File Number: 39875

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

B E T W E E N:

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)

Interveners

FACTUM OF THE INTERVENER, CANADIAN COUNCIL OF MUSLIM WOMEN (CCMW)

(Rule 42 of the *Rules of Supreme Court of Canada*)

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. The Canadian Council of Muslim Women (CCMW) is a Canadian non-governmental organization and registered charity that is committed to improving the status of women and girls. It seeks to empower them to remain true to both their Islamic heritage and Canadian identity.

2. Consistent with the position it took in opposing binding religious arbitration in Ontario,[1] CCMW comes to this Court advocating for a robust interpretation of s 23 of the *Children's Law Reform Act* (*CLRA*). CCMW asks this Court to articulate a test under s 23 of the *CLRA* that is consistent with principles of substantive gender equality and that ensures that no child in Ontario faces removal to a jurisdiction that will subject them to an outcome that would substantially deviate from the best interests of the child, as understood by Canadian law.

PART II - STATEMENT OF INTERVENER'S POSITION

3. CCMW's position is as follows:

(a) Section 23 of the *CLRA* should be interpreted broadly to ensure that children—one of the most vulnerable groups in society—who are present in Ontario receive the basic protections of Canadian law.

(b) The concept of "serious harm" requires the court to consider the best interests of the child. Serious harm under s 23 should be determined by looking at whether the outcome that would occur if the child were removed would constitute a substantial departure from the child's best interests.

(c) In assessing serious harm, an Ontario court should give no weight to the mere fact that the foreign court purports to consider the best interests of the child as part of its analysis. Rather, an Ontario court should focus on the potential *outcomes* of a child's removal from Ontario (including how a foreign jurisdiction might apply their own bests interests of the child standard) and whether those outcomes

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[1] *No Religious Arbitration* (2003), online: <https://www.ccmw.com/projects/2020/7/23/no-religious-arbitration>.

constitute a substantial departure from the child's best interests as understood in Canadian law.

(d) Section 23 should be interpreted in a manner that is consistent with substantive gender equality. This requires sensitivity to the gendered nature of and power imbalance in family disputes, especially in situations of violence. Ontario courts should be mindful of removal to places where gender distinctions in family laws create overt disadvantages for vulnerable groups. CCMW accepts that Canadian courts may allow removal to non-Hague Convention[2] states whose family laws make express distinctions on the basis of gender. However, courts should scrutinize such scenarios to determine whether removal would result in gender discrimination against the vulnerable parent, thereby substantially deviating from the child's best interest under Canadian law.

PART III - STATEMENT OF ARGUMENT

A. THE PURPOSE OF SECTION 23 OF THE *CLRA*

4. The purpose of s 23 of the *CLRA* is to ensure that every child physically present within Ontario is protected from serious harm that may result from the child's removal. Unlike the court's jurisdiction under ss 22(1)(a) and (b), s 23 is not concerned with the child's connection to Ontario.[3] Rather, s 23 reflects the legislature's decision to afford basic protections of Ontario law to every child present within the province, even where another jurisdiction may have a better normative claim to decision-making in respect of the child.

5. Section 23 is conceptually similar to many other rules of private international law that preserve a role for Canadian courts to intervene where it is necessary to protect fundamental interests. Consider for example the rule that precludes the enforcement in Canada of a foreign judgment in a civil dispute rendered by a court of competent jurisdiction, where that foreign judgment was rendered due to fraud, through a denial of natural justice, or where it is contrary to

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[2] Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can TS 1983 No 35 ("Hague Convention")
[3] *Children's Law Reform Act*, RSO 1990, c C12, ss 21, 22.

public policy.[4] That rule and s 23 of the *CLRA* play conceptually similar roles in our legal system: under both rules, the effect is that an Ontario court substitutes its judgment for the actual or anticipated judgment of a foreign court of competent jurisdiction, because failing to do so would lead to an intolerable departure from the basic values expressed in Canadian law.

6. However, s 23 of the *CLRA* is broader than analogous concepts of private international law in other domains, because it implicates parenting and contact orders in relation to children. Children are among the most vulnerable members of society, and the protection of their interests warrants particularly expansive jurisdiction by the Courts. For example:

(a) Courts have traditionally exercised *parens patriae* jurisdiction over any children present within the jurisdiction,[5] which is a broader jurisdiction in the private international law sense than in virtually all other civil disputes.

(b) At common law, foreign custody and access orders do not have the same binding effect on Canadian courts as do other foreign judgments. Foreign custody and access orders are, at common law, entitled to "great weight",[6] but are not automatically enforced in the way that other foreign judgments are.

(c) While common law enforcement rules in the custody and access context have been largely supplanted by a statutory framework, the *CLRA* continues to grant a broader role to Ontario courts in relation to foreign custody and access orders than is available to courts in relation to foreign orders in other civil disputes. For example,

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[4] *Beals v Saldanha*, 2003 SCC 72 at paras 39-40. Also analogous are the rule in *Tolofson v Jensen*, [1994] 3 SCR 1022 at p 1052, 1054 that an Ontario court will not apply the *lex loci delicti* in a tort claim where its application would give rise to an injustice, and the more general rule that a Canadian court will refuse to apply foreign law where doing so is contrary to the public policy of the forum: see Canadian Conflict of Laws, 6th Ed., §8.6 Public Policy, Book of Authorities of the Intervener, CCMW ("**IBOA**") Tab 1.

[5] Canadian Conflict of Laws, 6th Ed., § 18.1 Granting Custody and Access Orders, IBOA Tab 1. See *Yassin v Loubani*, 2006 BCCA 509 for an example of a circumstances where a Canadian court has exercised *parens patriae* jurisdiction even when the children were outside Canada. The court's *parens patriae* jurisdiction has been preserved by s 69 of the *Children's Law Reform Act*, RSO 1990, c C 12.

[6] See *eg* *McKee v McKee*, [1951] 2 DLR 657 at p 666; Canadian Conflict of Laws, 6th Ed., § 18.2 Recognizing and Enforcing Custody and Access Orders, IBOA Tab 1.

s 41 contains additional grounds on which enforcement can be refused as compared to what is available in other civil disputes, while ss 42 and 43 of the *CLRA* provide a range of circumstances in which the foreign court order can be superseded.[7]

7. Put simply, Canadian courts are substantially more willing to assume jurisdiction over disputes involving the care of children, in lieu of deferring to the courts of another jurisdiction, than they are in other contexts, because of the court's role in protecting children from harm. Section 23 should be interpreted against this backdrop.

B. A SUBSTANTIAL DEVIATION FROM WHAT WOULD BE IN THE CHILD'S BEST INTERESTS UNDER CANADIAN LAW CONSTITUTES SERIOUS HARM

8. The statutory threshold for engaging s 23 of the *CLRA* is that a child would suffer "serious harm." The concept of serious harm requires the court to consider the best interests of the child.

9. The best interests of the child test infuses every aspect of Canadian family law pertaining to children. Section 23 is no exception. One of the express statutory purposes of Part III of the *CLRA* (which includes s 23) is "to ensure that applications to the courts respecting decision-making responsibility, parenting time, contact and guardianship with respect to children will be determined on the basis of the best interests of the children."[8] The best interests of the child is embedded more broadly within Canadian family law: every key decision involving a child must be made with a view to that child's best interests,[9] and the child's best interest is the "primary consideration" when a child is affected by a court proceeding.[10]

10. The concept of the best interests of the child and serious harm as described in s 23 are not identical tests. However, the two are related, in that serious harm under s 23 should be conceived of as an outcome that substantially deviates from what would be in the best interests of the child.

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[7] *Children's Law Reform Act*, RSO 1990, c C12, ss 41-43.
[8] *Children's Law Reform Act*, RSO 1990, c C12, s 19.
[9] See *eg* *TC v AE*, 2021 SKCA 79 at para 25; *NJB v SF*, 2020 BCPC 53 at para 24; Droit de la famille — 22272, 2022 QCCS 637 at para 12.
[10] *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 at para 58. See also *Children's Aid Society of the Niagara Region*, 2022 ONSC 744 at para 97.

11. The best interests of the child analysis requires a decision-maker to identify the spectrum of possible outcomes for the child and to adjudicate between a number of competing options in respect of a child's parenting. Though the best interests of the child framework is typically used to identify the optimal outcome for the child, it is a multi-factored framework that can be used to rank-order an entire hypothetical spectrum of outcomes, ranging from the optimal outcome to those that would be extremely harmful. The serious harm test in s 23 fits within that framework: the concept of serious harm reflects an outcome on that continuum that substantially deviates from the child's best interests under Ontario law. In other words, the serious harm test is an inquiry into the magnitude of deviation from the best interests of the child under Ontario law.

12. To take a simple example, consider a dispute between two parents about the allocation of parenting time: one parent proposes a 70/30 parenting time split; the other proposes a 65/35 split. A court adjudicating this dispute could decide which of the two proposals would be in the best interests of the child. However, proposal rejected by the Court would almost certainly not constitute serious harm, given the minor difference between them. One outcome is better than the other and is therefore in the child's best interests, but the difference between the two is small. By contrast, an outcome that deviates substantially from the child's best interests represents serious harm. If, for example, one of the proposed outcomes in a parenting dispute would deprive the child of any education, the deviation between that and the optimal outcome is substantial, not minor.

13. Serious harm should be conceived of as a substantial deviation from an outcome that reflects the best interests of the child under Ontario law for three primary reasons.

14. First, this construct is a normatively defensible approach to the assumption of jurisdiction under s 23. An Ontario court will give appropriate weight to comity and not assume jurisdiction over a child with whom it has no meaningful connection merely because the outcome for the child, if removed from Ontario, would be slightly different than if an Ontario court assumed jurisdiction. However, once the likely outcome for that child is substantially worse than it would be if an Ontario court assumed jurisdiction, s 23 empowers the court to intervene to protect the child.

15. Second, the jurisprudence interpreting s 23 is, in substance, consistent with the notion that serious harm reflects the same considerations as, but a substantial deviation from, the best interests of the child. In *Ojeikere v Ojeikere*, the Court of Appeal for Ontario considered the following four

non-exhaustive factors in determining whether there would be serious harm: (1) the risk of physical harm; (2) the risk of psychological harm; (3) the views of the children; and (4) the mother's claim that she would not return to her home country, even if the children were required to do so.[11] These serious harm factors align directly with the best interests of the child standard:

(a) The risk of physical harm (factor 1) and the views of the children (factor 3) are factors that are expressly enumerated as relevant to the best interests of the child standard under s 24(3) of the *CLRA*.[12]

(b) The risk of psychological harm (factor 2) and the separation of one parent from the child (factor 4) reflect the consequence of a substantial deviation from the best interests factors under s 24(3). For example, one of the best interests factors is "each parent's willingness to support the development and maintenance of the child's relationship with the other parent."[13] A mild lack of enthusiasm from a parent to support the child's relationship with the other parent might not constitute serious harm. By contrast, a concerted effort by one parent to thwart the development of any meaningful relationship between the child and the other parent could cause psychological harm and constitute serious harm. The same analysis is true for every factor in s 24(3): a minor deviation from what an Ontario court might expect would not be significant, while a serious deprivation could cause serious harm.

16. Even those decisions that have noted a distinction between the best interests analysis and the serious harm analysis have recognized this linkage. For example, in his concurring opinion in *Ojeikere*, Miller JA articulated the relationship between best interests and serious harm as follows:

> Best interests analyses and serious harm assessments are different. A "best" interests inquiry is a matter of optimization of a child's many interests. It is a complex and comparative inquiry into which of (potentially several) proposals will best realize the many different goods needed to best secure a child's well-being. The serious harm inquiry, in contrast, is focused on discrete threats that would potentially imperil a threshold of well-being. Although serious harm and best interests can both be assessed by reference to the same basic needs of the child, not every suboptimal set of circumstances constitutes a serious harm: the serious harm standard must operate at a

[11] 2018 ONCA 372 at paras 63-64.
[12] *Children's Law Reform Act*, RSO 1990, C. 12, s 24(3)(e) and (j).
[13] *Children's Law Reform Act*, RSO 1990, C. 12, s 24(3)(c).

> higher threshold. For example, although it would be a serious harm to return children to a place where they would be unable to receive an education, a child would not suffer serious harm in the relevant sense if sent to a public school, rather than an elite private school. Neither would a child be harmed per se by a compelled return from a more economically prosperous state to a less economically prosperous one.[14]

17. Miller JA distinguished the "serious harm" standard from the "best interests" standard to a greater extent than the majority in *Ojeikere* did. Even under his approach, "serious harm and best interests can both be assessed by reference to the same basic needs of the child" and "the serious harm standard must operate at a higher threshold."[15] Miller JA's approach is consistent with the approach detailed above.

18. Third, there is little value in adopting a test for serious harm that looks at different factors than does the best interests analysis. A separate test muddies the jurisprudence without providing a benefit to judges interpreting complex fact scenarios, or to the children who depend on the *CLRA*'s protections. To the contrary, a separate test risks obscuring the necessary focus on the best interests of the child in all matters relating to children, as a separate test may fail to consider factors relevant to the best interests of the child whose presence or absence could lead to serious harm.

C. A FOREIGN COURT'S USE OF THE "BEST INTERESTS OF THE CHILD" INCANTATION SHOULD NOT BLIND THE COURT TO REALITIES

19. As described above, the focus of the serious harm analysis under s 23 is on the potential outcomes for the child if removed from Ontario. In considering whether a child would suffer serious harm if removed from Ontario to a foreign jurisdiction, an Ontario court should give little weight, if any, to the legislative framework that the foreign court would use. Rather, an Ontario court's focus should be on the practical likely outcome of the child's removal. Simply put, the analysis should focus on substance, rather than form.

20. The fact that a foreign jurisdiction purports to use the best interests of the child analysis is, by itself, irrelevant to the assessment of serious harm, and should not form part of a trial judge's analysis under s 23. The best interests of the child standard is a general proposition that derives concrete meaning only in the context of a particular legal tradition. Courts in different countries,

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[14] *Ojeikere v Ojeikere*, 2018 ONCA 372 at para 107 (emphasis added).
[15] *Ojeikere v Ojeikere*, 2018 ONCA 372 at para 107.

all of which apply the best interests of the child standard, can disagree substantially about what outcome would in fact be in the child's best interests.

21. As a hypothetical, suppose a foreign, non-Hague jurisdiction's legislation provided that it was in the child's best interests for decision-making to be allocated entirely to the older parent, on the theory that the older parent is wiser. While the foreign court purports to apply a "best interests test," that test departs in substance from the best interests of the child standard as understood in Canadian law. An adjudication by the courts of that foreign jurisdiction would not necessarily render an outcome in accordance with Canadian conceptions of the best interests of the child. In some cases, the application of such a test could lead to serious harm. In any case, there is no necessary connection from the mere fact that the foreign court purports to apply a best interests test and whether that outcome is in the best interests of the child under Canadian law.

22. A foreign court's use of the "best interests of the child" incantation is irrelevant, and it should play no role in a trial judge's analysis under s 23. Rather, the trial judge should focus on what will in fact happen to the child if the court does not assume jurisdiction under s 23. If a failure to exercise jurisdiction would mean the removal of a child to a foreign jurisdiction to have the parenting dispute decided in accordance with foreign law, the court must determine what a foreign court would likely decide and whether that outcome is in the best interests of the child, not merely identify the general test it would apply.

23. It is not unduly onerous to require the parties or an Ontario court to consider how a foreign court would decide a matter. In any civil case in which a party alleges that foreign law applies, the party must both plead and prove how foreign law would be applied.[16] This effectively necessitates consideration of how a foreign court would decide the case.

D. GENDER EQUALITY IS SALIENT TO THE SERIOUS HARM ANALYSIS

24. The overarching norms of gender equality that animate the Canadian law generally must inform the best interests of the child standard and the serious harm test under s 23 of the *CLRA*.

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[16] Canadian Conflict of Laws, 6th Ed., § 7.1 Foreign Law must be Pleaded and Proved, IBOA Tab 1.

25. There is no doubt that gender equality is a fundamental norm of Canadian law. It is embodied generally in ss 15 and 28 of the *Charter*,[17] the *Canadian Bill of Rights*,[18] and federal and provincial human rights codes.[19] It is further embodied by additional legislation promoting gender equality in particular contexts.[20]

26. Gender equality is also the starting point under the *CLRA*: the *CLRA* declares at s 20(1) that "a child's parents are equally entitled to decision-making responsibility with respect to the child."[21] The *CLRA* makes no distinctions on the basis of gender or sex, either among parents or children. However, courts can deviate from the presumption of equal entitlement if it is in the best interests of the child. In considering best interests, the *CLRA* points to the factors of family violence, where a parenting or contact order would be influenced by the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and the appropriateness of requiring parents to co-operate on issues affecting the child.[22] To ensure gender equality, consideration of the best interests of the child calls for the application of a gendered lens in understanding the dynamics of family violence, its disproportionate impact on women and gender-diverse groups, and that a one-size fits all approach regardless of gender can have the outcome of perpetuating gender inequality.

27. With this approach to gender equality in mind, courts should be mindful of foreign laws discriminating against a parent on the basis of gender which can have a direct impact on the best interests of the child. Courts have considered a foreign jurisdiction's approach to gender equality as part of the analysis of the court's jurisdiction under s 22 of the *CLRA*.[23] Laws and societal norms that reinforce gender-based presumptions or have disproportionate impacts on those who

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[17] *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[18] *Canadian Bill of Rights*, SC 1960, c. 44, s 1.
[19] See *eg* *Canadian Human Rights Act*, RSC, 1985, c H-6; *Human Rights Code*, RSO 1990, c. H.19, ss 1-3, 5-7.
[20] See *eg* *Pay Equity Act*, RSO 1990, c. P.7; *Department for Women and Gender Equality Act*, SC 2018, c. 27, s. 661; *Canadian Gender Budgeting Act*, SC 2018, c. 27, s. 314; *Gender Equality Week Act*, SC 2018, c. 14.
[21] *Children's Law Reform Act*, RSO 1990, C 12, s 20.
[22] *Children's Law Reform Act*, RSO 1990, C 12, s 24(3)(j).
[23] See *eg* *Chaudry v Khan*, 2016 ONSC 7773 at paras 71-74; *Yassin v Loubani*, 2006 BCCA 509 at paras 35-38.

are already vulnerable due to their gender in a family dispute ultimately distract from the fundamental goal of advancing the best interests of the child, and indeed can undermine it.

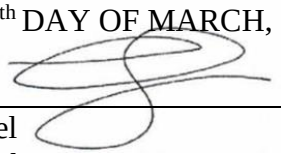
28. Gender equality is fundamental to the Canadian conception of the best interests of the child and serious harm. While gender equality is not an additional factor in the best interests analysis, the entire analysis occurs against the backdrop of the basic norms of gender equality. An outcome that puts a parent or child in a worse position solely because of their gender will not be in the best interests of a child. At best, sex-based discrimination distracts from the real focus of the analysis, which must be on the child's best interests. At worst, sex-based discrimination can result in outcomes which could cause serious harm to a child.

29. Trial judges applying s 23 should be attuned to gender inequality that might result in serious harm. For example, where a foreign jurisdiction allocates parental rights and responsibilities either automatically or by default based on the parent's gender, such an allocation by definition is not made in the best interests of the child as understood under Ontario law. That is not to say that a child should never be removed to a non-Hague Convention jurisdiction that makes distinctions on the basis of gender in parenting disputes. The Ontario court's focus should be on the likely outcome if the child were removed to the foreign jurisdiction, not on the mechanics of the foreign law. Removal to foreign jurisdictions that have discriminatory impacts based on gender in their family laws warrant greater scrutiny because of the increased likelihood that they would result in outcomes that deviate substantially from the best interests of child.

PART IV - SUBMISSION ON COSTS

30. CCMW seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 25th DAY OF MARCH, 2022



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