SCC File No. 39875

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

F.

APPELLANT
(Respondent)

-and-

N.

RESPONDENT
(Applicant)

-and-

ATTORNEY GENERAL OF ONTARIO, OFFICE OF THE CHILDREN'S LAWYER, DEFENCE FOR CHILDREN INTERNATIONAL-CANADA, and CANADIAN COUNCIL OF MUSLIM WOMEN (CCMW)

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PART I – OVERVIEW

1. The Office of the Children's Lawyer ("OCL") submits that the best interests of the child must inform a court's discretionary determinations regarding whether to assume jurisdiction due to serious harm under s. 23 of the ***Children's Law Reform Act*** ("CLRA"), and whether to make a return order under s. 40 of the CLRA.

2. The best interests of the child is an overarching principle in international human rights law under the United Nations **Convention on the Rights of the Child** ("CRC")[1] and in domestic family law.[2] To ensure compliance with the relevant human rights, *Charter* and legislative mandates, ss. 23 and 40 of the CLRA require a holistic, child-centred approach informed by the best interests of the child.

PART II – QUESTION IN ISSUE

3. The issue in this appeal is whether and to what extent the "best interests of the child" principle should inform the interpretation and application of ss. 23 and 40 of the CLRA, including which factors warrant consideration.

PART III - ARGUMENT

Overarching Principles: The Best Interests of the Child

4. In ratifying international human rights conventions, "Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms".[3] Given the presumption of conformity with the values and principles enshrined in international law, the rights of children under the CRC have been long-held to directly inform statutory interpretation and the exercise of discretionary decision-making.[4]

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[1] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 ("**CRC**")

[2] ***Ontario (Children's Lawyer) v Ontario (Privacy Commissioner)***, 2018 ONCA 559, paras 55-64 ("***OCL v IPC***"); ***SS v RS***, 2021 ONSC 2137, paras 26-50

[3] ***Reference re Public Service Employee Relations Act (Alta.)***, [1987] 1 S.C.R. 313, [1987] SCJ No 10 (QL), para 59 **("*Re PSERA*")**, as cited in ***Quebec (Attorney General) v. 9147-0732 Québec inc.***, 2020 SCC 32 (CanLII), para. 32 **("*Quebec (AG)*").** *See also* **CRC**, Article 4; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331, articles 27 and 27

[4] ***Baker v. Canada (Minister of Citizenship and Immigration)***, **1999 CanLII 699 (SCC)**, [1999] 2 SCR 817, paras 69-71**("*Baker*")**; ***Kanthasamy v. Canada (Citizenship and Immigration)***, 2015 SCC 61, [2015] 3 SCR 909, paras 34-41 ("***Kanthasamy***")**;** ***AC v Manitoba (Director of Child and Family***

5. Articles 3 (best interests), 2 (non-discrimination) and 12 (right to be heard) are fundamental rights under the CRC; they are overarching and inform the interpretation of all other rights.[5] The UN Committee on the Rights of the Child has described the child's best interests as a threefold concept: substantive, interpretive and procedural. As a substantive right, it includes:

> The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child […] Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.[6]

6. The CRC also protects the child's right to identity, including nationality (Articles 7, 8), and the right not to be separated from their parent against their will, except in their best interests (Article 9). These rights intersect and inform each other with the overall goal of protecting the best interests of children, while recognizing their evolving maturity as individuals (Articles 5, 12). In recognition of children as "full rights bearers," the OCL asks this Court to consider and give effect to these rights in this appeal.[7]

7. This Court has also repeatedly held that the *Charter* is generally presumed to provide at least as much protection as that afforded by the international human rights treaties Canada has ratified, including the CRC.[8] While this case no longer involves a constitutional challenge, the role of *Charter* compliance in the exercise of discretionary decision-making remains relevant. *Charter* compliance is achieved in this case by adopting a principled best interests approach in the application of ss. 23 and 40, consistent with the overarching purposes of the CLRA and CRC.

Services), 2009 SCC 30, para 93 ("***AC v Manitoba***"); ***MM v USA,*** paras 144, 146-148 **("*MM*")**; ***OCL v IPC*** paras 51, 58-63, 74-5, 88

[5] Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* UN Doc. CRC/C/GC/14 (2013), para 1 **("CRC GC14")**

[6] **CRC GC14**, at para 6. This Court has relied on the General Comments of human rights treaty bodies in a number of decisions: *see, for example,* ***Divito v. Canada,*** 2013 SCC 47, [2013] 3 SCR 157, paras 26-27; ***Suresh v. Canada (Minister of Citizenship and Immigration)*****,** 2002 SCC 1, [2002] 1 SCR 3, para 67; ***Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse),*** 2021 SCC 43, para 197

[7] ***Michel v. Graydon*****,** 2020 SCC 24, para 77

[8] ***Re PSERA***, para 59; ***Slaight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038, para. 23**;** ***Quebec (AG)***, para 31

Application of the Best Interests Principle to Sections 23 and 40 of the CLRA

8. When engaging in decision-making under ss. 23 or 40 of the CLRA, a court must turn its mind to, seriously consider, and give substantial weight to the rights of children, including their best interests.[9] The principle is "highly contextual" because of the "multitude of factors that impinge on best interests" and "must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity".[10] It further entails "[d]eciding what…appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention".[11]

9. The Majority in the court below prioritized the enforcement of parental rights of custody and the general aim of deterring abduction as the true focus of a return order.[12] This narrower focus has the potential to erroneously minimize a consideration of the best interests of the individual child before the court. If a child's best interests has the potential to conflict with other interests or rights, the primacy of best interests means that "a larger weight must be attached to what serves the child best" "in all circumstances, but especially when an action has an undeniable impact on the children concerned".[13]

10. The OCL submits that the Dissent adopts the proper approach and is supported by four imperatives: **1)** the clear statutory language and purposes of the CLRA; **2)** compliance with the CRC; **3)** jurisprudence; and **4)** compliance with the *Charter*. The Dissent relied on the CLRA and its purposes (ss. 19 and 24), as informed by the CRC and the relevant jurisprudence in reaching his conclusions and recognized that the analysis relating to serious harm (s. 23 CLRA) and whether to grant a return order (s. 40 CLRA) must necessarily be "guided by the imperative of the best interests of the child".[14]

11. An approach to serious harm which fails to consider and give due weight to relevant best interests factors, or a return order made contrary to/without regard to the children's overarching best interests, constitutes legal error. The OCL asks this Court to articulate a principled approach to ss.

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[9] ***Baker***, paras 69-71; ***MM***, paras 146, 201, 220 and 262
[10] ***Kanthasamy***, paras 35-37
[11] ***Kanthasamy***, paras 36 and 39
[12] ***N v F*, **2021 ONCA 614, (Court of Appeal Decision - "Majority" or "Dissent") Majority, paras. 140, 142, 181 and 186
[13] **CRC GC14**, at paras. 39-40.
[14] Dissent, paras 276, 273, 279, 283 and 333-338

23 and 40 of the CLRA and similar legislation across the country, based on the best interests of the child.

12. This requires giving child-centred meaning to serious harm and consideration of the impact of a return order on the individual child.[15] It also entails an approach that is not rigidly or singularly-focused on the general aim of discouraging child abduction. Giving primacy to the best interests of the child means that the enforcement of parental custody rights and the aim of discouraging abduction, must cede to the best interests of the particular child in appropriate circumstances.[16]

13. Under s. 23, a court must assess both the likelihood and severity of the risk of future harm if the child is removed from Ontario.[17] The OCA has established a lower threshold of risk for the determination of harm in non-Hague versus Hague cases: Laskin JA found that the words "intolerable situation" in art. 13(b) of the Hague Convention[18] import a more stringent standard than "serious harm" under s. 23 of the CLRA. Further, when countries *choose* not to sign the Hague Convention, there can be no assurance of the paramountcy of the best interests of the child when parenting decisions are made; moreover, there is no commitment to the reciprocal international enforcement mechanisms behind the Convention.[19]

14. As acknowledged by the Majority, the holistic assessment of serious harm under s. 23 enables a court to consider the many factors relevant to a child's best interests.[20] And as confirmed by the Dissent, this should not be conflated with an in-depth weighing of all factors directed to a parenting time/decision-making determination, but does entail consideration and due weight to *relevant* s. 24 factors going to the child's well-being, relationships and any other applicable best interests considerations to inform threshold jurisdictional issues and the exercise of discretion in making return orders.[21] In other words, there is an obligation to consider the child's best interests, *guided* by the relevant best interests factors, including those in s. 24 and those based on the facts of the case, when ss. 23 and 40 determinations are made.

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[15] Dissent, paras 273-276 and 338

[16] Dissent, paras 271 and 280; **CRC GC14**, at paras 39-40; ***HE v MM***, 2015 ONCA 813, para 87; ***Ojeikere v. Ojeikere***, 2018 ONCA 372, para 60 (**"*Ojeikere*"**); ***Geliedan v. Rawdah***, 2020 ONCA 254**,** paras 35-38 ("***Geliedan***"); ***MAA v DEME***, 2020 ONCA 486, paras 43 and para 71 **("*MAA*")**; ***Gordon v. Goertz,*** **[1996] 2 SCR 27,** [1996] SCJ No 52 (QL), para 4 **("*Gordon*")**

[17] ***Ojeikere***, para 62; Majority, para 140; Dissent, para 280

[18] Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can TS 1983 No 35 **("Hague Convention")**

[19] ***Ojeikere***, para 60; ***Geliedan,*** paras 35-38; ***MAA***, para 43

[20] Majority, para 140

[21] Dissent, paras 335 and 339; Trial Judge Reasons for Judgment, para 449

Range of Best Interests of the Child Factors under Sections 23 and 40

15. There should be no arbitrary limit to the potential range of best interests factors in any given case going to the question of risk of serious harm, i.e. regarding the physical and emotional well-being of the child.[22] Any one of the s. 24 CLRA considerations could engage risk of serious harm to the child on the facts of a given case. The OCA has endorsed a holistic approach to s. 23, with a non-exhaustive list that has included several of the factors below:

• the risk of psychological harm • the risk of physical harm • the incidents of citizenship/nationality for Canadian citizen children • the likelihood of a child being separated from their primary caregiver relevant to risk of emotional/psychological harm • separation from the primary caregiver (both voluntary and involuntary, with greater weight to the latter) o barriers to the parent returning or remaining with the children in the country of return including residency status/nationality of the parents and child in the country of return and laws or practices that could result in separation from the children	• the views of the child where they can be reasonably ascertained, with due weight given to those views consistent with their evolving maturity; the views of the child informing other factors, including but not limited to, physical and psychological harm and their rights as Canadian citizens, where applicable • factors relevant to the focal point of the child's life/circumstances, including of those too young to express views • a child's rights in international law (e.g. against *refoulement*) • whether and how the country of return applies a best interests test - does it comport to Canadian and international human rights best interest standards?[23]

16. The same range of considerations should inform decisions under s. 40, where the court has broad discretion to fashion a remedy consistent with the overarching best interests of the child. The OCL submitted to the OCA that no return order should be made under s. 40(3) of the CLRA if it is not in the overarching best interests of the child. The Dissent agreed.[24] The Majority, however, held that other factors can outweigh best interests, albeit the example given was in the extradition and criminal law context,[25] not the family law context where the best interests of the child is paramount.[26] Even considering the other policy objectives of s. 19 (discouraging child abduction/refraining from accepting jurisdiction where another appears more appropriate), the

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[22] ***Kanthasamy***, para 35
[23] Majority, para 140; Dissent, paras 272- 296; ***Ojeikere***, paras 64, 74, 77, and 90; ***MAA***, paras 44, 46, 58 and 63-68; ***Ojeikere***, para 85
[24] Dissent, paras 333 and 336-338
[25] Majority, para. 180
[26] ***Young v. Young,*** 1993 CanLII 34 (SCC), [1993] 4 SCR 3, 1993 CarswellBC 264, at paras 1, 74, 99, 193, 210 (**"*Young*"**)

Majority did not ask the question: should a return order be made if it is contrary to the individual child's best interests?[27] This Court in ***Young v. Young*** endorsed a child-centred approach, with the best possible arrangements for the particular child, and held:

> 227 […] To deprive a child of what a court has found to be in his or her best interests is to "injure", in the sense of not doing what is best for the child. The vulnerable situation of the child heightens the need for protection; if one is to err, it should not be in favour of the exercise of the alleged parental right, but in favour of the interests of the child.[28]

17. The OCL submits that if an outcome is not in the child's best interests, it should not be the outcome. Unlike Hague Convention cases, s. 40 contains no mandate to return even if it has been determined that a child has been wrongfully removed or retained, or that jurisdiction may not or should not be exercised. It also contains no reference to habitual residence; no presumption that return to a particular place is in the best interests of the child; and no specific exceptions to return.[29] A plain reading of s. 40 reinforces the approach endorsed by the Dissent and the OCL: it allows for the possibility of multiple outcomes, including interim parenting time/decision-making responsibility orders, all of which are informed by the primary purpose of the CLRA, the CRC and the *Charter*.

18. A consideration of the best interests factors relevant to this appeal follows.

Nationality / Citizenship of the Child

19. ***Ojeikere*** linked citizenship to the children's views and rights under s. 6(1) of the *Charter* as "an added consideration somewhat increasing the risk of psychological harm" from being returned.[30] This approach is not inconsistent with the Majority's ruling that an order made under s. 40(3) to return a Canadian citizen child to a place outside Canada *prima facie* infringes the child's *Charter* right to remain in Canada.[31] In this case, the Majority found the *ability* to make a return order was a reasonable limit under s. 1 of the *Charter* but cautioned that the *effect* on the child, including serious harm, must be considered before issuing a removal order.[32] Citizenship/nationality (or lack thereof in the country of return), is therefore a relevant consideration in the assessment of serious harm, as well as a child's overarching best interests in the context of a return order.[33]

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[27] Majority, paras 177-190
[28] ***Young***, paras 162 and 227; *see also* **CRC GC14**, at para 71
[29] ***MAA***, para 71; ***Geliedan***, paras 30-34, 61 and 69; Dissent, para 331
[30] ***Ojeikere***, para 85
[31] Majority, para 245
[32] Majority, para 246
[33] ***Office of the Children's Lawyer v. Balev*, 2018 SCC 16**, para 44, regarding nationality as

Children's Separation from Primary Caregiver

20. A child's separation from the primary caregiver may generally rise to the level of serious harm (s. 23) and should be considered in the assessment of risk, without reference to mitigation. At a minimum, it is likely contrary to the overall best interests of the child and warrants due consideration under s. 40, as has been recognized in a significant body of case law.[34]

21. Both the Majority and Dissent acknowledged that the trial judge accepted expert evidence that separation of young children from a primary caregiver can be harmful and that the mother was the primary caregiver who was, loving, caring, devoted and a powerful force in the children's lives.[35] Further evidence was unnecessary to enable the court to *draw the inference* of harm. The role of the expert is to provide the basis for inference.[36] If something is the subject of jurisprudential precedent or judicial notice, i.e. the harm arising from children's separation from their primary caregiver, there is no need for expert evidence to confirm that the particular children will face harm.[37] Once the primacy of the relationship has been established on the evidence, it is more probable than not that harm will ensue from separation.[38]

22. The Majority also considered the trial judge's findings that any harm to the children posed by the mother's non-return could be mitigated by the father's proposed plan. Causing harm and then putting measures in place to lessen the impact is not the legal threshold under s. 23. As has been held in the immigration context: "It is obvious […] that the concept of "undeserved hardship" is ill-suited when assessing the hardship on innocent children. Children will rarely, if ever, be deserving of any hardship."[39]

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relevant to the child's "links and circumstances".

[34] ***Ojeikere***, para 90 and 92; ***Young***, at paras 79-80; ***Gordon***, paras 121 and 125-126; ***MM***, para 146; ***MAA***, para 58; ***Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)***, [1994] 2 SCR 165, [1994] SCJ No 37 (QL), paras 38-40; **CRC GC14**, at para 71; Dissent, paras 283-284, 286, 288-291

[35] Majority, paras 19 and 87-88; Dissent, paras 283, 284 and 286

[36] Sopinka, Lederman & Bryant, *The Law of Evidence in Canada,* 5th ed (Toronto: LexisNexis Canada Inc., 2018), ch 12 at 12.36 **("Sopinka")**

[37] Dissent, paras 287-291; ***Young,*** paras 125-129, 164; *R v Williams,* [1998] 1 SCR 1128, para 54; **Sopinka**, ch 19, at 19.16, 19.56 and 19.60

[38] Dissent, para 291

[39] ***Kanthasamy***, para 59, citing ***Hawthorne v. Canada (Minister of Citizenship and Immigration)***, 2002 FCA 475 (CanLII), [2003] 2 FC 555, para 9

23. Determining the likelihood and severity of the harm[40] is distinct from deciding to place the child in harm's way and then attempting to mitigate the negative impacts. Mitigation shifts the analysis to how much hardship and stress a child should be required to endure in order to promote the policy of return. This not only waives the benefit of prevention but increases the possibility of error, with the child shouldering the burden of the experiment. As was noted in ***Young***, "judges must exercise their discretion in order to *prevent* harm to the child, rather than merely identify or establish its presence after the damage is done" and we would add, attempt to mitigate its ill effects.[41] To engage in the analysis undertaken by the trial judge and endorsed by the Majority diminishes the meaning and import of serious harm.

24. Courts, including this Court, have recognized that potential severance of the parent-child relationship engages the child's s. 7 *Charter* rights given the profound psychological impact that separation from a primary caregiver may have on the child.[42] Return orders can have profound and often searing impacts on children. Separation from a primary caregiver is a factor that must inform discretionary decision-making. This and other factors have led courts to impose mandatory considerations and/or procedural safeguards in recognition of children's rights under s. 7 of the *Charter* and articles 9 and 3 of the CRC.[43]

Barriers of Primary Caregiver to Return - Laws and Non-Binding Proposals

25. The OCL submits that courts must carefully examine barriers to return, particularly involuntary barriers caused by lack of residency or other factors, faced by the primary caregiver. Courts must also be cautious about relying on non-enforceable undertakings or non-binding offers.[44] Unlike Hague Convention proceedings, s. 40 does not *mandate* return, creating no compliance issues necessitating "amelioration" of short-term harm to the child.[45]

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[40] ***Ojeikere***, para 62
[41] ***Young,*** para 122
[42] ***New Brunswick (Minister of Health and Community Services) v G(J)***, [1999] 3 SCR 46, paras 57 and 60 **("*G(J)*")**; *Winnipeg Child and Family Services v KLW*, 2000 SCC 48, paras 72-73, 85, 87, 94, 108, and 122-133 **("*KLW*")**; ***Ojeikere***, paras 89-90
[43] ***AMRI v KER,*** 2011 ONCA 417, paras 97-99 and 108-128; ***AC v Manitoba***, paras 80-108; ***G(J)***, paras 70-72 and 81; ***KLW***, paras 122-23; ***MAA***, paras 77-78
[44] Dissent, para 281; *see also* ***Landman v. Daviau***, 2012 ONSC 547 (CanLII), paras 123; ***F(JH) v N(SHF),*** 2015 BCSC 349, para 63; ***Achakzad v Zemaryalai,*** 2010 ONCJ 318, paras 28-30
[45] ***Thomson v Thomson,*** [1994] 3 SCR 551, 1994 CarswellMan 91, paras 86 and 106

26. Where a parent has no genuine control over whether to return and remain in a country; where the law does not allow for sponsorship of an ex-spouse; or the parent is reliant on the good faith/promises of a former spouse or third party, the situation is too precarious to meet the best interests of the child. There is risk of serious harm through separation, where the parent and the children are not citizens and where the male guardian, without exception, at law, controls the ability of the children to travel.[46] As noted by this Court in ***MAA***: "The father's statement that he would not enforce the custody order or the obedience order offers little reassurance.[47]

27. Where the returning parent provides sufficient evidence of barriers to return (e.g. laws; no binding court order, etc.), the other parent bears an evidentiary burden to satisfy the court that those barriers do not exist. Speculation about *proposed* custody or residency arrangements and their potential enforcement is not sufficient when dealing with the best interests of children.[48] Speculation renders the situation "unacceptably contingent".[49]

Whether the Best Interests Test in Country of Return Comports with the Best Interests Test in Canadian and International Law as a Factor under Sections 23 and 40

28. The failure of a country of return to decide parenting time/decision-making responsibility based on a robust best interests test, comporting with Canadian and international human rights law,[50] has and should continue to be a consideration under ss. 23 and 40. The Dissent recognized that while any best interests test in the return country need not duplicate Canadian law, it should not derogate from certain fundamental principles relating to the promotion of children's best interests derived from Canadian law and international human rights law.[51] It is a "pronounced departure" from these principles to make gender-based determinations regarding decision-making responsibility.[52]

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[46] Dissent, paras 292-302, 318 and 320-321

[47] ***MAA***, para 58

[48] Dissent, para 292, 295, 297 and 302-303

[49] Dissent, paras 297 and 302

[50] Articles 5 and 16, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13

[51] Dissent, paras 274, 305, 314, 316-317, 328, 336-339; *see also* art. 20 of the Hague Convention by comparison.

[52] Dissent, paras 305 and 314-317. In **CRC GC14**, para 67, the UN Committee on the Rights of the Child states that "in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. […]". In its 2015

29. Where the experts agree that a male (parent) is granted and retains decision-making powers (guardianship) under the law without exception, this must be a consideration.[53] Similarly, where there are initial gender-based presumptions about parenting time (custody) unrelated to the best interests of the individual child, this must be a factor in the exercise of discretion under ss. 23 and 40.[54] The Majority's suggestion that a law which favours women as custodians (day-to-day care), acts as a counterbalance, is misguided.[55]

30. Any gender-based presumption deprives children of an assessment of their unique needs and the opportunity to be cared for by the parent best able to meet those needs. Under a human rights-compliant best interests test, the ultimate determination of parenting time and decision-making responsibility depends on *all* relevant factors, including but not limited to, who is the primary caregiver, who can best meet the child's needs and whether that parent/child has legal status in the country of return. It will not be based on parental gender.[56]

31. The OCL encourages the adoption of an approach to the interpretation of ss. 23 and 40 of the CLRA which confirms the child's right to have an individualized assessment of their best interests based on all relevant, case-specific factors. As this Court recently reiterated in ***Michel v. Graydon***: "courts are not to be discouraged from defending the rights of children when they have the opportunity to do so".[57]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of March, 2022

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Concluding Observations on the second periodic report of the UAE, the Committee urged the abolishment of the concept of male guardianship as a matter of priority and a review of the legislation on custody to ensure that the best interests of the child are the paramount consideration in any decision taken in this respect: Committee on the Rights of the Child, Concluding Observations: United Arab Emirates, UN Doc. CRC/C/ARE/CO/ (2015)), para 48.

[53] Dissent, paras 308-322
[54] Dissent, paras 304 and 310-311
[55] Majority, para 80
[56] Dissent, paras 314-317
[57] ***Michel v. Graydon***, para. 31

PART VII – TABLE OF AUTHORITIES & LEGISLATION

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Department of Justice, Legislative Background: *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act* (Bill C-78 in the 42nd Parliament) (29 August 2019), s. A, 1-2 (as cited in ***SS v RS***, 2021 ONSC 2137, at footnote 2): **Overview: Legislative objectives** **A. Promoting the best interests of the child** The best interests of the child is a foundational legal principle in Canadian family law. The Supreme Court of Canada has referred to the best interests of the child as a child's "positive right to the best possible arrangements in the circumstances."Footnote10 The best interests of the child is also a significant principle internationally. For example, it forms the basis of Article 3 of the United Nations *Convention on the Rights of the Child*,Footnote11 which calls for the child's best interests to be a primary consideration in all actions involving children. The best interests of the child test also underlies much of provincial and territorial family law. There is considerable consensus that the best interests of the child is the appropriate basis upon which to make decisions related to children.	2, 8

The 2019 changes to family laws maintain the best interests of the child as the only consideration for parenting decisions under the *Divorce Act* and includes various measures to promote the best interests of the child. For example, the amendments create a duty for parents to exercise their responsibilities for their children in a manner consistent with the best interests of the child. […]	
UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, para 67: "in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. […]" **(d) Care, protection and safety of the child** 71. When assessing and determining the best interests of a child or children in general, the obligation of the State to ensure the child such protection and care as is necessary for his or her well-being (art. 3, para. 2) should be taken into consideration. The terms "protection and care" must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as "to protect the child from harm"), but rather in relation to the comprehensive ideal of ensuring the child's "well-being" and development. Children's well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety. 72. Emotional care is a basic need of children; if parents or other primary caregivers do not fulfil the child's emotional needs, action must be taken so that the child develops a secure attachment. Children need to form an attachment to a caregiver at a very early age, and such attachment, if adequate, must be sustained over time in order to provide the child with a stable environment.	5, 9, 12, 16, 20, 28
UN Committee on the Rights of the Child, Concluding Observations on the second periodic report of the UAE (Committee on the Rights of the Child, Concluding Observations: United Arab Emirates, UN Doc. CRC/C/ARE/CO/ (2015)): 48. The Committee urges the State party to promptly repeal all provisions of the personal status law that discriminate on the basis of gender, infringe on the dignity of women and girls and have a negative impact the family environment, and to ensure that mothers and fathers equally share the legal responsibility for their children, in accordance with article 18 (1) of the Convention. The State party should abolish the concept of male guardianship as a matter of priority. The Committee also urges the State party to review its legislation on custody and ensure that the best interests of the child are the paramount consideration in any decision taken in this respect.	28
Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 13:	28

Article 5 States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; ***Article 16*** 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;	
Committee on the Elimination of Discrimination against Women, Concluding observations on the combined second and third periodic reports of the United Arab Emirates, UN Doc. CEDAW/C/ARE/CO/2-3 (2015), paras 45 and 46: **Discrimination against women in marriage and family relations** 45. The Committee notes with concern the numerous provisions of the Personal Status Law that discriminate against women and girls, as well as the State party's rejection of the recommendations made in the context of the universal periodic review, in 2013, with a view to ensuring equality of women and men in family relations (see A/HRC/23/13, paras. 128.87, 128.95 and 128.101). The Committee is particularly concerned about the de jure maintenance of male guardianship for women and girls, the impossibility for an Emirati woman to sign her own marriage contract, the continued practice of dowry, the obligation imposed on a woman to obey her husband, including sexually, the maintenance of polygamy and the limited grounds available to women to seek divorce while men may unilaterally ask for divorce for any reason. The Committee is deeply concerned by the fact that a divorced woman loses custody of her daughters when they reach 13 years of age and of her sons when they reach 11 years of age, or before those ages if she remarries. 46. **The Committee reiterates its recommendation that the State party withdraw its reservation to article 16 of the Convention and undertake a comprehensive legislative review of its Personal Status Law, taking into account the experience of other countries with similar cultural backgrounds and legal norms, to provide women with equal rights with regard to marriage, divorce, property and the custody of children. It calls upon the State party to end the**	28

practice of dowry and to discourage and prohibit polygamy, in accordance with the Committee's general recommendation No. 21 (1994) on equality in marriage and family relations and general recommendation No. 29 (2013) on article 16 of the Convention (economic consequences of marriage, family relations and their dissolution) (see CEDAW/C/ARE/CO/1, para. 48)	
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