. Also in the spring of 2019, it appears that Ms. Price began the process of seeking to move the Washington Superior Court proceedings to British Columbia.
- [21] On September 3, 2019, Mr. Srivastva registered the children for the next school year in Washington State and refused to return them to Ms. Price. Ms. Price brought a habeas corpus motion, and Judge Garrett ordered that the children return to British Columbia with Ms. Price until September 13, 2019, after which the Final Parenting Plan schedule was to resume.
- [22] On September 9, 2019, Ms. Price filed an application for a protection order in the British Columbia Provincial Court. Judge Browning heard that application on September 12 and 13, 2019. Both parties had counsel at that hearing. On September 13, 2019, Judge Browning granted an interim order suspending Mr. Srivastva's parenting time until a full court hearing on the final protection order could be heard. Mr. Srivastva, through his counsel, agreed to set that hearing for November 8, 2019.
- [23] Apparently, Mr. Srivastva dismissed his British Columbia counsel prior to the November 8, 2019 hearing. He did not request an adjournment and did not appear by telephone. However, it appears that Mr. Srivastva was still aware of the November 8, 2019, court date because he had a British Columbia process server serve Ms. Price at the courthouse that morning with his own application to find Ms. Price in contempt of the Washington Superior Court parenting orders.
- [24] It appears from the evidence that Judge Boblin, before whom the application for the final protection order was heard, concluded from Mr. Srivastva's absence, failure to answer his phone, and his service of Ms. Price at the courthouse, that Mr. Srivastva had chosen not to contest the protection order. Judge Boblin issued a final Protection Order under s. 183(3)(a) of the FLA. The protection order prohibits Mr. Srivastva from having any contact with Ms. Price or the children other than through counsel or to attend court. He is not allowed to be

within 150 metres of their residence, school, or work, and the police may enforce the order or arrest Mr. Srivastva if he breaches these conditions. This protection order is in force for the standard one-year term and does not expire until November 8, 2020.

- [25] On November 22, 2019, Mr. Srivastva's application to find Ms. Price in contempt of the Parenting Plan was heard, and Ms. Price was found in contempt by a commissioner of the Washington Superior Court. The Commissioner ordered that the parties immediately return to the parenting schedule as set out in the Final Parenting Plan and that Ms. Price allow unrestricted phone communication. The Commissioner's order stated that her order "supersedes" the protection order issued in British Columbia as to the children. Apparently, when Ms. Price continued to comply with the British Columbia protection order rather than the Washington State Parenting Plan, she was found in contempt a second time.
- [26] On September 13, 2019, the same date the interim protection order was made in the British Columbia Provincial Court, Ms. Price also filed for a protection order in the Washington Superior Court. I understand that that motion was opposed by Mr. Srivastva and was dismissed in October 2019.
- [27] On November 29, 2019, Ms. Price filed a notice of family claim in this Court seeking the consolidation of the British Columbia Provincial Court proceeding and recognition of the Provincial Court orders and Washington orders in this Court, and variations to the existing parenting plan.
- [28] Mr. Srivastva responded to that claim and filed his own counterclaim in this Court. In his response, he agreed to some of the claims set out in the notice of family claim including: parenting arrangements (to be determined based on the best interests of the children); child support payable per the FLA and Federal Child Support Guidelines, SOR/97-175; an order consolidating the British Columbia Provincial Court's transfer order of May 10, 2019; and an order recognizing the Washington Superior Court's orders. In his counterclaim, he asked this Court for orders respecting parenting arrangements and child support, that the protection order made on November 8, 2019 be set aside, that he be recognized as a guardian, and for orders "varying the provisions of the Final Parenting Plan recognized by the Supreme Court of British Columbia so that the children would live primarily with [him]."
- [29] Mr. Srivastva also filed a petition in the Washington Superior Court to modify the Final Parenting Plan and grant him custody of the children. Judge Garrett determined that the evidence supported a review of the Parenting Plan in light of the difficulties the parties have had complying with it, but she was not prepared to entertain an application for a change to the primary custody of the children with Ms. Price in British Columbia.
- [30] On January 30, 2020, the British Columbia Provincial Court file (F391165) was consolidated with this proceeding in this Court with the consent of both Mr. Srivastva and Ms. Price.

- [31] The children have not seen their father in person since they returned to British Columbia in September 2019 with Ms. Price, although I understand there are interim orders from the Washington Superior Court providing for regular parenting time via video call.

Legal Framework

Jurisdiction Simpliciter

- [32] In British Columbia, the jurisdiction analysis generally has two-steps. First, the court determines whether it has jurisdiction simpliciter (often called territorial competence). The onus of establishing jurisdiction simpliciter is on the party asserting its existence: *Aleong v. Aleong*, 2013 BCSC 1428 at para. 80; *D.L. v. M.Y.*, 2019 BCSC 881 at para. 27. As stated above, both Ms. Price and Mr. Srivastva agree that this Court has territorial competence to hear matters relating to the parenting of the children and related family matters, primarily on the basis that the children are habitually resident in British Columbia.
- [33] I agree that this Court has territorial competence to hear these matters. The starting point for determining territorial competence is s. 3 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C.2011, c. 25 [CJPTA]: *S.R.L.* at para. 17. The CJPTA also recognizes that the Legislature or Parliament may create different rules for determining territorial competence or jurisdiction by passing legislation. Section 74(2) of the FLA gives this Court jurisdiction to make an order respecting guardianship, parenting arrangements, or contact with a child where the child is habitually resident in British Columbia: see *S.R.L.* at paras. 22 and 24. The Final Parenting Plan orders that the children primarily reside in British Columbia with Ms. Price, and they have done so since 2016. Mr. Srivastva concedes that that children are habitually resident in British Columbia, and I am satisfied that the children are indeed habitually resident in British Columbia. Therefore, s. 74(2)(a) of the FLA empowers this Court to make an order respecting parenting arrangements for the children.
- [34] I also find that this Court has subject matter competence over this family claim, as defined in the CJPTA.[2]

Forum Non Conveniens Test

- [35] Where jurisdiction simpliciter is established, as it is here, then the court moves on to the second step of the jurisdiction analysis, which is referred to as the forum non conveniens or forum conveniens analysis. In this step, the court decides whether or not to exercise its jurisdiction. A court may decline to exercise jurisdiction where there is another forum that is "clearly more appropriate": *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 103. The party asserting that another forum is more appropriate has the burden of proof in this court: *Club Resorts Ltd.* at 103; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200; *D.L.* at para. 28.

- [36] In this case, therefore, Mr. Srivastva has the burden of establishing that the Washington Superior Court is the "clearly more appropriate forum" for determinations related to the parenting of the parties' children and related issues. This is not a burden he has in Washington State, where I understand Ms. Price has the burden of establishing that this Court is the more convenient forum, as a matter of its doctrine of continuing jurisdiction.[3]
- [37] In contrast to the principle of continuing jurisdiction, the principle that the habitual residence of the children is the primary factor in determining jurisdiction is the foundation of British Columbia's legislation, including the CJPTA and the FLA, and international law: see *Droit de la famille* -- 18126, 2018 QCCA 116 [*Droit de la famille*] paras 37-44.
- [38] With respect to international law, the determination of legal forum on the basis of the habitual residence of the children is reflected in the two main international law conventions respecting children: First, it is implicit in the 1980 Hague Convention, which has been ratified in Canada and the United States. Second, it is expressly stated in Article 5 of the 1996 Hague Convention, including the principle that jurisdiction will generally move with the habitual residence of the children.
- [39] The 1996 Hague Convention has been signed by both the United States and Canada, but has not yet been brought into force by law in either country.[4] Nevertheless, the principle of the 1996 Hague Convention providing that the jurisdiction of a child's habitual residence is the jurisdiction most appropriate to determine the child's best interests is relevant in so far as it sets out an international standard for jurisdictional issues in family law cases recognized, if not yet in force with legal effect, in Canada.
- [40] In any event, this principle that the jurisdiction of a child's habitual residence is the jurisdiction best suited to determine the child's best interests is an underlying assumption in the FLA, reflected in the wording of Division 7 of Part 4, that: see *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at para. 38; *Droit de famille* at para. 39. It is also subject to rebuttal under both Articles 8 and 9 of the 1996 Hague Convention and s. 74(3) of the FLA.
- [41] Division 7 of Part 4 of the FLA governs jurisdictional issues with respect to guardianship, parenting arrangements, or contact with the children. Section 74(3) of the FLA contains a *forum non conveniens* provision:
- (3) A court may decline to make an order under this Part if the court considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.
- [42] In assessing whether the court should decline to exercise jurisdiction with respect to guardianship, parenting arrangements, or contact, it is useful to consider the purposes set out in s. 73 of the FLA:

73 The purposes of this Division are as follows:

- (a) to ensure that court applications respecting guardianship, parenting arrangements or contact with a child are determined on the basis of the best interests of the child;

- (b) to avoid the making of orders respecting guardianship, parenting arrangements or contact with a child, respecting the same child, in more than one jurisdiction;
- (c) to discourage child abduction as an alternative to determining by due process the guardianship of, or parenting arrangements with respect to, a child;
- (d) to provide for effective enforcement of orders respecting guardianship, parenting arrangements or contact with a child, and for the recognition and enforcement of extraprovincial orders.

[43] The factors that apply on a forum non conveniens analysis, and which are engaged under s. 74(3) of the FLA, are codified in s. 11 of the CJPTA: Shortridge-Tsuchiya at para. 60. Section 11 of the CJPTA provides as follows:

Discretion as to the exercise of territorial competence

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

[44] These factors are not exhaustive. In determining whether to decline jurisdiction, the court can consider other relevant factors such as the purposes set out in s. 73 of the FLA, including the best interest of the children: Shortridge-Tsuchiya at para. 61.

[45] Many of the factors under s. 11 of the CJPTA are neutral in the circumstances of this case. With respect to the factors listed at subsections (b)-(f), the parties agree that the current situation is unworkable and only one court should exercise jurisdiction over the dispute in order to avoid a multiplicity of legal proceedings and conflicting orders. There is also a general acceptance that a judgment from either court could be enforced in the other jurisdiction where appropriate.

- [46] Both courts are courts of competent jurisdiction and have robust family law regimes that will be able to determine the issues between the parties in accordance with the best interests of the children. Although there was some suggestion on Mr. Srivastva's part that the British Columbia courts are and will be less favourable to him, I reject that submission. Both this court and the Washington Superior Court are forums in which the issues between the parties will be determined in a fair and just manner on the evidence before them.
- [47] At this stage, the question is not who should have parenting time or where the children should reside, but rather, whether this Court should decline to exercise its jurisdiction on the basis that the Washington Superior Court is better situated to determine the issues between the parties. For the most part, the parties focused on factors that fall under s. 11(2) (a) of the CJPTA: the comparative convenience and expense for the parties to the proceeding and for their witnesses in this Court, as opposed to the Washington Superior Court.

Issues

- [48] It is in this legal context that I must consider whether Mr. Srivastva has established that the Washington Superior Court is clearly the more appropriate forum for determinations related to the best interests of the parties' children.
- [49] Before addressing that question on the merits, I must first consider Ms. Price's argument that since Mr. Srivastva has attorned to the jurisdiction of this Court, he can no longer raise the forum non conveniens issue.

Attornment

- [50] Ms. Price argues that Mr. Srivastva has attorned to the jurisdiction of British Columbia by agreeing to proceeding in British Columbia Provincial Court in May 2019, participating in proceedings before both the British Columbia Provincial Court and this Court, filing a response and counterclaim in this Court, and consenting to orders in both courts, and that he is therefore barred from raising the issue of forum non conveniens.
- [51] Ms. Price relies, in particular, on the May 10, 2019 consent order made by the British Columbia Provincial Court in which the Final Parenting Plan was recognized in British Columbia. She says that it was at that point that the parties agreed that the parenting issues would be addressed in British Columbia. After that date, Mr. Srivastva proceeded in British Columbia (if not in the Washington Superior Court) on the basis that the courts of this province had full jurisdiction to hear and decide the parenting issues between the parties. It was only after the Judicial Management Conference in which I pointed out the inconsistency of Mr. Srivastva's position as between this Court and Washington State, that Mr. Srivastva filed a notice of jurisdictional dispute.

- [52] Having consented to the jurisdiction of this Court, and so attorned to it, Ms. Price argues that Mr. Srivastva is now barred from objecting to the jurisdiction of this Court. She relies upon a line of cases, including *Nordmark v. Frykman*, 2018 BCSC 2219 [Nordmark] that find that once a person has attorned to this Court's jurisdiction, they may no longer raise an objection to the court's exercise of jurisdiction, including on the basis of *forum non conveniens*.
- [53] I note that *Nordmark* was the subject of appeal [2019 BCCA 433], and while the appeal was dismissed, the Court of Appeal did not endorse the reasoning relied upon by Ms. Price. As I read the Court of Appeal's reasons, attornment will give rise to territorial competence of a court that might not otherwise have that competence. However, it does not necessarily waive the right to argue *forum non conveniens*.
- [54] Through his conduct prior to filing his jurisdictional response, Mr. Srivastva attorned to this Court on all issues pled for the purposes of territorial competence. Section 3(b) of the CJPTA provides that a court has territorial competence where "during the course of the proceeding that person submits to the court's jurisdiction". However, the Court of Appeal states in *Nordmark* at paras. 47 and 48, that attornment is a stand-alone basis for the assumption of jurisdiction that "arises when a defendant is deemed to have submitted to the jurisdiction of a court that otherwise would not have jurisdiction over them by actions inconsistent with a denial of that jurisdiction" [emphasis in original]. The Court of Appeal goes on to explain that the concept of attornment does not apply when jurisdiction already exists. Even if the defendant in that case had attorned, he would not be barred from raising *forum non conveniens*.
- [55] Like in the Supreme Court Civil Rules, which were considered in *Nordmark*, the Supreme Court Family Rules treat jurisdiction and *forum non conveniens* as distinct concepts. A person who has attorned to the jurisdiction of the court can still raise a *forum non conveniens* argument before the court: see Rule 18-2 of the Supreme Court Family Rules.
- [56] This doctrine makes particular sense as families evolve and change. A forum that is most appropriate at the outset of a proceeding may cease to be for any number of reasons, including the inability of a party to enter a country (in Mr. Srivastva's case) or a permanent and court-sanctioned move with the children to another jurisdiction (as in Ms. Price's case).

Forum Non Conveniens

- [57] Having concluded that this Court has territorial competence and jurisdiction simpliciter, and that Mr. Price's attornment to this Court does not preclude him from raising the issue of *forum non conveniens*, I must now consider whether this Court should decline to exercise its jurisdiction on the basis that the Washington Superior Court is the more appropriate forum in which to adjudicate the ongoing issues between the parties.

[58] Mr. Srivastva has the onus of proving that a more appropriate forum exists and that this court should decline jurisdiction: Club Resorts Ltd. at paras. 103 and 108-109. He provides three reasons why I should decline to exercise this Court's jurisdiction:

- a) Location of the Evidence;
- b) Existence of Ongoing Proceedings; and
- c) Bad Faith of the Claimant.

[59] I will address each in turn. I will then address the broader question of the comparative convenience of each court in light of the evidence before me.

Location of the Evidence

[60] Mr. Srivastva says that notwithstanding the fact that the children are habitually resident in British Columbia, Washington State is the more appropriate forum because a significant amount of evidence that will be relevant to both parties' applications to vary the parenting arrangements remains in Washington State. This includes the substantial amount of evidence already filed in the Washington Superior Court in relation to the 2016 trial, and the applications and decisions since that date.

[61] Ms. Price disagrees and says that the evidence of most of the witnesses that Mr. Srivastva references dates back to the divorce proceedings, has already been incorporated (or rejected) by the Washington Superior Court in the existing Final Parenting Plan, and is now obsolete for the purposes of a variation application. The more recent evidence available from Washington State witnesses other than Mr. Srivastva himself, or his current partner, is based on no more than a single or glimpsing interaction with the children. Ms. Price says that the majority of the witnesses and evidence related to the children's wellbeing is located in British Columbia, where the children attend school, attend regular counselling, and receive health treatments.

[62] Both parties seek to vary the Final Parenting Plan. Both seek a significant variation that would change custody or remove the children's access to the other parent. Whether these arguments are heard in British Columbia or Washington State, the paramount consideration of the courts will be the best interests of the children and whether those interests have changed since the Final Parenting Plan was granted. The presiding court will therefore need to consider evidence relating to the children's current circumstances and best interests.

[63] As in most inter-jurisdictional disputes, there are likely to be witnesses and documentary evidence in both jurisdictions that will be relevant to the ultimate issues the court must decide. I accept Mr. Srivastva's evidence that there is a voluminous evidentiary record filed with the Washington Superior Court as it was the forum for the trial, and apparently numerous applications made, primarily by Mr. Srivastva, since the trial. I also understand that there have been investigations by the Washington State Child Protection Services since 2017 and as recently as 2019.

- [64] Mr. Srivastva has sworn an affidavit that attaches a list of potential witnesses who have been involved in assessing the children's medical or psychological wellbeing or safety, many of whom are Washington-based. Reviewing that list, it appears on its face that the involvement of some of these potential witnesses ended in 2016 or earlier. I assume that any relevant information from these individuals would have been before the Washington Superior Court at trial in 2016 and is the basis upon which Judge Garrett ordered the Final Parenting Plan. I do not consider that the evidence from these trial witnesses is likely to be particularly relevant in either jurisdiction beyond the findings and final orders that have already been made.
- [65] On the other hand, both Mr. Srivastva and Ms. Price list professionals involved with the children on a more contemporary and continuous basis that are more likely to be important to a court's determination of the children's best interests. While some of these are in Washington State, I find that the majority, and the majority with more than a passing familiarity with the children, are located in British Columbia. These include the son's counsellor and youth care worker at his school from whom he gets daily support, the daughter's academic support professionals at her school, the son's treating psychiatrist, multiple clinical counsellors who have treated at least one of the children a dozen times or more in the last few years, and the British Columbia Ministry of Family and Child Development, which has been involved with the family from September 2017 to present.
- [66] On the evidence before me, I find that the majority of the relevant evidence relating to the best interests of the children is located in British Columbia. In addition, to the extent that evidence is held by third parties and disclosure orders are required, this Court is in the best position to order the disclosure of relevant and current evidence and documentation relating to the children.
- [67] In addition, given that the children now reside in British Columbia, this Court is the more convenient forum for the children to provide evidence to the courts, either through professionals or potentially more directly when they are older. If the children are required to meet with experts for interviews and assessments for the purposes of preparing reports for use in this litigation, the children can do so with the least amount of inconvenience or disruption to their everyday lives in British Columbia.
- [68] Overall, I find that the location of evidence in Washington State is not a compelling reason for this Court to find that Washington State is the more appropriate forum for a consideration of the best interests of the children. To the contrary, the location of relevant evidence favours this Court maintaining its jurisdiction over the parenting arrangements applicable to these children.

Existence of Ongoing Proceedings

- [69] Mr. Srivastva points to the existence of ongoing proceedings in Washington State, including his pending application to modify the Final Parenting Plan. Judge Garrett has already ruled that she will not consider a major modification of the Final Parenting Plan that might change Ms. Price as the custodial parent in British Columbia, but she has ruled, and indeed set down, dates for the hearing of a minor modification to visitation and parenting time.
- [70] This is of significant concern. Generally, this Court does not encourage changes in jurisdiction mid-way through court proceedings. This is undoubtedly one of the reasons Ms. Price was unsuccessful in having the British Columbia Provincial Court assume jurisdiction of the parties' then family matters in the months leading up to trial in 2016, shortly after she moved to British Columbia with the children.
- [71] However, the Washington State proceedings are not the only proceedings that are ongoing. Ms. Price filed, with Mr. Srivastva's express consent, pleadings in British Columbia to recognize the parenting plan in this jurisdiction, and Mr. Srivastva has filed his own pleadings seeking to have the parenting plan recognized and varied in British Columbia, amongst other relief. Still pending before this Court is Ms. Price's notice of family claim and application to vary the parenting order, and Mr. Srivastva's counterclaim. Mr. Srivastva also seeks to set aside the protection order, which remains a significant impediment to him seeing the children, and this is the only court in an effective position to consider that relief.
- [72] Furthermore, given the amount of litigation the parties have been involved in since the trial order was made, the times when the parties are not involved in ongoing litigation in one or both jurisdictions are likely to be few and far between.
- [73] Although not binding on me, the 1996 Hague Convention provides some guidance in this respect. It leaves jurisdiction with the court hearing initial divorce and parenting claims until a final order is made. After a final order has been made, further proceedings are directed to take place in the jurisdiction where the children are habitually resident.
- [74] In this case, I find that the proceedings in Washington State reached the state of a final order with respect to divorce and parenting in 2017. Since then, the children have been habitually resident in Canada. Proceedings have been ongoing in both jurisdictions since early 2019 with both parties' consent, and the existence of these proceedings is a factor that weighs equally on both sides. This factor does not establish that Washington State is the more appropriate forum for the hearing of the outstanding parenting issues between the parties beyond the Final Parenting Plan.
- [75] Although not specifically raised by the parties, I have also considered the fact that there is often an advantage to having a trial judge continue to hear post-trial applications for a period after the trial, particularly in high-conflict cases such as this one. I understand, however, that Judge Garrett will no longer have conduct of this family matter beyond the end of this year. Having now become familiar with the proceedings in this case, both in

Washington State and in the British Columbia courts, I would be prepared to seize myself of this case to provide the parties with a similar level of consistency and stability.

Bad Faith of the Claimant

- [76] Mr. Srivastva accuses Ms. Price of forum shopping and alleges that she is seeking this Court to maintain its jurisdiction because this Court is more favourable to her. This argument rests primarily on the fact that Ms. Price sought a protection order in British Columbia Provincial Court, where she was successful on an interim basis in September 2019 (and successful on an uncontested basis in November 2019). She also sought a similar protection order in Washington State later in September 2019 and was not successful. She was apparently also told by a Commissioner in Washington State that the British Columbia courts have no jurisdiction and that Washington State has "exclusive" jurisdiction over parenting issues relating to the children. Nevertheless, she persisted in relying on the orders of the British Columbia Provincial Court rather than the Final Parenting Plan or orders enforcing that plan in Washington State.
- [77] There is no question that seeking relief in multiple forums for the purpose of forum shopping is problematic. However, Ms. Price is not the only one to have engaged in this conduct.
- [78] Mr. Srivastva consented to the jurisdiction of the British Columbia Provincial Court with respect to the filing and variation of the parenting plan in May 2019. Mr. Srivastva participated in the proceedings in British Columbia Provincial Court in September 2019, and it appears that it was only after he was unsuccessful with respect to that interim order that he abandoned participation in the hearing of the final order by dismissing his counsel and failing to appear by telephone in November 2019. In the joint hearing, his counsel in Washington State went further and argued that the outcomes of proceedings in each court, including the fact that British Columbia made a protection order when Washington State did not, is relevant to the court's determination of jurisdiction.
- [79] There is no high ground for either party to take in this regard. My concern is not with what either party believes might be the more substantively favourable court to the success of their position. Both this Court and the Washington Superior Court are fair and have a robust jurisprudence that does not inherently favour either parent. Different evidence and different arguments can easily lead to different results, particularly when one party does not contest an order in one court but does in another.
- [80] For both courts, the question is not what is more favourable to one party versus the other, but what is in the best interests of the children. Regardless of the conduct of the parties, the legislation and jurisprudence in British Columbia is clear that the interests of the children are best served by proceedings in the jurisdiction where the children live.

Comparative Convenience

- [81] Overall, I am not convinced that the location of evidence, the existence of proceedings in Washington State, or instances of bad faith on Ms. Price's part establish a basis for this Court to decline to hear this family matter in favour of Washington State. I am also convinced that the comparative convenience to the parties favours this Court exercising its jurisdiction to hear this matter.
- [82] Under s. 11(2)(a) of the CJPTA, I must consider the comparative convenience and expense for the parties and for their witnesses in litigating in British Columbia or in Washington State.
- [83] Ms. Price argues that the comparative convenience and expense to both parties weighs significantly in favour of this Court exercising its jurisdiction to hear this matter. I accept Ms. Price's evidence that in this Court, she has access to legal aid to retain counsel. I also accept her evidence that she does not have access to legal aid in Washington State and that because of the expense of retaining legal counsel, she has been less able to participate in the many applications brought by Mr. Srivastva in Washington State.
- [84] I also accept that litigation expenses are significantly lower for both parties in British Columbia, if for no other reason than the differential in the Canadian and United States dollars. Although he may not qualify for legal aid, Mr. Srivastva's United States dollar earnings go further in Canada. Ms. Price also says that a report under s. 211 of the FLA, or a hear the child report, is less expensive in British Columbia than the equivalent report in Washington State. Both parties spending less money on litigation is in the best interests of the children.
- [85] These factors tend to support this Court exercising its jurisdiction in this case.
- [86] My primary concern with respect to proceeding in this Court is the possibility that Mr. Srivastva will not be able to attend court to testify in person or to instruct his counsel as a result of his criminal convictions in the United States. While Ms. Price says that is a burden that Mr. Srivastva must bear, having committed those offences, it would be to Mr. Srivastva's disadvantage if he is not able to fully participate in his own case, including not only giving viva voce evidence (where appropriate) but also hearing all of submissions and the evidence led in order to better instruct his counsel on the conduct of the case as it proceeds in court.
- [87] This is further complicated by the current closure of the international border between the United States and Canada in both directions for all but essential travel as a result of the COVID-19 pandemic. At this point, there is no certainty (or even likelihood) that it will reopen in the near future.

- [88] To address the potential unfairness of Mr. Srivastva not being able to attend proceedings in British Columbia in person, I would be prepared to make an order for his in person attendance for the duration of any court hearing in this case. While the Canadian Border Service Agency ("CBSA") would have to consider whether this is sufficient for them to issue Mr. Srivastva a temporary resident permit, I understand that the CBSA has been open to such applications when supported by a court order.
- [89] Alternatively, this Court has now instituted the option of remote video hearings whereby applications, and even trials, are heard on a virtual platform. This option would allow Mr. Srivastva, and other witnesses in Washington State, to testify in the British Columbia Supreme Court. More importantly, it would allow Mr. Srivastva full access to the proceedings in this Court to enable him to instruct counsel throughout the proceedings.
- [90] Either of these options would address my concern about the comparative convenience to Mr. Srivastva if this matter proceeds in this Court. Overall, I find the factors of litigation cost, access to counsel for Ms. Price, and the improved access for the children to the court in the jurisdiction of their habitual residence to all outweigh the inconvenience to Mr. Srivastva of either obtaining a temporary resident permit to attend the proceedings or of this matter proceeding on a virtual platform.

Conclusion

- [91] On the totality of the evidence before me and having considering all of the factors in s. 11 of the CJPTA, the FLA, and the best interests of the children, I am not satisfied that this Court should decline to exercise its jurisdiction to hear this case. I find that this Court is the more appropriate forum for these proceedings.
- [92] I therefore dismiss Mr. Srivastva's application for a stay of these proceedings in British Columbia.
- [93] I make the declaration sought by Ms. Price at paragraphs 1 and 2 of her application that the children have been habitually resident within the Province of British Columbia since May 2016 and that this Court has territorial competence regarding the best interests of the children (neither of which were opposed by Mr. Srivastva). I do not make any declaration as to "exclusive" territorial competence of this Court, as the competence of other courts of inherent jurisdiction, including the Washington Superior Court, is not for this Court to determine.
- [94] The relief sought at paragraphs 3, 4 and 5 of Ms. Price's application are adjourned generally, subject to my comments below.

Next Steps

- [95] There is significant urgency to the hearing of the parenting issues in this matter, and specifically, the need for an order that considers and addresses the conflicting parenting orders from the Washington Superior Court and the protection order issued by the British Columbia Provincial Court. I understand that both orders have been consolidated as orders of this Court by way of the consent order of Justice Choi of February 7, 2020. Both parties have pleadings and applications seeking a variation of the Final Parenting Plan, although Mr. Srivastva's outstanding application was filed in Washington State.
- [96] I direct a telephone Judicial Case Conference ("JCC") be convened at 9:30 a.m. on August 6, 2020, for the purposes of setting an early hearing date for resolution of these matters. If either party, or their counsel, is not available on August 6, counsel should advise British Columbia Supreme Court Scheduling immediately. I direct Ms. Price's counsel to file the appropriate forms to secure the hearing date, and I waive the requirement that the parties exchange updated Form 8s for this purpose.
- [97] In advance of the JCC, I ask counsel to confer regarding the amount of time expected to be required for the trial or hearing. I also ask counsel to prepare, exchange, and forward to my attention draft trial briefs for this purpose, indicating, amongst other things, what types of evidence they expect to adduce, including the potential for both affidavit and viva voce evidence, as well as anticipated expert evidence.

Costs

- [98] Ms. Price has been successful in her application and in opposing Mr. Srivastva's application for a stay of these proceedings in this Court. She is entitled to one set of costs on both applications.

"Marzari J."

- [1] Canada is a full participant in the 1980 Hague Convention. Canada signed the 1996 Hague Convention in 2017, and recent amendments to the Divorce Act the Parliament provide for the implementation of the 1996 Hague Convention, but they are not yet in force.
- [2] In his written submissions, Mr. Srivastva appears to contest this Court's "subject matter competence" but clarified in argument that this Court is competent to consider the family law matters as pled, and that his argument relates entirely to the issue of forum non conveniens.
- [3] In *Droit de la famille -- 18126*, 2018 QCCA 116, the Quebec Court of Appeal provides a helpful description and comparison of the law relating to jurisdiction (largely between states) in the United States, as governed by the Uniform Child Custody Jurisdiction and Enforcement Act.
- [4] Article 5

- (1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.
 - (2) Subject to Article 7, in case of a change of the child's habitual residence to another Contracting State, the authorities of the State of the new habitual residence have jurisdiction.
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