

CANADA / JUDGMENT

Tsui v. Chow

2024 BCSC 1291

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1291 Tsui v. Chow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tsui v. Chow,

2024 BCSC 1291

Date: 20240718

Docket: E230194

Registry: Vancouver

Between:

Ching Tsui

Claimant

And

Stephen Marcellus Chow

Respondent

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Claimant:

J. Wong

Counsel for the Respondent:

H. Chiu

Place and Date of Hearing:

Vancouver, B.C.

November 22-23 and

December 12, 2023, February 15 and March 13, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 18, 2024

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Introduction

- [1] The parties have one child, M., born February 2009. The parties lived in Hong Kong together with M. from at least 2010 until August 2020, when the claimant and M. moved to Vancouver. The respondent says the move to Vancouver was a temporary move because of the extreme restrictions imposed in Hong Kong during the COVID-19 pandemic. He further says that the claimant and M. were to return to Hong Kong in August 2023 but did not do so. As a consequence, he filed an application on September 14, 2023, seeking an order under the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, 1343 U.N.T.S. 22514 [Hague Convention] that M. be returned to Hong Kong. He additionally seeks an order that this court decline jurisdiction over the claims made by the claimant in her notice of family claim under Parts 5 and 7 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] (Property Division and Child and Spousal Support).
- [2] The claimant opposes the relief sought. She says that the move to Vancouver was intended to be a permanent move and that Vancouver is the habitual residence of M. Additionally, she says that the respondent has attorned to the jurisdiction of this court and that, in any event, this court is the appropriate forum.
- [3] For the reasons that follow, the respondent's application is dismissed.

Facts

- [4] As will be seen, there are significant disputes over many of the facts. Where the facts are disputed, I make findings only where necessary to resolve the issues on this application.

The Parties

- [5] The respondent is currently 52 years of age. He immigrated to Canada with his parents in 1995, when he was about 24 years of age. He is a Canadian citizen.
- [6] The claimant is 56 years of age. She is a citizen of Hong Kong. Importantly, she has no immigration status in Canada. Despite this, she has been residing in Canada since 2020. She is able to remain in Canada by driving across the border to the United States every six months. The claimant also has no British Columbia driver's licence and maintains bank accounts and credit cards in Hong Kong.

2001 to 2020

- [7] The parties met in Vancouver in 2001, while the claimant was visiting Canada on a visitor's visa. At the time, she resided in Hong Kong.

- [8] The parties were married in Vancouver on August 9, 2003. The reasons for the marriage are disputed. The respondent says they married because the claimant wanted to immigrate to Canada. The claimant disputes this.
- [9] A joint family law proceeding (#E042147) was filed in the Vancouver Registry on June 24, 2004, for the divorce of the parties. An order of divorce was made by this court on December 7, 2004, effective January 7, 2005. The claimant deposes that she has no knowledge or recollection of having been divorced and she suggests that she was tricked into signing the divorce documents.
- [10] The relationship of the parties and their living arrangements following the divorce are much disputed. The claimant deposes that the parties have lived together in a marriage-like relationship uninterrupted since August 2003. She deposes they lived in Vancouver/Burnaby until 2006, that they lived in San Jose, California for a short period in 2006, that they moved to Shenzhen China in late 2006, and then moved to Hong Kong. The respondent deposes that he alone moved to Shenzhen in 2006 and then to Shanghai, where he lived alone until February 2010. He deposes the claimant resided in Hong Kong during this period but deposes that he and the claimant had an "on and off" relationship during this time period.
- [11] What is undisputed is that M., the biological child of the parties, was born in Hong Kong on February 21, 2009.
- [12] It is also undisputed that from at least February 2010 the parties were living together in Hong Kong.
- [13] The parties married a second time in Coquitlam on February 26, 2010, while on a visit to Vancouver. Importantly, the claimant deposes that she thought they were merely renewing their vows.
- [14] Following the second marriage, the parties returned to Hong Kong.
- [15] In 2013 (or possibly 2012), M. moved to the lower mainland to live with his paternal grandparents, who were informally appointed as his guardians. The respondent deposes that this move was temporary and occurred because a nanny could not be hired in Hong Kong to assist with the care of M. The claimant does not deny this. She merely deposes that during this period she lived with the respondent in Hong Kong and flew back and forth to visit M.
- [16] In the latter part of 2014, the respondent purchased a house in Hong Kong and M. returned to Hong Kong to live with the parties.
- [17] M. has attended kindergarten and elementary school in Hong Kong, at the Hong Kong Academy, from 2014 until 2020.

- [18] In 2019, the respondent purchased a house in North Vancouver. The purpose for which the house was purchased is disputed. The respondent says it was for an investment, that he intended to rent it out, and that he, in fact, had arranged for a tenant to move in but this did not materialize because of the onset of the COVID-19 pandemic. The claimant deposes that the respondent never mentioned that the house was to be rented and, to her knowledge, it was never rented.
- [19] The claimant deposes that since 2016 they spent one to two months every summer in Vancouver and that M. attended programs at St. George's School. She says in 2019 M. attended a 40-day boarding program at St. George's School and that the respondent and M. toured other schools in Victoria and Toronto.

August 2020

- [20] In August of 2020, the claimant and M. relocated from Hong Kong to the lower mainland. The respondent remained in Hong Kong but visited from time to time. The reasons for this relocation and whether it was temporary or permanent, are disputed.
- [21] The respondent deposes that the move was because of the COVID-19 pandemic and was to be temporary. More specifically, he deposes that he and the claimant decided that she and M. would temporarily relocate to Vancouver because of the closure of in-person school attendance in Hong Kong and the severe COVID-19 restrictions otherwise imposed in Hong Kong. He deposes that their intention was that once the pandemic was over, the claimant and M. would return to Hong Kong.
- [22] The claimant deposes that the relocation to the lower mainland was not temporary. She deposes that the parties, especially the respondent, had always intended that she and M. would live in the lower mainland so that M. could receive his education here. In her affidavit #2 sworn August 21, 2023 she deposes that they have been preparing for M. to undertake his high school education in Vancouver for more than 10 years. She says the move in August 2020 was in furtherance of this intention.
- [23] Both parties have filed affidavits from individuals who say they were told by one or both of the parties that the move was either temporary or permanent. The claimant filed affidavits of two individuals, Lohong Cai and Chunmei Pan, who depose they attended a farewell dinner in Hong Kong on July 10, 2020, where the parties announced that they were relocating to Vancouver long-term and that their plan was for M. to attend school in Vancouver and later university. The respondent has filed the affidavit of Ken Kwok Kin Fong, who deposes he was told by the respondent in June 2020 that the claimant and M. were moving to Vancouver temporarily. He also deposes that he attended a dinner party in July 2020 where the claimant told him she and M. were moving to Vancouver temporarily. The respondent's mother also deposed in an affidavit that, in August 2020, the parties told her they hoped COVID-19 would end soon so the claimant and M. could return to Hong Kong.

- [24] I prefer the evidence of the respondent over that of the claimant in relation to the August 2020 move of the claimant and M. to Vancouver.
- [25] The respondent's evidence is supported by an email dated April 6, 2020, from the Hong Kong Academy confirming that M. had been enrolled in Grade 6 for the 2020-2021 school year.
- [26] The respondent's evidence is further supported by text messages between the parties in 2021, 2022 and 2023. In the text messages sent in 2021 and 2022, they considered various schools for M. in Shanghai and Shenzhen. On February 24, 2023, the claimant texted the respondent telling him "have to find a school upon going back to Hong Kong this weekend". In a series of texts in March and April 2023, the parties discussed M. attending the Canadian International School in Hong Kong.
- [27] Additionally, and most importantly, the respondent's evidence is confirmed by M. The evidence includes an evaluative views of the children report dated November 19, 2023, prepared by Nooshin Morgan. She conducted two interviews of M. Her report contains the following:
- [M.] says initially, they moved to Canada due to the pandemic, expecting a temporary stay
- [28] Accordingly, I find as a fact that the move to Vancouver in 2020 was, as the respondent deposes, a temporary move because of the pandemic.
- [29] It is undisputed that since August 2020, the claimant and M. have resided at the North Vancouver house purchased by the respondent and M. has attended school here. M. currently attends the Argyle Secondary School. It is, however, notable that M. attends school as a foreign student, pays foreign student fees and pays for medical insurance as he is not covered by the British Columbia Medical Services Plan.

Separation

- [30] The respondent deposes that the parties separated in December 2020.
- [31] The claimant's evidence of when the separation occurred is more confusing. In her notice of family claim and in her affidavit #1 sworn January 24, 2023, the date of separation is said to be May 2021. However, her application response states the date of separation was January 2023. In a third affidavit sworn September 28, 2023, she deposes that the date of separation of May 2021 was an error and that she decided to end the marriage in January 2023.
- [32] As the date of separation of the parties is not critical to this application, I will not attempt to resolve this dispute.

Return to Hong Kong

- [33] The respondent deposes that in December 2022 he and the claimant decided it was time for M. to return to Hong Kong since the COVID-19 restrictions were being lifted. He deposes that they discussed various schools but ultimately decided upon the Canadian International

School of Hong Kong. He deposes that they submitted an application for his enrollment in the 2023-2024 academic year together with two reference letters from M.'s teachers at the Argyle school. He deposes that M. attended an interview by Zoom, that M. was accepted, and that a deposit of \$80,000 HKD was paid on April 17, 2023.

- [34] The claimant deposes that they always intended M. to undertake his high school education in Vancouver. She says the respondent took M. to look at schools in 2019 and 2020. She deposes that they agreed to place deposits for both a Vancouver and Hong Kong school to keep their options open. Confusingly, she later deposed that the respondent refused to pay deposits on any Vancouver schools.
- [35] The respondent does not dispute that they discussed alternative schools for M., including some in Vancouver as a backup plan. However, he deposes that they never actually applied to any schools other than the Canadian International School of Hong Kong
- [36] I prefer the evidence of the respondent over that of the claimant in relation to the discussions and decisions about M. returning to Hong Kong to attend school for the 2023-2024 school year. The respondent's evidence is well supported by emails and text messages both with the Canadian International School of Hong Kong and with the claimant. In particular, from the text messages it is clear that the parties discussed applying to the Canadian International School of Hong Kong, discussed how to prepare M. for his interview with the school and discussed the payment of the deposit to the school once he was accepted.
- [37] Additionally, the claimant does not deny that the deposit was paid to secure M.'s spot at the Canadian International School of Hong Kong. Rather, she merely deposes that deposits were paid at Vancouver schools as well. However, she offers no documentation supporting that they applied to schools in Vancouver or that deposits were paid at Vancouver schools. She may have independently done so but, if so, she did it in secret and without the agreement of the respondent.
- [38] Considering all the evidence, I am satisfied that the parties did agree that M. would return to Hong Kong to attend at the Canadian International School of Hong Kong for the 2023-2024 school year. Further, I am satisfied that the 2023-2024 school year in Hong Kong commenced on August 15, 2023. This was the respondent's evidence and was not disputed by the claimant.
- [39] It is, of course, common ground that M. did not return to Hong Kong on August 15, 2023, and that he remains in Vancouver.

Proceedings Chronology

BC Supreme Court Proceedings

- [40] The notice of family claim in this matter was filed by the claimant on January 23, 2023. In it, she claims parenting orders, spousal and child support and division of property.
- [41] On January 24, 2023, a without notice asset restraining order was issued by Justice Chan.
- [42] On March 9 and May 9, 2023, consent orders were issued continuing the asset restraining order.
- [43] On August 8, 2023, a jurisdiction response was filed by the respondent.
- [44] Also on August 8, 2023, a judicial case conference was held. The only order made was to release the parties from the judicial case conference program.
- [45] On August 21, 2023, the claimant filed her notice of application for interim child and spousal support, payment of special expenses and for disclosure of documents.
- [46] On September 14, 2023, the respondent filed the current application for the return of M. to Hong Kong and challenging the jurisdiction of this Court.
- [47] On September 15, 2023, an amended notice of family claim was filed which added a claim for divorce.
- [48] On October 5, 2023, Justice Groves adjourned the notices of application filed on August 21 and September 14, 2023. The terms of the adjournment included that a views of the child report be arranged. The order further provided that it was without prejudice and could "in no way be advanced to defeat the respondent's future application under the Hague Convention or his application to challenge the jurisdiction of this honourable Court".
- [49] Following the preparation of the views of the child report, the hearing of applications filed on August 21 and September 14, 2023, commenced before me on November 24, 2023, although as I have indicated, submissions have only been made on the respondent's application filed September 14, 2023.

Hong Kong Proceedings

- [50] Meanwhile, on August 21, 2023, the respondent filed a proceeding in the Hong Kong courts for divorce, custody orders, maintenance, and property division. The Hong Kong proceeding was later served on the claimant.
- [51] On October 19, 2023, Master Lam of the Family Court Registry in Hong Kong gave various directions for the proceeding there. The directions included that the respondent in that proceeding (the claimant in this proceeding) was to make an application "regarding appropriate forum, if so advised" within 28 days.

- [52] An application was subsequently brought by the respondent in that proceeding (the claimant in this proceeding) for a 14-day extension of time within which to bring her "appropriate forum" application. That application was set to be heard on November 23, 2023.
- [53] On the second day of the hearing in this matter, I was advised by counsel that the Hong Kong court extended the time for the filing of the "appropriate forum" application to December 4, 2023.

Issues

- [54] There are two issues raised by the application. The first is whether this court should order the return of M. to Hong Kong under either the Hague Convention or the FLA. The second is whether the court has jurisdiction to address the claims in the notice of family claim for child support, spousal support and property division.
- [55] I will address first, whether M. is required to be returned to Hong Kong pursuant to the provisions of the Hague Convention. I will then address the question of the jurisdiction of this court.

Return of the Child

The Hague Convention

- [56] It is agreed that Hong Kong is a signatory to the Hague Convention as is Canada.
- [57] Pursuant to s. 80 of the FLA, the Hague Convention has the force of law in British Columbia.
- [58] The objectives of the Hague Convention are set out in Art. 1. They 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 access under the law of one Contracting State are effectively respected in the other Contracting States.
- [59] Article 3 of the Hague Convention addresses the circumstances where the removal or retention of a child is wrongful, namely, where the removal or retention is in breach of the rights of custody of another and those rights of custody were actually being exercised.

Article 3

The removal or the retention of a child is to be considered wrongful where:

- a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

[60] I note that the claimant has not challenged the applicability of the Hague Convention on the basis that the respondent did not have or did not exercise rights of custody. Moreover, the evidence includes a letter from Hong Kong solicitors dated September 28, 2023, setting out that under Hong Kong law "in relation to custody the rights and authorities of the father and mother shall be equal and exercisable by either without the other".

[61] Article 4 provides that the convention applies to children under 16, which is the case for M.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

[62] Article 12 of the Hague Convention provides that where a child is wrongfully removed or retained, an order for the return of the child shall be made provided that the application for the return of the child is made within one year of the wrongful removal or retention. If the application is made outside the one-year period, an order for the return of the child shall be made, unless it is demonstrated the child is settled in its new environment.

Article 12

Where a child has been wrongfully removed or retained in terms of article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the proceeding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

[63] Article 13 of the convention provides for certain exceptions, including: where the person seeking the return of the child consented to or acquiesced in the removal or retention of the child; where the return of the child would expose the child to a grave risk of physical or emotional harm; or where the child is sufficiently mature and objects to being returned.

Article 13

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:

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[64] The parties have referred me to multiple authorities involving the Hague Convention and wrongful removal or retention of children. I do not intend to refer to all those authorities. The applicable legal principles and the proper approach were very recently summarized by Horsman J. in *Gill v. Gill*, 2024 BCCA 140 and by Skolrood J. in *Laranjeira e Silva v. Virco*, 2024 BCCA 164 [Virco].

[65] In *Gill*, Horsman J. summarized the principles and approach as follows:

[16] The objects of the Hague Convention, as set out in Article 1, are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State", and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States".

[17] Under Article 3, the removal or retention of a child is considered to be wrongful where: (a) it is in breach of rights of custody attributed to a person under the law of the State in which the child was "habitually resident" immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised, or would have been exercised but for the removal or retention. Article 5 broadly defines rights of custody. They include rights relating to the care of the person of the child, and the right to determine the child's place of residence.

[18] If the criteria in Article 3 are established, Article 12 provides that where an application for return of a child has been commenced within one year of the wrongful removal or retention, the judicial or administrative authority of the Contracting State where the child is "shall order the return of the child forthwith".

- [19] Article 13 sets out a list of exceptions in which the requested State is not bound to order the return of a child. This includes, in (b), where 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".
- [20] An order for the return of a child under the Hague Convention is not a custody determination. It is simply 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 the abduction: *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 at para. 24 [Balev].
- [21] In determining whether there has been a wrongful removal or retention of a child under Article 3, the court must first determine where the child was "habitually resident" immediately before the removal or retention. Within the overall scheme of the Hague Convention, the purpose of the habitual residence requirement is to define the children to whom the Hague Convention applies. If the child's habitual residence is not in the state of the parent seeking return, then the Hague Convention does not apply: *Balev* at para. 36.
- [22] The term "habitually resident" is not defined in the Hague Convention. In *Balev*, the Supreme Court of Canada adopted a "hybrid approach" to determining habitual residence. This approach requires an application judge to determine the "focal point" of the child's life--that is, the family and social environment in which the child's life has developed--immediately prior to the removal or retention: *Balev* at para. 43. The entirety of the relevant circumstances should be considered, and no single factor dominates the analysis: *Balev* at para. 44. The circumstances of the parents, including their intentions, may be an important consideration, particularly in the case of young children. However, the role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case": *Balev* at para. 45.
- [66] In *Virco*, at paras. 28-31, Skolrood J. summarized the principles and approach as follows:
- [28] The leading Canadian decision on the Hague Convention is *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, where Chief Justice McLachlin, for a majority of the Court, described the key objectives of the Convention:
- [24] The Hague Convention is aimed at enforcing custody rights and securing the prompt return of wrongfully removed or retained children to their country of habitual residence: see Article 1; *Thomson v. Thomson*, 1994 CanLII 26 (SCC), [1994] 3 S.C.R. 551, at pp. 579-81. The return order is not a custody determination: Article 19. It is simply an order designed to restore the status quo which existed before the wrongful removal or retention, and to deprive the "wrongful" parent of any advantage that might otherwise be gained by the abduction. Its purpose is to return the child to the jurisdiction which is most appropriate for the determination of custody and access.

- [29] As is apparent from the various Articles reproduced above, an important consideration under the Convention is the habitual residence of the child in issue. That term is not defined in the Hague Convention. However, a central feature of Chief Justice McLachlin's decision in *Balev* is her endorsement of a "hybrid approach" to determining habitual residence, which she distinguished from the "parental intention" and "child-centered" approaches that had been used in various other jurisdictions. Chief Justice McLachlin described the hybrid approach in these terms:
- [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.
- [30] Another leading authority on the proper approach to determining Hague Convention applications is *Ludwig v. Ludwig*, 2019 ONCA 680 where the Court of Appeal for Ontario held that determining habitual residence for the purposes of the Hague Convention involves a two-stage analysis: first, the court must determine the date of the alleged wrongful removal or retention; and second, the court must determine in which state the child was habitually resident immediately prior to the removal or retention (at para. 23).
- [31] In *Ludwig*, Justice Tulloch (as he then was) provided a helpful summary of the governing analytical framework (at para. 40):

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:

...

- [32] Stage two involves consideration of the various 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. The appellant sought to establish certain of these exceptions before the judge. However, as I will discuss below, the judge rejected those arguments and the appellant has not appealed those aspects of the judge's decision.
- [67] As noted in *Gill and Virco* and the cases cited therein, the determination of whether a child has been wrongfully removed or retained depends on the habitual residence of the child at the time of the alleged wrongful removal or retention. A hybrid approach is used to determine this habitual residence. In the circumstances of this case, this involves a

determination of the focal point of M.'s life immediately before the removal or retention by considering the links and circumstances to Hong Kong and British Columbia and the circumstances of his move to British Columbia. If I find his habitual residence at the material time was British Columbia, the application must be dismissed. If I find his habitual residence at that time was Hong Kong, then I proceed to the second stage of the analysis and consider whether the exceptions in Art. 13 of the Hague Convention apply. If none of the exceptions apply, M. must be returned to Hong Kong.

- [68] Virco is also instructive in how parental intention and time-limited travel should be addressed. At paras. 59-61, Skolrood J. reminds us that the intention of the parents is not determinative of habitual residence but merely a factor to be considered. He further observes that parental intention can change.
- [59] The Chief Justice returned to this point later in her reasons when she considered whether a child's habitual residence can change while they are staying with one parent under the time-limited consent of the other:
- [73] Applying the hybrid approach, the application judge considers the intention of the parents that the move would be temporary, and the reasons for that agreement. But the judge also considers all other evidence relevant to the child's habitual residence. The court must do so mindful of the risk of overlaying the factual concept of habitual residence with legal constructs like the idea that one parent cannot unilaterally change a child's habitual residence, or that a parent's consent to a time-limited stay cannot shift the child's habitual residence. The court must also avoid treating a time-limited consent agreement as a contract to be enforced by the court. Such an agreement may be valuable as evidence of the parents' intention, and parental intention may be relevant to determining habitual residence. But parents cannot contract out of the court's duty, under Canadian laws implementing the Hague Convention, to make factual determinations of the habitual residence of children at the time of their alleged wrongful retention or removal.
- [60] The time limited nature of the travel here cannot be ignored, particularly since approval was in the form of a court ordered Authorization, issued over the objection of the father. One can readily understand the father's position that upon expiry of the Authorization, return of the Child to Brazil was expected. However, to make this factor determinative would be to ignore the requirements of the hybrid approach under which the Court must consider all relevant circumstances with a view to determining the focal point of the child's life immediately before the alleged wrongful retention.
- [61] It also ignores that parental intentions, or one parent's intentions, can change and without bad faith being involved. As observed in *K.F. v J.F.*, 2022 NLCA 33:
- [58] As discussed in *Balev*, Chief Justice MacLachlin identified the problem with Courts over relying on parental intention (paras. 45, 69). By way of further explanation, I add that permitting the determination of a child's habitual residence to rest on parental intention as it has been described and applied in pre-*Balev* jurisprudence fails to recognize that parents'

intentions and lives change. Parents, together or separately, are people who often change their minds about where they want to live and whether they want to stay together as a unit. Failing to appreciate this reality, and binding both parents to a joint intention formed at a previous time and in different circumstances, binds both parents to the preference of one parent over the other, and effectively treats the child as a possession of the parent whose intention has not changed. That approach is folly, in that it diverts the inquiry away from determining the child's own connections to the jurisdictions in question, as Balev directs. The inquiry into habitual residence must concentrate on the focal point of the child's life immediately before the time of the alleged wrongful removal or retention, and not on past parental intentions that do not reflect the current circumstances of either the parents or the child.

[Emphasis added.]

Stage 1 - Step 1 - Date of Wrongful Retention

- [69] The first step in the analysis is to determine the date of the alleged wrongful retention.
- [70] The respondent submits that the date of wrongful retention was August 15, 2023, being the date on which the 2023-2024 school year commenced in Hong Kong.
- [71] The claimant made no submissions on the date of wrongful retention other than noting the alleged date was August 15, 2023.
- [72] I have above found as a fact that the parties agreed M. would return to Hong Kong to attend at the Canadian International School of Hong Kong for the 2023-2024 school year and that the school year commenced on August 15, 2023. It is common ground that M. did not return to Hong Kong by August 15, 2023. This is therefore the date of the alleged wrongful retention.

Stage 1 - Step 2 - Habitual Residence

- [73] The second step in the stage 1 analysis is to determine the habitual residence of M. immediately before the alleged wrongful retention, which means immediately before August 15, 2023.
- [74] The respondent submits that M.'s habitual residence immediately before August 15, 2023, was Hong Kong. The respondent relies heavily on the fact that the move to Vancouver was always intended to be temporary and that the last time the parties lived together as a family was in Hong Kong. The respondent stresses the facts and circumstances connecting M. with Hong Kong and further submits that the claimant's lack of immigration status in Canada is a relevant factor.

- [75] The claimant submits that M.'s habitual residence immediately before August 15, 2023, was British Columbia. She submits that the move to British Columbia was intended to be permanent. She stresses the facts and circumstances connecting M. to British Columbia. The claimant additionally submits that her lack of immigration status is not a relevant consideration in the analysis.
- [76] The task before me is to determine the focal point of M.'s life immediately prior to August 15, 2023. In doing so, I am to consider M.'s links and circumstances in Hong Kong, the links and circumstances of the move to British Columbia, and his links and circumstances in British Columbia.

M.'s Links and Circumstances in Hong Kong and British Columbia

- [77] There are several facts and circumstances suggesting M.'s habitual residence, or the focal point of his life, immediately prior to August 15, 2023 was Hong Kong and several that suggest it was British Columbia
- [78] In relation to Hong Kong, the relevant facts and circumstances include:
- a) He was born in Hong Kong;
 - b) He lived in Hong Kong with the parties from his birth until 2012 or 2013 and then from 2014 until August 2020 when he moved with the claimant to British Columbia;
 - c) He attended school in Hong Kong until August 2020;
 - d) He was enrolled to attend school in Hong Kong in 2023;
 - e) The claimant is a citizen of Hong Kong and, notwithstanding she has been in British Columbia since August 2020, she continues to have ties to Hong Kong; and
 - f) The respondent resides in Hong Kong.
- [79] The respondent stresses that the parties last lived together as a family in Hong Kong. That is true and I accept that as of August 2020, M.'s habitual residence was Hong Kong. However, that does not assist in answering the question before me, which is M.'s habitual residence as of August 15, 2023.
- [80] The respondent additionally stresses that M. has expressed a desire to spend more time with his father, who resides in Hong Kong. This is an important factor and one that I take into account. However, it is somewhat diminished by several other factors. First, the claimant, not the respondent, has clearly been the primary caregiver for M and she is currently residing in British Columbia, albeit on a visitor's visa. Second, it is apparent that frequent travel and extended stays in Vancouver have been a constant aspect of the family's life together. For example, during the two periods when M. lived in Vancouver with his grandparents, the parties travelled frequently to be with him. Given the propensity of the parties to travel, M. and the respondent can spend more time together in Vancouver,

although not as much time as they would have if M. returned to Hong Kong.

- [81] There are also significant facts and circumstances connecting M. to British Columbia. These include:
- a) He is a Canadian citizen;
 - b) His paternal grandparents reside in British Columbia;
 - c) He lived with his paternal grandparents in British Columbia for approximately two years from 2013 to 2014;
 - d) He has a step-sister who lives nearby in Seattle;
 - e) While living in Hong Kong, he travelled frequently to British Columbia with the parties. During those travels, he attended various lengthy summer programs at St. George's School in Vancouver, including in the years 2016, 2017, 2018 and 2019;
 - f) The claimant, M.'s primary caregiver, is currently residing in British Columbia; and
 - g) The respondent owns a house in British Columbia in which the claimant and M. have resided since August 2020.
- [82] The respondent suggests that the connections with Canada are diminished by the fact that M. pays foreign student fees and does not have health care or other benefits enjoyed by residents of British Columbia. That is so but I do not consider it a particularly important factor. Given his Canadian citizenship, there is nothing preventing him from becoming a full-fledged resident of British Columbia with all of the associated benefits.
- [83] I also take into account that during the three years from August 2020 to August 2023, M. has understandably deepened his roots here. He has developed several close friendships. He participates in many programs and activities including lifeguard training, competitive swimming, and school band. I accept, as the respondent submits, that M. can make new friends in Hong Kong and can do the same sorts of activities in Hong Kong. However, this does not alter the fact that as of August 15, 2023, M. had these connections with British Columbia.
- [84] I further take into account that the parties, including the respondent, always had an intention that M. would someday live in Canada. The claimant deposes to this directly several times in her affidavits. Although in his affidavit #4, at para. 17, the respondent denies he intended M. to attend school in Canada, I do not accept this evidence. In his earlier affidavit #2, at para. 25, he deposed that upon graduating from Canadian International School in Hong Kong, M. will have easier access to university programs in Canada, thus suggesting an intention that he would receive some schooling in Canada. Additionally, in a text message on December 9, 2020, the respondent wrote "I have all along wanted young M. to live in Canada".

The Links and Circumstances of the Move

- [85] I have addressed the circumstances of the move to Canada from Hong Kong. I have found as a fact that the move to Vancouver in August 2020 was intended to be a temporary move because of the COVID-19 pandemic and the severe restrictions imposed in Hong Kong. However, the fact that the parties intended the move to be temporary, although an important factor, is not definitive: Balev, at para. 45; Gill at para. 22; Virco at para. 59-61.

Relevance of Claimant's Lack of Immigration Status

- [86] The respondent submits fairly strongly that the claimant's lack of any immigration status in Canada is a factor that must be taken into account and that weighs heavily in favour of returning M. to Hong Kong. The claimant submits that this is just one of many factors and is neither determinative nor particularly relevant since the claimant has been effectively living in Canada for three years without any formal status.
- [87] I have been provided with only one authority that addresses the relevance of a party's immigration status, namely, *Jenkins v. Jenkins* (2000), 8 R.F.L. (5th) 96, 2000 CanLII 22523 (ON SC). *Jenkins* was not a Hague Convention case. Rather, the issue in *Jenkins* was whether the spouses and their children could be "ordinarily resident" in a province, within the meaning of the then Divorce Act, when they did not have any immigration status. The court held that the lack of status was not an impediment to a finding of ordinary residence.
- [15] The father's counsel submitted that without legal immigration status as permanent or at least indefinite term Canadian residents, the parties and children could not be regarded as ordinarily resident here. I disagree. Ordinary residence as viewed by the case law is a question of fact, not dependent on citizenship, domicile or even immigration status. The cases have not gone so far as to say that only permanent residence or landed immigrant status will do. See *Trotter v. Trotter* (1992), 1992 CanLII 8600 (ON SCDC), 90 D.L.R. (4th) 554 (Ont. Gen. Div.) (wife in Canada on visitor's visa for less than two years was ordinarily resident). The parties and children all were legally in the country throughout the entire three and a half year period and no one had taken any steps to terminate the mother's or children's residence here by the time this motion came before me. Absent any action by the mother to leave or by the government to remove them from Canada, the mother and children's residence did not lose the quality of ordinariness.
- [88] Notwithstanding the decision in *Jenkins*, I remain troubled by the fact that the claimant is in Canada on a visitor's visa which she renews by travelling across the border every six months. I agree with the respondent that this could be problematic if she was refused entry. However, she has not been denied entry in over three years and it is speculation to suggest that this will change. Moreover, in the event such a situation occurred, M. would not be left alone to fend for himself. His paternal grandparents are present in Vancouver. The parties were sufficiently content with their ability to look after M. that they allowed him to live with them for approximately two years and informally appointed them as his guardians. There is

no suggestion in the evidence that they are incapable of stepping in to look after M. should the claimant have difficulties renewing her visitor's visa. Therefore, in the particular circumstances of this case, given M.'s age, the fact the family has always been relatively mobile and the presence of the paternal grandparents in the jurisdiction, the claimant's lack of immigration status has less weight.

- [89] Considering all of the above facts and circumstances, I am of the view that, notwithstanding the move in August 2020 was intended to be temporary, by August 15, 2023, British Columbia was the focal point of M.'s life and his habitual residence. It follows from this that M. is not to be returned to Hong Kong.

Stage 2 - Exceptions

- [90] Given my conclusion that M.'s habitual residence immediately before August 15, 2023 was British Columbia, it is not necessary to address whether there are any exceptions that apply. However, if I had determined the habitual residence was Hong Kong, I would nevertheless have determined that he should not be returned based on his age and maturity and his objection to being returned.

- [91] As indicated, the evidence includes an Evaluative Views of the Children Report dated November 19, 2023, prepared by Nooshin Morgan. I quote liberally from Ms. Morgan's report:

In both interviews conducted by the Assessor, preference to continue residing in Canada, articulating his disinterest in returning to Hong Kong. [M.]'s stance on where he wants to live, favouring Canada over Hong Kong, reflects a thoughtful decision based on perceived opportunities and a desire for continuity in friendships and education.

The move from Hong Kong to Canada has significantly impacted [M.]'s social life. He expresses a preference for the friendly and open atmosphere in Canada, emphasizing the importance of relationships with friends like "Ben, Matteo, and Aaron". His engagement in activities like sleepovers and playing saxophone in the school jazz band underscores the significance of these social connections in his life.

[M.]'s perspective on his educational aspirations and preference for living in Canada is evident throughout his statements. He expressed a clear desire to stay in Canada emphasizing the opportunities and better educational environment compared to Hong Kong. [M.'s] sentiment is captured in his words: "I want to stay here. I've made up my mind like a long time ago that I wanted to stay here." He believes that the curriculum in Hong Kong is more challenging, and the language barrier would make it difficult for him to adapt.

[M.] says initially, they moved to Canada due to the pandemic, expecting a temporary stay. However, his desire to remain in Canada has grown over time, influenced by the perceived opportunities, educational advantages, connection with peers and quality of life.

[M.] expresses a preference for staying in Canada, citing the broader opportunities for education and the familiarity of his current life. He appreciates the support and encouragement he receives from his mother, who actively contributes to his well-being, including driving him to school and helping him manage his busy schedule.

The impact of the family's relocation from Hong Kong to Canada is apparent in [M.].s longing for the normalcy of life before the conflicts escalated. He expresses concerns about the potential consequences of moving back to Hong Kong, emphasizing the loss of friendships, the comfortable living conditions, and the educational advantages he perceives in Canada.

Overall, [M.].s narrative suggests a nuanced understanding of his family dynamics and a desire for stability and continuity in his life in North Vancouver. The conflict between his parents and the potential disruption of his living situation weighs heavily on his thoughts and preferences.

In terms of broader safety considerations, [M.] seems to prioritize his current living conditions in Canada. He emphasizes the importance of staying in a place where he has established connections, enjoys a larger living space, and sees opportunities for his future. The potential move to Hong Kong is viewed with apprehension, anticipating challenges like adjusting to a different school system, smaller living spaces, and the need to rebuild social connections.

[M.] asserts that his decision to stay in Canada is driven by his desires rather than parental influence. This autonomy indicates his growing sense of independence and conviction in shaping his future.

[M.].s strong preference for residing in Canada is evident in his statements, expressing a deep attachment to his current community. He articulates, "I want to stay here. I've made up my mind like a long time ago that I wanted to stay here." This decision is rooted in his comfort with the Canadian lifestyle and his acknowledgment of the challenges he might face if he were to relocate to Hong Kong. He perceives the academic environment in Hong Kong as more demanding and identifies potential language barriers as obstacles to adapting seamlessly. [M.] emphasizes the quality of life in Vancouver, citing the favourable living conditions and the support system he has established, stating, "The living conditions are good. It's far better than Hong Kong." His desire to maintain existing friendships further solidifies his choice, as he mentions, "I have friends here, and I don't really want to find new friends again back in Hong Kong." Ultimately, [M.].s preference for living in Canada is a holistic decision influenced by educational opportunities, lifestyle, and the emotional connections he has cultivated in Canada in the last three years. [Emphasis added.]

[92] Importantly, Ms. Morgan determined that M.'s preference to remain in Canada was not influenced by the parties.

While [M.].s relationship with his parents is complex, and he has experienced challenges within his family, his decision seems to be shaped by factors beyond immediate familial influence and are as follows

Concerns about the family's disagreement are evident in [M.]'s responses, particularly regarding the arguments between his parents. He expresses a wish for them to handle disagreements more calmly and constructively. Despite this, he doesn't feel pressured by either parent to choose sides in their conflicts. Therefore, this assessor believes that [M.]'s desire to stay in Canada is authentically his own. [Emphasis added.]

[93] Ms. Morgan summarized her findings as follows:

In summary, several reasons contribute to [M.]'s strong preference for staying in Canada over returning to Hong Kong. These reasons are multifaceted and encompass educational considerations, language preferences, social connections, family stability, and the belief in a brighter future with more opportunities. [M.]'s perspective reflects the intricate interplay between personal experiences, cultural influences, and his academic and personal growth aspirations.

[94] Concerning M.'s degree of maturity, Ms. Morgan said:

It is this assessor's opinion that [M.] has a mature understanding of his situation and expresses a desire to stay in Canada. He provides thoughtful insights into the dynamics between his parents, acknowledging their different perspectives and behaviours. [M.]'s preference for staying in Canada is influenced by the opportunities he perceives in terms of education and future career prospects. [Emphasis added.]

[95] Ms. Morgan also expressed the view that:

Overall [M.] presents a mature perspective on his family situation and shows a strong preference for remaining in Canada due to perceived opportunities and a stable living environment. [M.]'s relationships with friends, active involvement in the swimming club, commitment to music, and the goal of becoming a lifeguard collectively contribute to a well-balanced and purposeful life. These aspects not only enrich his personal experiences but also showcase his commitment to physical and mental well being. [Emphasis added.]

[96] I note that M. was 14 years of age when he was interviewed by Ms. Morgan.

[97] The approach in British Columbia to a views of the child report was set out by Justice Butler (as he then was) in *C.C. v. D.R.*, 2018 BCSC 176 at para. 36:

[36] Of course, if the law in Ontario is different, I must apply the British Columbia law. In this province, the Court of Appeal has adopted the approach to the views of the child exception as set out in *Re M*, [2007] UKHL 55. I summarized that approach in *G.A.G.R. v. T.D.W.* [2013 BCSC 586] at para. 53 as follows:

In summary, the proper approach to the exercise of discretion under Article 13 includes the following:

- a) While courts are increasingly encouraged to take account of the views of children, that does not mean that their views are determinative or even presumptively so.

- b) The question as to whether a child has reached an age and degree of maturity where it is appropriate to take her views into account must be determined based on all of the evidence. The relevant evidence will include the nature, strength and reasons for the child's objection.
- c) A child's views should only be regarded if they are authentically her own. If the views have been influenced by someone else, or are based solely on a desire to stay with the abducting parent, then they should be given little weight.
- d) The exercise of discretion may take into account the child's welfare.
- e) The policy considerations underlying the Convention are an important factor in the exercise of discretion.
- f) The older the child, the more weight her objections are likely to carry, however, there is no minimum age at which the objections can be taken into account.
- g) A child's views can prevail even where the circumstances are not exceptional.

[98] In *Silva v. da Silva*, 2018 BCSC 788, Justice Fleming (as she then was), wrote:

[39] The child objection exception in Article 13 of the Hague Convention provides the court with a discretion to refuse to order the return of a child, although wrongfully retained, if two conditions are met: first, the child himself objects to being returned; and second, he has attained an age and degree of maturity which makes it appropriate to take his views into account: *Re M*, [2007] UKHL 55, [2008] 1 All ER 1157, para. 46.

[40] In *Beatty v. Schatz*, 2009 BCSC 706, Justice Martinson determined the proper approach to the exercise of the court's discretion was articulated by the House of Lords in *Re M*, at para. 46, which reads:

In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play only when two conditions are met: first, that the child herself objects to being returned and second, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion come into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances. [Emphasis added in *Beatty*]

- [41] The Court of Appeal agreed, also emphasizing that each case turns on its particular facts: *Beatty v. Schatz*, 2009 BCCA 310, at para. 20.
- [99] These authorities confirm that Art. 13 of the Hague Convention gives me a discretion to refuse to order the return of a child wrongfully removed or retained on the grounds that the child objects to being returned provided I am satisfied: that the child objects; that the child's view are their own; and they have the necessary age and maturity to take their views into account.
- [100] I find that Ms. Morgan's report to be very compelling. I agree with her assessment that M. displays a "mature perspective" and that his objections to returning to Hong Kong are, for the most part, based on thoughtful considerations. If necessary, I would have given effect to his objections and refused to order his return to Hong Kong.

Jurisdiction

- [101] Given my determination respecting M.'s habitual residence, I do not intend to address the jurisdiction issue in any detail. In submissions before me, the respondent rightly conceded that, if I determined M. was to remain in Canada, then this court had jurisdiction over parenting, child support, and spousal support. However, while accepting that this court has jurisdiction to determine property division, the respondent nevertheless submits that Hong Kong is the more appropriate forum to determine property division.
- [102] The respondent relies on ss. 106(4) and (5) of the FLA, which provide:
- 106(1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.
- (2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:
- (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
- (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
- (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
- (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.
- (3) For the purposes of subsection (2) (d), a real and substantial connection is presumed to exist if one or more of the following apply:
- (a) property that is the subject of the proceeding is located in British Columbia;

- (b) the most recent common habitual residence of the spouses was in British Columbia;
 - (c) a notice of family claim with respect to the spouses has been issued under the Divorce Act (Canada) in British Columbia.
 - (4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.
 - (5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:
 - (a) [Repealed 2014-9-15.]
 - (b) the relative convenience and expense for the spouses and their witnesses;
 - (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
 - (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
 - (e) the extent to which an order respecting property or debt
 - (i) made in another jurisdiction would be enforceable in British Columbia, and
 - (ii) made in British Columbia would be enforceable in another jurisdiction;
 - (f) the fair and efficient working of the Canadian legal system as a whole;
 - (g) any other circumstances the court considers relevant.
 - (6) A determination of authority under subsection (2) or of whether to decline jurisdiction under subsection (4) is to be made solely by reference to this section.
- [103] The onus is on the respondent to show that Hong Kong is a more appropriate forum: *Jiang v. Shi*, 2017 BCCA 276, at para. 60.
- [104] In my view, the respondent has failed to discharge the onus of proving Hong Kong is a more appropriate forum.
- [105] First, the parties and potential witnesses are located in both Hong Kong and British Columbia. There is no clear preference for Hong Kong in relation to the location of the parties and the witnesses.
- [106] Second, there is property in both British Columbia and Hong Kong and it is not suggested that orders made in one jurisdiction will not be enforced in the other. Again, there is no clear preference for Hong Kong in relation to the location of the property.
- [107] Third, the British Columbia proceedings appear to be slightly more advanced than those in Hong Kong. The desirability of avoiding multiple proceedings would tend to favour British Columbia.

[108] Finally, and most importantly, the fair and efficient working of the Canadian legal system favours British Columbia. This is so because issues of spousal support and property division are frequently intertwined. The amount and duration of spousal support can be affected by how property is divided and vice versa. Therefore, it is better that spousal support and property division be decided together in this court. Indeed, having property division and spousal support addressed in two different jurisdictions could result in an injustice.

Order

[109] Accordingly, the respondent's notice of application is dismissed in its entirety.

[110] The parties have leave to speak to me on the matter of costs, if necessary.

"Giaschi J."

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