SCC File No.: 39875

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

BETWEEN:

F.

Applicant
(Respondent)

- and -

N.

Respondent
(Applicant)

ATTORNEY GENERAL OF ONTARIO

Intervener

REPLY TO THE RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL (F., APPLICANT)

(pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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Index

APPLICANT'S REPLY MEMORANDUM

The law is not "settled" and requires pan-Canadian clarification

1. The Respondent's assertion that "further clarification is not required" does not withstand a fair reading of the jurisprudence. There is no uniform interpretation of the law and the outcomes in various cases do not turn solely on the existence of different facts. For example, in *Ojeikere*, Miller J.A. did not agree that the *CLRA* should be interpreted as adopting a lower threshold of "serious harm" than under the *Hague Convention*.[1] The decision of the Ontario Court of Appeal below demonstrates fundamental disagreement regarding the application of the "serious harm" standard in the context of non-*Hague* signatory states.[2]

2. Contrary to the Respondent's submission, this Honourable Court has not definitively answered this question. *Thompson* was not primarily concerned with *what* constitutes serious harm, but rather whether the *Hague Convention* or provincial legislation *should* prevail when both are invoked. Also, *Thompson* was decided in the context of a removal to Scotland, a *Hague Convention* signatory, where the Court was assured the best interests test would apply.[3]

3. Fundamental questions remain unanswered, including: the extent to which Canadian courts must be guided by the "best interests analysis" when ordering the removal of children to a non-*Hague* signatory state?

Clear issues of public importance affecting Canadian children

4. The Trial Judge and Court of Appeal decisions[4] bring a fundamental issue of public importance clearly into focus: can there be a principled basis for determining which non-*Hague* countries do or do not appropriately take the "best interests" of children into account? Further, what principles guide the exercise of discretion to return a child to a non-*Hague* signatory?

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[1] *Ojeikere v. Ojeikere*, 2018 ONCA 372, at para. 106.
[2] *Ojeikere v. Ojeikere*, 2018 ONCA 372, at paras. 101, 106, 107, 111-114.
[3] *Thomson v. Thomson*, [1994] 3 S.C.R. 551
[4] *N. v. F.*, 2021 ONCA 614. [Court of Appeal Decision].

5. In Canada, the *Divorce Act* provides a non-exhaustive list of factors which *shall* be considered by courts in making best interests determinations.[5] Like all Canadian statutes, the *Divorce Act* must also accord with the requirements of the *Charter*.[6] Section 15 of the *Charter* explicitly recognizes that every individual is equal before and under the law and has the right to the equal benefit of law without discrimination based on sex. As a consequence, any best interests determination made in Canada must be informed by *Charter* values[7]. Equal entitlement to decision-making responsibility, regardless of sex, ensures that the best interests of children are not subverted by unnecessary presuppositions about the respective roles of men and women.

6. The UAE does *not* recognize equal rights between the sexes. For example, in *L.C.M. v. J.N.S.*, the Alberta Court of Queen's Bench considered expert evidence that, a) in the UAE, "Shariah-trained" judges would have difficulty with the concept of the best interests of the child, *as understood in Canada*; b) that guardians (either the father or another *male* relative) have the right to make all the significant decisions regarding the child; and c) that Shariah law does not recognize joint or shared guardianship.[8]

7. Similarly, in *Isakhani v. Al-Saggaf*, the Ontario Court of Appeal found that an order from the UAE which required a woman to return to her husband's home and "obey him" was evidence of a "serious risk of harm".[9] In *Droit de la famille – 172346*, the Quebec Superior Court refused to return a child to Saudi Arabia, in light of concerns that, by remarrying, the mother had forfeited her right to custody. The presence of this rule demonstrated that the child's best interests, as we understand them, were *not* the paramount criteria to decide a child's custody.[10]

8. At its core, this case is about the extent to which Canadian courts should defer to foreign legal systems where there can be no assurance that the "best interests" of children will be of paramount concern. The decision of the Court of Appeal below raises a fundamental issue – namely, that for non-*Hague* signatory states, Canadian courts have no predictable method for determining whether or how the best interests of children will be determined appropriately.

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[5] *Divorce Act*, RSC 1985, c 3 (2nd Supp), s. 16(3).
[6] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 28.
[7] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at para. 23.
[8] *L.C.M. v. J.N.S.*, 2008 ABQB 459, at paras. 9, 12, and 30.
[9] *Isakhani v. Al-Saggaf*, 2007 ONCA 539.
[10] *Droit de la famille – 172346*, 2017 QCCS 4582.

9. Establishing clear principles in the context of a child's removal across international borders is a matter of urgent national importance. Granting Leave herein would not only protect vulnerable children from being returned to non-*Hague* jurisdictions, where they may face risk of serious harm, but would also provide predictability and consistency to the law across Canada.

Deference does not preclude consideration by this Honourable Court

10. Errors of law or principle allow for the displacement of deference owed to a Trial Judge's findings. If the Trial Judge did not consider relevant factors or evidence, as Lauwers J.A. concluded, this Honourable Court would be at liberty to "review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence."[11] The threshold of deference cannot be so high that appellate courts are rendered meaningless.

11. By granting Leave, this Honourable Court could also address the degree of deference owed to courts making determinations with respect to foreign law. For example, to what extent should appellate courts consider the materials and evidence upon which an expert opinion on foreign law is based?[12] In *General Motors Acceptance Corporation of Canada, Limited v. Town and Country Chrysler Limited*, the Court of Appeal observed that:

- "high deference" does not apply to "findings and determinations made in respect of foreign law…the credibility of an expert witness testifying on legal issues is just as easily assessed on appellate review as at trial"; and

- "it is highly unlikely that the autonomy or integrity of trial courts will in any way be put at risk if appellate courts do not defer to the trial judge's findings in respect of questions of foreign law".[13]

This case is about the law, not facts

12. The Majority acknowledged that Lauwers J.A.'s dissent was based upon legal errors in the Trial Judge's reasons, including with respect to his conclusions regarding: UAE law;[14] the

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[11] *Van de Perre v. Edwards*, 2001 SCC 60, at para. 15.
[12] *Grayson Consulting Inc. v. Lloyd*, 2019 ONCA 79, at paras. 29 and 38; *Allen v. Hay*, 1922 CanLII 25 (SCC), p. 81; *General Motors Acceptance Corporation of Canada, Limited v. Town and Country Chrysler Limited*, 2007 ONCA 904 ["*General Motors*"], at para. 38.
[13] *General Motors*, 2007 ONCA 904, at paras. 32 and 33.

Applicant's residential status in the UAE;[15] the Respondent's settlement proposal;[16] and the harm resulting from separating children from their primary caregiver.[17]

13. The Respondent ignores that Lauwers J.A. found *legal* errors that warrant reversal,[18] mischaracterizing his well-considered and principled dissent as having "re-weighed the evidence, disregarded the evidence of experts, and substituted his own findings and discretion for those of the trial judge".[19]

14. Furthermore, there remains fundamental disagreement about the extent to which a best interests analysis should be conducted when assessing "serious harm". For example, Lauwers J.A. determined that the Trial Judge erred by viewing the best interests analysis "as an all-or-nothing exercise specific to the determination of custody disputes."[20] Lauwers J.A. seeks regard to the list of factors set out in s. 24(3) of the *CLRA*.[21] On the other side of this disagreement, in *Ojeikere*, Miller J.A. wrote that "[i]n assessing what constitutes serious harm, a judge is not to replicate the best interests analysis".[22] How should this legal dispute be resolved? Similarly, the extent to which the best interest analysis informs the exercise of discretion under s. 40 of the *CLRA*, remains in dispute.

15. Paciocco J.A. has since determined that there are "serious issues to be tried regarding whether [the Trial Judge's] determinations were based on the correct principle" and that "[i]f the application judge erred…there is a risk that the mother and children will be separated, or that parenting rights to the children will be determined based on gender-based principles or presuppositions rather than the best interests of the children."[23]

16. In suggesting that the Applicant is trying to re-establish the "tender years" doctrine, the Respondent offers a straw man. The Respondent improperly conflates the role of a primary

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[14] See Court of Appeal Decision, at para. 78.
[15] See Court of Appeal Decision, at para. 63.
[16] See Court of Appeal Decision, at para. 69.
[17] See Court of Appeal Decision, at para. 92.
[18] Court of Appeal Decision, at paras. 252 and 266.
[19] Respondent's materials at para. 26.
[20] Court of Appeal Decision, at para. 335.
[21] Court of Appeal Decision, at paras. 337-339.
[22] *Ojeikere v. Ojeikere*, 2018 ONCA 372 at paras. 111-114.
[23] *N. v. F.*, 2021 ONCA 688, [Stay Decision], at paras. 30 and 39.

caregiver with the "tender years" doctrine. The tender years doctrine was predicated on the bond between *mothers* and their children, based on the gendered assumption that women are inherently better custodial parents. By way of contrast, deciding whether a parent is or is not the "psychological parent" or "primary caregiver" is not based on sex or gender identity. It just so happens that, in this case, the undisputed primary caregiver was the mother.

17. While the Majority in the Court of Appeal and the Respondent raise the spectre of "results-based rulings",[24] a fair reading suggests that this may be what the Trial Judge did. In his costs endorsements, the Trial Judge provides:

> After all, had the mother succeeded on the jurisdictional argument, she would have also succeeded in placing herself in the enviable position of being the sole parent in the company of the children for well more than half a year before a court in Ontario determines custody and access. Intentional or otherwise, that would have gone some distance to making F.'s litigation positions a *fait accompli*.[25]

18. The Trial Judge acknowledged that, had Ontario accepted jurisdiction, it would have been likely that an application of the best interests factors in s. 24(3) of the *CLRA* mitigated in favour of the children remaining with their mother. Since the UAE law automatically grants decision-making authority to fathers, the effect of the Trial Judge's return order *is* to determine custody.

The constitutional status of the *CLRA*

19. It is submitted that, in the family law context, where a child's best interests is to be the sole and overriding consideration, a failure to adequately consider *all* factors relevant to their best interests violates security of the person interests under s. 7 of the *Charter*. By rejecting the application of the *Charter* herein, the decisions below raise an issue of national importance affecting any discretionary return order involving a non-*Hague* signatory state.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of November, 2021.

Fareen L. Jamal

Fadwa Yehia

[24] Court of Appeal Decision, at paras. 6 and 39.
[25] *N. v. F.*, 2021 ONSC 416 at para. 36. [Costs Decision].

TABLE OF AUTHORITIES

APPELANT'S AUTHORITIES	CITED AT PARAGRAPH NO.
CASES	
Allen v. Hay, 1922 CanLII 25 (SCC)	11
Droit de la famille – 172346, 2017 QCCS 4582	7
General Motors Acceptance Corporation of Canada, Limited v. Town and Country Chrysler Limited, 2007 ONCA 904	11
Grayson Consulting Inc. v. Lloyd, 2019 ONCA 79	11
Isakhani v. Al-Saggaf, 2007 ONCA 539	7
L.C.M. v. J.N.S., 2008 ABQB 459	6
Ojeikere v. Ojeikere, 2018 ONCA 372	1, 20
Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038	5
Thomson v. Thomson, [1994] 3 S.C.R. 551	2
Van de Perre v. Edwards, 2001 SCC 60	10
LEGISLATION	
Children's Law Reform Act, RSO 1990, c C12, s. 24(3), s. 40 *Loi portant réforme du droit de l'enfance*, LRO 1990, c C.12, s. 24(3), s. 40	14, 18
Divorce Act, RSC 1985, c 3 (2nd Supp), s. 16(3) *Loi sur le divorce, LRC 1985*, c 3 (2e suppl), s. 16(3)	5
The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss. 7, 15, 28 *Loi constitutionnelle de 1982,* Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11, ss. 7, 15, 28	5, 19