Court of Queen's Bench of Alberta

Citation: CB v BM, 2021 ABQB 151

Date: 20210226
Docket: FL03 55350
Registry: Edmonton

Between:

CB

Applicant

- and -

BM

Respondent

Reasons for Decision
of the
Honourable Madam Justice D. J. Kiss

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1. Introduction

[1] CB and BM are the divorced parents of two children: CGB, a daughter born June 30, 2008, and BCB, a son born August 10, 2010. CB, the father, seeks the return of both children to France pursuant to the operation of Article 12 of the *Convention of the Civil Aspects of International Child Abduction*, Can TS 1983 No 35, 19 ILM 1501 ("*Hague Convention*"). BM, the mother, opposes the return of the children on the grounds that the children are at grave risk of physical or psychological harm if they are returned, and because the children are now settled in their new environment here in Canada.

[2] These proceedings have been case managed. Pursuant to an Order granted November 13, 2019, the case management Justice directed that CB's application would be heard in two stages.

A half day Special Chambers application was scheduled for February 28, 2020 and a four day Oral Hearing was scheduled for April 21–24th, 2020.

[3] The issues to be addressed at the Special Chambers application on February 28, 2020 were as follows:

(a) Whether it is demonstrated that the children are now settled in their new environment pursuant to Article 12 of the *Hague Convention*;
(b) Whether the children object to their return to France pursuant to Article 13 of the *Hague Convention*; and
(c) Whether the children have reached an age and degree of maturity at which it is appropriate to take account of their views pursuant to Article 13 of the *Hague Convention.*

[4] The Special Chambers application proceeded as scheduled. On March 26, 2020, Justice Ouellette rendered his decision on these matters, concluding as follows:

(a) the children are not settled in their new environment;
(b) the children voice an objection to returning to France, but the objection must be reviewed carefully in light of the conflicting evidence regarding being happy in France and the clear alignment with BM;
(c) the children have not reached an age or a degree of maturity which would make it appropriate to take into account their views.

[5] Justice Ouellette directed that his Ruling was to be binding on the judge who would preside over April 21–24, 2020 Oral Hearing. Unfortunately, the Covid-19 pandemic intervened and the Oral Hearing was cancelled pursuant to Master Order #3 (Relating to the Court's Response to the Covid-19 Virus) issued by Chief Justice M.T. Moreau on March 20, 2020.

[6] In November 2020, the case management Justice rescheduled the Oral Hearing dates for January 2021, and permitted the parties to file updated Affidavits addressing any changes which may have occurred in the children's circumstances in the 10 month period since the Special Chambers application.

2. Issues

[7] The issues before this Court for determination are as follows:

(a) Were the children wrongfully removed by BM from France?
(b) If this Court determines the children were wrongfully removed from France, were these proceedings commenced within one year from the date of their wrongful removal?
(c) If these proceedings were not commenced within one year, are the children now settled in their new environment?
(d) Is there a grave risk that returning the children to France would expose them to physical or psychological harm or otherwise place the children in an intolerable situation?

3. Evidence Before the Court on this Application

[8] In addition to the filed materials that were before Justice Ouellette at the Special Chambers application on February 28, 2020 and further written argument from all counsel, I was also provided with the following:

(a) Supplemental Affidavit of CB sworn November 27, 2020;
(b) Supplemental Affidavit of BM sworn December 20, 2020;
(c) Transcript of the evidence given by the children during BM's Extradition Hearing on September 10, 2020; and
(d) Written Update from Counsel for the children dated December 17, 2020.

[9] During the Oral Hearing, the Court heard evidence from the following witnesses:

(a) Dr. Perlita Torres, PhD, the psychologist who completed the Voice of the Child Report dated February 15, 2020. Dr. Torres was qualified as an expert in assessing children, with agreement of all counsel;
(b) CB, who testified by Webex from France;
(c) CM's current wife, who I will refer to as EB, who testified by Webex from France;
(d) BM; and
(e) BM's current partner, who I will refer to as MC.

4. Agreed Facts

[10] The basic facts, as outlined by the parties in an Agreed Statement of Facts and a Chronology of Events, can be summarized as follows:

- CB and BM were married in France on March 31, 2007. When the parties separated in April, 2015, they were residing in the town of Manosque, France.
- In October, 2015, CB commenced divorce proceedings in France.
- In November, 2015, allegations of sexual abuse involving BCB were made against CB. The police launched an investigation.
- In December, 2015, an Order was granted in the divorce proceedings directing that CB and BM would have joint parental authority regarding the children, CB would have supervised access, and there would be a psychological assessment of all parties.
- In January, 2017, the investigation into the allegations of sexual abuse against by CB was completed and no further steps were taken. The complaint of sexual assault was dismissed.
- On June 20, 2017, there was a Court hearing in France in the divorce proceedings. The decision was reserved.
- On June 27, 2017, BM left France and came to Edmonton with BCB and CGB.
- On August 2, 2017, the Court in France issued its decision arising from the hearing on June 20, 2017. CB was granted increased access with the children.
- On December 6, 2017, the Court in France granted a Divorce Decree granting CB sole parental authority and full custody of both children.
- On February 19, 2018, CB completed a Hague Convention application.

- On February 21, 2018, the Central Authority in France referred the Hague Convention application to the Canadian Central Authority.
- On March 9, 2018, the Canadian Central Authority located the children in Edmonton.
- On March 16, 2018, the Central Authority in this Province opened a file.
- In the Spring of 2018, BM received notice of CB's Hague Convention application.
- On May 29, 2018, the Central Authority was advised by CB that he wanted to suspend his Hague Convention application for the return of the children.
- On August 7, 2018, CB indicated he did not wish to proceed with the Hague Convention application and on August 22, 2018, the Central Authority withdrew their Notice under the *Hague Convention*.
- CB proceeded with the extradition process he had initiated in France. In July 2019, BM was arrested on an international warrant for child abduction. The extradition proceedings are ongoing in the Court of Queen's Bench of Alberta, Judicial District of Edmonton.
- On August 14, 2019, CB requested the reopening of his file under the *Hague Convention.* The Edmonton Central Authority filed a new Notice on August 27, 2019.
- This Application was filed by CB in the Court of Queen's Bench of Alberta, on October 18, 2019.

5. Analysis

A. General Principles

[11] The *Hague Convention* carries legal force in Alberta by operation of s 2 of the *International Child Abduction Act*, RSA 2000, c. I-4.

[12] The objectives of the *Hague Convention* are clear. It aims to enforce custody rights and secure the prompt return of wrongfully removed children to their country of habitual residence: ***W(V) v S(D)***, [1996] 2 SCR 108. This serves several purposes. It protects against the harmful effects of wrongful removal on children; it deters parents from abducting children by depriving the removing parent of any advantage they might have otherwise gained by the abduction; and it allows custody and access disputes to be determined in the most appropriate forum, which is the jurisdiction where the child was habitually resident: ***Office of the Children's Lawyer v Balev***, 2018 SCC 166 at paras 24–27.

[13] Under Article 3 of the *Hague Convention*, the removal or retention of a child is considered wrongful if:

(a) it is in breach of the 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.

[14] Notwithstanding Article 3, Article 13 of the *Hague Convention* sets out important exceptions to the presumption of summarily returning children to their place of habitual residual residence. Article 13(a) provides that the Court is not required to order the return of the children if CB consented to, or subsequently acquiesced to, the removal or retention of the children by BM. Article 13(b) provides that the Court is not required to order the return of the children if doing so would pose a grave risk of physical or psychological harm to the children. Article 13 also provides that the Court is not required to order the return of the children if it finds that they object to being returned and have attained an age and degree of maturity at which it is appropriate to take account of their views. As mentioned, Justice Ouellette determined that this final exception was inapplicable, and his ruling is binding on me.

[15] Article 14 further provides that the Court may take notice of the law, and of administrative or judicial decisions, of the country of the children's habitual residence, without recourse to the specific procedures for the proof of that foreign law or decision.

B. Were the children wrongfully removed by BM from France?

[16] The parties do not dispute that the children were habitually resident in France at the time BM travelled with them to Canada. Both children were born in France and had lived their entire lives in that country.

[17] BM argues that the removal of the children was not wrongful as CB consented to her coming to Canada with the children. She argues that CB provided his verbal consent to her before she left France at the end of June, 2017, and then provided a written letter of consent several months later, in November, 2017.

[18] CB claims that BM's removal of the children from France was done in breach of both the *French Civil Code* and the Order granted in their divorce proceedings in December, 2015, under which he was given joint parental authority and supervised access to the children. CB states that he was exercising his parental rights at the time of the children's removal from France. He argues he was never notified by BM of her intention to take the children to Canada and that he never provided his consent for her to do so, verbally or in writing.

i) Does CB have a "right of custody" in relation to the children?

[19] The December 15, 2015 Order granted by the Superior Court of Digne-Les-Baines, France (Affidavit of BM sworn December 13, 2019, Exh "F") contained the following relevant provisions:

> Whereas in the interim, parental authority shall be exercised jointly, which is not disputed; (p.2)
>
> In the interim and temporarily;
>
> State that parental authority over the children they have in common, CGB, DOB 30 June 2008, and BCB, DOB 10 August 2010, shall be exercised jointly by both parents. (p.3)

[20] The August 2, 2017 Order granted in France provides the following additional information regarding the meaning of the phrase "joint parental authority" (Affidavit of BM sworn December 13, 2019, Exh "S"):

RECALL that both parents jointly exercise parental authority over the children they have in common, CGB and BCB

RECALL that the exercise of joint parental authority particularly requires both parents to:

- **make important decisions regarding the children together** (particularly with regard to his/her health, academic direction, religious education, **change of residence**…
- keep each other informed, through essential communication between parents, of the organization of the child's life (academic, sports and cultural life, medical treatments, hobbies, vacations …)
- allow the child to communicate freely with his/her other parent, while respecting each one's way of life

RECALL that any change of residence of either parent, as soon it changes the terms and conditions of the exercise of parental authority, must be subject to prior and immediate communication from the other parent (particularly a move). (emphasis added)

[21] The issue of whether the concept of "joint parental authority" in French law provides a party with a "right of custody" as contemplated by the *Hague Convention* was considered in the case of ***Droit de la famille — 093056***, 2009 QCCS 5812. Justice Tessier stated as follows (at paras 49–51):

> Judge Jean-Pierre Senecal [in *Droit de la famille* -3202 AZ-9902116] had to rule on an order from the French courts which, by consent of the parties, continued to exercise the joint exercise of parental authority, notwithstanding the fact that the child's habitual residence was at the mother's home.
>
> He is of the opinion that the order conferring parental authority on both parents had the effect of granting custody rights within the meaning of the Convention.
>
> It is expressed as follows:
>
> > "What is the meaning and especially what are the consequences of this ordinance within the framework of French law?
> >
> > In the opinion of the Court, this order had the effect of attributing rights of custody within the meaning of the *Act* on the *Civil Aspects of Child Abduction* and the *Hague Convention*, not only to the mother but also to the father. It was therefore up to both parents, the mother and the father, to take the important decisions concerning the child, the Court having decided that the exercise of parental authority with regard to it should take place jointly by both parents.
> >
> > The residence of the child is surely one of these important questions and the fixing of the residence of the child abroad is

> certainly even more so. It is, without a doubt, a fundamental question in the life of the child, as much for this one as for his parents".

He adds;

> "The Court is therefore of the opinion that by the joint attribution of the exercise of parental authority by the French court, the decision in matters of fixing the residence of the child abroad should be taken by the two parents, the mother not being able to act alone nor to decide alone. By doing so, she violated the father's custody rights within the meaning of the Convention and the Québec law, and we are in the presence of a case of wrongful removal."

[translated from the French]

[22] I agree with Justice Tessier's reasoning. Accordingly, I am satisfied that, as CB had joint parental authority relative to both children, he had a "right of custody" within the meaning of Article 3(a) of the *Hague Convention.*

ii) Was CB exercising his "right of custody"?

[23] CB provided copies of two Reports prepared by the Trait d'Union, the agency that was supervising his visits with the children. A Report dated June 7, 2016 confirms that between December 15, 2015 and June 7, 2016, CB had 9 visits with the children. A Report dated June 1, 2017 indicates that between January 9, 2017 and June 1, 2017, CB had another 9 visits with the children.

[24] The August 2, 2017 Order from the France Court (at p.5) refers to at least two other Reports having been prepared by Trait d'Union (September, 2016 and January 9, 2017) and confirms that a further 12 visits between CB and the children took place between June 7, 2016 and January 9, 2017.

[25] It appears that CB was consistently exercising the supervised access that had been awarded to him pursuant to the Order granted December 15, 2015, right up until the time that BM left the country with the children. Further, on the date that BM departed, the parties were awaiting the decision from the hearing before the French Court on June 20, 2017 regarding CB's application for increased parenting time.

[26] I therefore find that CB had been exercising his rights of custody as of June, 2017, when BM brought the children to Canada, and there is no evidence to suggest that he would not have continued to do so but for the children's removal.

iii) Did CB consent to, or subsequently acquiesce to, the removal of the children?

[27] Even if CB has a right of custody and was exercising those rights, Article 13(a) of the *Hague Convention* makes it clear that I am not required to order the return of the children to France if I conclude that CB either consented, or acquiesced to their removal.

[28] The onus of proof is squarely on BM to establish, on a balance of probabilities, that CB consented to the children's removal from France: ***Oncu v Oncu***, 2009 BCSC 829 at para 28. In

order to trigger the application of the Article 13(a) exception, although the consent does not have to be evidenced in writing or expressly stated, there must be "clear and cogent" evidence of unequivocal consent or acquiescence: ***Katsigiannis v Kottick-Katsigiannis*** (2001), 55 OR (3rd) 456 at paras 43 and 49, 18 RFL (5th) 279 (CA).

[29] Article 373-2 of the *French Civil Code* states, in part, that:

> Any change of residence of one of the parents, when it modifies the terms and conditions of exercise of parental authority, shall be the subject of a preliminary notice to the other parent, in due time. In case of disagreement between them, the most diligent parent shall refer the matter to the family law judge who shall rule according to what is required by the child's interest.

[30] BM's evidence can be summarized as follows:

- at some point around June 2017, the children's family doctor, Dr. Amzallag, advised her that she should take the children away as their frequent illnesses, including stomach and digestive problems, were the result of their fears of CB.
- on June 20, 2017, BM attended the court hearing relating to CB's request for increased, unsupervised parenting time.
- on June 21, 2017, Dr. Amzallag provided BM with a letter allowing the children to finish the school year early, as of June 26, 2017, because of their "current state of health".
- BM booked plane tickets for herself and the children just "days before" they left. BM could not recall if she had booked the plane tickets by the time of the court hearing on June 20, 2017.
- on June 25, 2017 (Father's Day), BM spoke to CB after his visit with the children and told him that she was planning to take the children to Edmonton because of the state of their health, and on the advice of their doctor. CB appeared to be in a hurry at the time of the conversation, but verbally agreed to this trip.
- BM told the children they were going on vacation and that it would be "like going to Disneyland". BM did not specifically tell the children that they were going to Edmonton as they were very young.
- BM booked flexible return plane tickets, which were more expensive, so that she could change the return date if the children did not like it in Canada. They departed on June 27, 2017 from Milan, Italy. BM's brother drove her and the children to the airport in Italy. They flew from Milan to Amsterdam, and then from Amsterdam to Edmonton. The return date on the tickets was November 16, 2017.
- before leaving France, BM gave her lawyer the letter from Dr. Amzallag and told her that she was going on vacation to Canada. BM instructed her lawyer to communicate with her brother.
- other than her brother, BM did not tell any of her other family members (including her mother and sister) that she was taking the children to Canada.
- by the end of the summer of 2017, BM had decided to remain in Canada and consulted an immigration lawyer. She was advised that in order to register the children in school and to be able to get a work visa, she required CB's written consent allowing her and the children to remain in Canada.

- BM asked her sister to contact CB to request that he sign a document providing his written consent for her and the children to remain in Canada while she was working. CB signed a document dated November 18, 2017 (Affidavit of BM sworn December 20, 2020, Exh "D") providing his consent, and her brother scanned and emailed a copy to her on November 19, 2017. She provided this to her immigration lawyer. She was then approved for a work visa and the children were both granted visitor's visas.
- BM indicated that she never received any document revoking or cancelling CB's consent.
- BM registered the children in school under her last name, not the children's legal last name.

[31] CB's evidence can be summarized as follows:

- BM did not advise him of her plans to take the children out of school early, or to go on a vacation with the children.
- CB did not provide his verbal consent to BM, at any time, to travel to Canada with the children.
- CB showed up for his scheduled supervised visits with the children at the Trait d'Union on both July 2 and July 16, 2017. On July 2, 2017, when the children did not arrive, the supervisor attempted unsuccessfully to contact BM. BM's mother called the Trait d'Union that afternoon to advise that the children would not be coming as they were ill.
- When the children did not show up for the next scheduled visit on July 16, 2017, CB contacted the police. He was advised that he would not be able to take any further steps until the children had missed several visits.
- CB attempted to call BM on her cell phone repeatedly, but the number was disconnected.
- On August 1, 2017, the police were prepared to accept CB's written complaint and began to make inquiries regarding the whereabouts of the children.
- On September 5, 2017, CB spoke with the director at the children's school. The director confirmed that the children were not in attendance for the first day of school and the school had not heard from BM. CB filed another report with the police on September 6, 2017.
- CB was never contacted by BM's sister and did not sign the letter of consent dated November 19, 2017, authorizing BM to keep the children in Canada. The first time he saw this document was when he received BM's Affidavit sworn January 17, 2020 in these proceedings. CB noted that the address in the document was incorrect as he had moved into other rental accommodation by November 2017.
- CB would not have signed the letter of consent in November 2017 as, by then, he was spending money on legal fees to try and locate his children. The French police had also started their investigation in October 2017.
- CB was not told where the children were until after the police completed their investigation sometime in 2018. He was provided with an address in Calgary.

- CB suspended his *Hague Convention* application in May 2018, and withdrew it on August 7, 2018. CB indicated that he had made this decision based on the advice he received to prioritize the criminal extradition proceedings.
- CB travelled to Calgary in the summer of 2019. The address he had been provided with ended up being for the office of BM's immigration lawyer.
- The Calgary Police made some inquiries while CB was in Canada and were able to confirm that the children were living in Sherwood Park, Alberta.
- CB travelled to Sherwood Park and met with RCMP there. He was advised not to try and contact the children as BM might leave with them again. He was told that the best thing for him to do was to return to France and proceed with an application under the *Hague Convention* to have the children returned.
- CB requested the reopening of his *Hague Convention* file in August 2019.

[32] There are a number of aspects of BM's version of events that I find troubling and implausible.

[33] To begin with, if CB had consented to the trip and knew the children were leaving on vacation, there would have been no reason for BM's mother to falsely advise the supervising agency, Trait d'Union, on July 2, 2017 that the children were not coming for CB's scheduled visit because they were ill. BM's mother later confirmed to the police, during an interview in September, 2017, that she was aware that BM had already left France with the children by the end of June.

[34] As well, if CB had consented to the trip, there would be no reason for BM to have kept her destination a secret from her mother, with whom she and the children shared a residence, and with whom she was extremely close. When BM's mother was questioned by police in September, 2017, she stated that BM had only told her she was going to Brittany and, after that, she did not know where she went. BM's mother also claimed that she had not spoken to BM since the end of July. At this hearing, BM confirmed that she now typically speaks to her mother weekly. The only reasonable explanation for BM not telling her mother where she was going with the children, or for how long, and for not keeping in regular contact with her mother after she left France, is that BM did not want to be located.

[35] In addition to being close to her mother, BM also commented several times on how close she is with the other members of her immediate family – particularly her brother and sister. Therefore, BM's evidence that her brother was the only person to whom she had told that she was coming to Canada only makes sense if she was trying to keep her destination hidden from CB.

[36] Further, if BM had only intended to go on a vacation with the children, and had CB's consent, then it would be expected that the children would have been returned to France before the start of the new school year. Booking plane tickets with a return date well into November, 2017, even if those tickets could be changed, suggests that BM was not simply planning a vacation. As well, even if the children were going to be late starting the school year in France for some reason, it would be expected that BM would have notified CB and their school, to at least confirm their registration. Correspondence from the school confirms that they had no such contact from BM.

[37] I also note that, after the Court appearance in France on June 20, 2017, BM was aware that the Court would be rendering a decision that would impact the ongoing parenting

arrangements. After all of the allegations made by BM against CB, and her efforts over the course of the previous two years to limit CB's contact with the children, it is difficult to accept that BM would opt to cut off all contact with her lawyer, and not follow up to determine the outcome of those court proceedings. I am of the view that, if BM had really only planned on taking a vacation, there would have been no reason for BM to cut off all communication with her lawyer in this manner, and delegate this responsibility to her brother.

[38] BM's explanation of what she told the children when they left France is also concerning. BM's evidence was that she told the children they were going on vacation and that it would be "like going to Disneyland". She states she did not tell the children they were going to Canada because they were "very young". I note that in BCB's interview with Dr. Torres, he states that his mother told him they were in fact going to Disneyland, but that BM did that to "protect" him. Although BM claims that the children were not old enough to be told where they were going on vacation, approximately four months later when she registered them in school in Edmonton, BM determined that they were mature enough to decide that they could change their last name and start using her last name, rather than their legal names.

[39] Equally unconvincing to me is BM's claim that, in November, 2017, CB provided his written consent for the children to remain in Canada.

[40] CB provided a copy of a Rental Agreement for an apartment leased in his name commencing 05/06/2015. It supports CB's claim that as of the date this consent form was alleged to have been signed by him, November 18, 2017, he had not been residing at the address specified on that consent form for some time.

[41] CB claims, and I accept, that he did not even know where BM and the children were at the time this document is alleged to have been signed by him. BM does not dispute that she did not initiate contact with CB directly, by email, telephone, letter or any other means, to provide CB with her address in Edmonton, or to facilitate any contact between the children and CB between the date that she left France and the date that this consent is alleged to have been executed by CB.

[42] CB testified that he was actively engaged in trying to locate the children at this point and incurring legal fees to do so. CB also stated that the police in France had just commenced their investigation in October, 2017, and therefore it would make no sense for him to have signed such a document only a few weeks later. I agree.

[43] Finally, BM claims that she asked her brother to obtain a written consent from CB. She understands that her brother typed out the form and then gave it to her sister, who was the one who contacted CB to ask him to sign the document. Once it was signed, BM's brother emailed her a copy. When asked why she did not contact CB herself to make this request, her response was that she and CB had difficulty communicating, with everything that had been going on. She stated that CB played a "role", or different "character" depending on who he was with, and by way of example, suggested that CB had been having an extramarital affair for years without her knowing. However, BM's evidence concerning the verbal consent she claims to have obtained from CB in June, 2017, and the written consent she claims to have obtained in November, 2017 is inconsistent. If BM was able to approach CB in June to speak to him directly and obtain his consent for the children to leave school early and go on vacation, then it makes no sense whatsoever that only four months later, after no intervening contact between the parties, that BM would suddenly feel that she was only able to communicate with CB through an intermediary.

[44] Although it was not argued before me, the period from May, 2018 to August, 2019 when CB suspended his *Hague Convention* application after learning of the children's whereabouts needs to be addressed. Clearly, a suspension of a *Hague Convention* application could constitute acquiescence in the appropriate circumstances. However, CB explained that this suspension occurred because he had been advised to give priority to the extradition proceedings. CB did actively pursue the extradition proceedings and further, travelled to Alberta and met with police in both Calgary and Edmonton after he was provided with an address for BM, obtained from her application for a work visa. I therefore find that the suspension of CB's initial *Hague Convention* application did not constitute acquiescence to the removal of the children from France.

[45] Considering all of the circumstances, I find that CB has failed to provide plausible, much less "clear and cogent" evidence of BM's unequivocal consent or acquiescence to the removal of the children from France.

iv) Conclusion – wrongful removal

[46] For the reasons outlined above, I find that CB had a right of custody and was exercising those rights in June, 2017 when BM left France with the children. I conclude that BM wrongfully removed the children from France in June, 2017. Further, I find that BM has not satisfied her onus of establishing, on a balance of probabilities, that CB consented or acquiesced to the children's removal from France.

C. Were these proceedings commenced within one year from the date of their wrongful removal?

[47] Article 12 of the *Hague Convention* makes it clear that, if a period of less than one year has elapsed between the date of the children's wrongful removal and the date of the commencement of proceedings before the judicial authority in the Contracting State where the children are now, then the judicial authority in the Contracting State must order the immediate return of the children: ***Balev*** at para 103.

[48] The sequence and timing of the events that occurred are not in dispute. Correspondence from the French Ministry of Justice dated December 13, 2019 (Affidavit of CB sworn January 15, 2020, Exh "N") confirms that CB filed a *Hague Convention* application with the French Central Authority in February, 2018 and it was received by the Canadian Central Authority within a few days. By March 9, 2018 the children had been located and the matter was referred to the Central Authority for the Province of Alberta.

[49] The Alberta Central Authority filed the Notice on March 13, 2018, but CB took no further steps at that time.

[50] In May, 2018, CB advised the French Central Authority that he wanted to suspend his *Hague Convention* application and on August 7, 2018, CB advised the French Central Authority that he did not want to proceed with the application. CB's evidence was that he made this decision based on the advice he received from the judge in France who had been assigned to his case. He was told that he should prioritize the criminal extradition proceedings and stop pursuing his *Hague Convention* application.

[51] On August 22, 2018 after having been advised by the French Central Authority that CB did not intend to pursue his claim under the *Hague Convention*, the Alberta Central Authority withdrew the Notice and closed their file.

[52] A year later, in August 2019, CB contacted the French Central Authority and requested the reopening of his file under the *Hague Convention*. A new referral to the Alberta Central Authority was made on August 20, 2019 and the Alberta Central Authority filed a new Notice on August 27, 2019.

[53] CB retained counsel and this Application was filed on October 18, 2019.

[54] The question to be determined is what is meant by the phrase "commencement of proceedings before the judicial or administrative authority of the Contracting State where the child is".

[55] This issue was considered in ***M(VB) v J(DL),*** 2004 NLCA 56. The Court of Appeal determined (at para 30) that the judicial or administrative authority under Article 12 means the entity charged with the responsibility of determining whether an order should be made to return the child. This entity is different in the various Contracting States. The Court of Appeal concluded that in Newfoundland and Labrador, that entity was the Courts, not the Central Authority. Therefore, it followed that submission of an application to the Central Authority did not constitute "the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is". The Court determined (at para 39) that proceedings had only been commenced when the father took the step of filing an originating application with the Court.

[56] The wording of the actual Notice that was filed by the Alberta Central Authority in the Court of Queen's Bench of Alberta is also of assistance. The Notice contains the following provision:

> After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or **unless an application under this Convention is not lodged within a reasonable time following receipt of the notice**. (emphasis added)

[57] In my view, this wording clearly suggests that the Notice itself is not an application or proceeding and therefore, simply having the Notice filed by the Central Authority is not sufficient to satisfy the requirements of Article 12.

[58] Finally, I note that the ways in which an action can be commenced in this Province are specified in rule 3.2(1) of the *Alberta Rules of Court* which provides as follows:

> 3.2 (1) An action may be started only by filing in the appropriate judicial centre determined under rule 3.3:
>
> (a) a statement of claim by a plaintiff against a defendant;
>
> (b) an originating application by an originating applicant against a respondent; or
>
> (c) a notice of appeal, reference or other procedure or method specifically authorized or permitted by an enactment.

[59] I am therefore satisfied that neither CB filing Notice with the Central Authority, nor the Central Authority filing Notice with this Court, "commenced proceedings" as contemplated in Article 13. I conclude that no proceedings were commenced by CB before the Court of Queen's Bench of Alberta, which is the judicial authority with the jurisdiction to make an order for the return of the children, until CB filed his Application on October 18, 2019. This proceeding was not commenced within one year of the children's wrongful removal from France.

D. Are the children now settled in their new environment?

[60] Article 12 of the *Hague Convention* provides that even where the proceedings are commenced after the one year period, children should still be returned to their place of habitual residence, unless it is established that they are now settled in their new environment.

[61] The "now settled" exception represents a compromise between the *Hague Convention*'s objectives of summarily returning wrongfully removed children and the children's interest in not having their lives disrupted again once they have settled down in a new environment: ***Kubera v Kubera***, 2010 BCCA 118 at paras 38-9, 66. Determining whether the children are well settled in their new environment is a child-centric factual inquiry (***Kubera*** at para 48). This determination depends on detailed and compelling evidence, which requires the court to look beyond the outward appearances and superficial realities to determine the actual degree of settlement (***Kubera*** at para 74). This factual inquiry includes a physical element, relating to being established in a community, and an emotional element, relating to security and stability (***Nowlan v Nowlan***, 2019 ONSC 4754 at para 45). The threshold is high and requires more than a mere physical adjustment to surroundings, but the level of settlement does not need to be exceptional (***Kubera*** at paras 74-5).

[62] Justice Ouellette determined that, as of the end of February, 2020, the evidence did not demonstrate that the children were settled in their new environment here in Canada. I am bound by his ruling. However, as the original dates scheduled for this Hearing had to be adjourned as a result of the Court closure related to the pandemic, another 11 months has now passed. All parties agreed that I must re-examine this issue, taking into account only evidence of what has transpired in the period since Justice Ouellette's finding was made.

[63] Information regarding the children's circumstances since February, 2020 came from three sources – BM, BM's current partner MC, and children's counsel, Ms. Hardin. Dr. Torres, the psychologist who prepared the Voice of the Child Report in February, 2020 did not meet with the children again during this period.

[64] It was readily apparent from BM's oral evidence that she bears much animosity towards CB. Despite being separated from CB now for over 5 years, her belief that CB had an extra-marital affair with his current wife continues to cause her considerable distress. Although this issue was in no way relevant to the matters before this Court for determination, BM made this allegation repeatedly during her testimony.

[65] BM remains firm in her view that CB sexually assaulted their son, BCB and that CB's father, Pierre, also did something inappropriate to CGB when she was approximately 3 years old.

[66] At various times during her testimony, BM became visibly upset and displayed considerable hostility towards CB. She described the children's experience living with CB in France as a "nightmare" and described CB as a "murderer". BM later clarified that what she had intended to say was that CB was "a murderer of the innocence of their children".

[67] BM did not answer questions in a forthright manner. She was often defensive and evasive in her responses. BM had to be instructed several times to answer the question that had been asked, as she tended to avoid answering even the most direct of questions by offering unsolicited information that supported her position instead. Nor was BM even-handed in giving her evidence. By way of example, while BM went on at some length about how well CGB was doing in school this year, she failed to mention that the exact opposite was the case with BCB. Instead, she noted only that BCB was "more lazy" and that she "has to keep after him".

[68] In paragraph 62 of BM's Affidavit sworn December 13, 2020, she states: "I will never allow my children to be returned to CB's custody. I will do anything in my power to prevent CB and Pierre from having access to them". After hearing BM testify and observing her behavior during this hearing, I believe that this sworn statement is an accurate reflection of BM's intentions.

[69] In my opinion, BM's evidence was clearly influenced by the strong negative emotions she feels towards CB. As a result, I have difficulty accepting much of the evidence given by BM on this issue, or giving it any significant weight. Further, on points where BM's evidence conflicted with that of her current partner MC, or the information provided by children's counsel, I find BM's evidence to be less reliable.

[70] With respect to the children's living arrangements, since February, 2020, the children and BM have continued to reside with MC in his residence in Sherwood Park. CGB and BCB continued to sleep in the dining room of the main floor of this open concept residence until bedrooms in the basement were built. Although MC's own two children only spend weekends and holidays at this residence, those two children were given the 2 extra bedrooms on the second floor. BM indicated the children's rooms were completed by March 2020, while MC testified they were not done until sometime in the summer of 2020. I note that in Dr. Torres' Report dated February 15, 2020, she indicates that CGB mentioned that the "plan" was to build bedrooms in the basement. Further, MC testified that it took probably a year to complete the bedrooms. I therefore accept that the children did not have their own bedrooms until at least the summer of 2020.

[71] With respect to the children's schooling, CGB was required to change schools again in September 2020, as she was starting junior high. This is now her third school since coming to Canada. CGB is doing well in school and enjoys her classes.

[72] BCB is attending the same school as last year. BCB's Report Card for the first 3 months of the school year ending November 30, 2020 indicated that his teachers were unable to assess his progress in many areas due to his significant absences. BM estimated that BCB had missed around 20 days of school during that first term. She indicated that BCB missed 4 days during her extradition hearing in mid-September, as there was no one to drive him to school. The balance of the absences are due to him being "really stressed". BM indicated that she typically receives calls from the school saying that BCB has a stomach ache and then she has to leave work to pick him up. He then remains home for a couple of days on each occasion.

[73] With respect to the children's extracurricular activities, MC, BM and counsel for the children all confirmed that BCB spends a considerable amount of time playing video games. CGB also spends time using a photo shop program on the computer. BCB continues to report that he does not have friends outside of school and that he plays with MC's children on weekends. CGB has made friends at school however, the move to online schooling in December

and for part of January, 2020 has meant that most of her contact with friends has been online, through games and chats. Neither child has ever been to a sleepover, or had a sleepover with friends. MC noted they sometimes go for nature walks and play board games.

[74] In February, 2020, both children had just become involved in Tae Kwon Do. By the summer of 2020, they had been moved to a different dojo. Then, as a result of the pandemic, the activity was completed suspended in latter part of 2020. Neither child is involved in any other extra-curricular activity.

[75] With respect to the children and BM's status in Canada, BM was granted a Work Visa and the children had Visitor's Visas, copies of which were entered as Exhibits at the hearing. However, the copies of the Visas that were put before this Court had all expired on November 13, 2019. BM's evidence was that the Visas had since been renewed.

[76] As well, BM's extradition proceedings are still ongoing. When MC was asked what would happen to the children if BM were extradited, he stated that he thought the children would go back with BM to France as well. Further, he indicated that he and BM had not talked about this at length and that while he would prefer to keep the children in Canada with him, he would need to arrange child care and so they had no firm plans. When BM was asked the same question, she indicated that if she was extradited, she intended to leave the children in Canada and her mother or sister would come to Canada to look after them. In my view, BM and the children's circumstances remain as uncertain and precarious as when the matter was before Justice Ouellette.

[77] With respect to the children's extended support network, BM's evidence was that the children have developed very strong attachments with two families, that I will refer to as the "B Family" and the "G Family". BM and the children lived with the B Family in their basement in Edmonton for the first 18 months after arriving in Canada and BM is now employed by a member of the B Family. She stated that all of the children, some of whom are very close in age to CGB and BCB, have become very close and that they have established new traditions and rituals – such as getting together for Halloween, Christmas and attending church. BM did concede that since being arrested in June, 2019, she has had a curfew and this has made it more difficult to spend time with these families as she must be at home between certain hours and is also required to remain within a defined geographical area. As well, the pandemic has restricted their ability to spend time with these families in the last year.

[78] BM noted that she is still very close to her family, who all reside in France. She indicated that the children speak to their grandmother most weeks. Her sister has travelled to Canada once to visit her and the children but was unable to come again as a result of the pandemic. Her sister has a son, who is 8 years old. BM noted that BCB and their cousin have a good relationship, they talk on the phone and play video games together. BM also speaks to her brother regularly and both CGB and BCG Facetime and play online video games with his three children. Her brother's son travelled to Canada in 2018 and spent a month in the summer babysitting the children for her while she worked.

[79] While I am not disputing that the children may have developed some meaningful ties to the B Family and the G Family during the time they have been in Canada, as suggested by BM, I find it unlikely for there to have been any significant change in these relationships since February, 2020 given the bail restrictions that BM has had to comply with, and the further restrictions that have been imposed on everyone as a result of the pandemic. Even from BM's

own evidence, it would appear that the children have more frequent contact with their various relatives in France than with the families that BM suggests form their support network here.

[80] Both children were experiencing bedwetting problems at the time of the Special Chambers application in February, 2020. BM confirmed that this problem persisted for CGB until at least the spring of 2020 and for BCB until the summer of 2020. By this time, CGB was almost 12 years of age and BCB was 10. BM could not recall whether she had mentioned this to Dr. Torres and indicated that the only steps she had taken to address the problem after coming to Canada was to speak to a doctor at a walk-in medicentre.

[81] Counsel for the children suggested that the bedwetting could be indicative of the children being in distress, rather than an indication of the children being well-settled. While no expert evidence was presented on this issue, I note that neither party suggested that the children had an underlying medical condition which might otherwise explain this troubling behavior. Further, when the bedwetting first began occurring in 2016, BM did consider it to be a symptom of the stress she felt the children were experiencing at that time. (Affidavit of BM sworn December 13, 2019, paras 34–37).

[82] BM also confirmed that she has arranged for the children to have at least 10 counselling sessions over the telephone with one of the psychologists who was involved with the children in France, Dr. Sciallano. The time frame during which these sessions have occurred is not clear, although there was one as recently as December, 2020. BM indicated that while she initiates the phone calls to Dr. Sciallano, they have been made at the request of the children. BM suggested that the pandemic has been hard on the children and that these sessions have helped them cope with stress.

[83] After weighing all of the evidence, I cannot conclude that, since the Special Chambers application in February, 2020, the children have become well settled in their new environment.

E. Is there a grave risk that returning the children to France would expose them to physical or psychological harm or otherwise place the children in an intolerable situation?

[84] Article 13(b) of the *Hague Convention* provides another exception to the Court's obligation to return children to their country of habitual residence. However, there is a high threshold to prove "grave risk" of physical or psychological harm. This exception is to be very narrowly construed so as not to compromise the underlying objectives of the *Hague Convention*: ***Stefanska v Chyzynski***, 2020 ONSC 3048.

[85] The exception for "grave risk" must not turn into an assessment of the parenting arrangements that are in the best interest of the child. It is not for this Court to determine what parenting arrangements are in the best interests of the children, only the jurisdiction or Court in which that decision must be made***: RVW v CLW***, 2019 ABCA 273 at para 19.

[86] BM, as the parent who wrongfully removed the children, bears the burden of establishing the significant risk of harm, or intolerable situation: ***RVW***, at para 18. While the standard of proof is a balance of probabilities, there must be considerable evidence and it must be credible: ***Pollastro v Pollastro*** (1999), 43 OR (3d) 485, 45 RFL (4th) 404 (OntCA).

[87] The leading case in Canada concerning the interpretation of Article 13(b) is still ***Thompson v Thompson***, [1994] 3 SCR 551. The Supreme Court clarified that the risk must be

more than an ordinary risk and one of substantial, not trivial, psychological harm. Further, the Court (at pp 596-597) adopted the following approach to the interpretation of Article 13(b):

> In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation.

[88] However, in ***RVW*** (at paras 16–19), our Court of Appeal noted that the Courts of other Contracting States have not all adopted this conjunctive interpretation of Article 13(b) and that some jurisdictions have recognized three distinct grounds for invoking this Article by considering "grave risk that the return would otherwise place the children in an intolerable situation" as a separate category.

[89] Regardless of the approach, it is certainly accepted that the phrase "physical or psychological harm" is coloured or influenced by the phrase "intolerable situation": ***RVW***, at para 16. As noted in ***Jabbaz v Mouamman*** (2003), 226 DLR (4th) 494 at para 23, 38 RFL (5th) 103 (OntCA), "The use of the term "intolerable" speaks to an extreme situation, a situation that is unbearable; a situation too severe to be endured".

[90] BM argues there is a grave risk of the children being exposed to harm if they are returned to France and that they would be placed in an intolerable situation if they were placed in CB's care. BM states the children are both experiencing anxiety regarding her circumstances and the possibility of being separated from her. She claims that the children are better off remaining in Canada as too little is known of what awaits them in France. BM suggests this Court must consider the physical risks to the children associated with international travel during the Covid-19 pandemic and the high rates of Covid-19 in France as compared to Canada. Finally, BM submits that both children now allege they have been sexually abused by CB, they are fearful of him and do not want to have any relationship with him at all.

[91] Ms. Hardin, counsel for the children is also of the view that returning the children to France would present a grave risk to their psychological health and would put them in an intolerable situation. Ms. Hardin noted that both children still firmly believe that BCB was sexually assaulted by CB and that he presents a danger to them. As well, on September 10, 2020, CGB testified in BM's extradition proceedings. CGB claimed that her statement to the French police in December, 2015 had not been true and that she had remembered "a couple weeks ago" that CB had hurt her as well as BCB, by putting his fingers in her "butt" and scrubbing her too hard in the shower (Transcript from Extradition Hearing, Exhibit 1, Tab 3, pp 19-20). From the time the initial investigation was commenced in 2015 until that date, CGB had steadfastly maintained that CB had done nothing to hurt her.

[92] Ms. Hardin submits that, given the depths of the children's beliefs and the length of time they have held them, as well as the ineffectiveness of the counselling efforts that were undertaken in the last year in Canada, it is probable that a return to France would present a grave risk to their psychological health.

[93] I will address each of these arguments briefly.

i) Anxiety Relating to BM's Circumstances and Separation

[94] A main focus of BM's arguments was on the psychological harm that would occur if the children were returned to CB in France.

[95] Dr. Torres testified that children develop attachments with their parents between the ages of 1-3 years. She noted that the Court Expert in France concluded the children were attached to both of their parents and that BM's disruption of their attachment to CB, which occurred when she brought the children to Canada, would have been distressing for them. Dr. Torres indicated that if the children were returned to France, they would be "initially resistant" and would similarly find the separation from BM distressing. Dr. Torres suggested the children would need therapeutic support.

[96] However, BM's evidence was that if this Court directed the return of the children to France, she would return with them. In her words, she would continue to "fight in France". Even though it is anticipated that BM would likely be arrested upon her arrival in France on the outstanding warrant, the outcome of those criminal proceedings is unknown at this point. While there may certainly be an initial period of time when the children and BM would be separated upon their return to France, the length of time of any such separation is uncertain.

[97] I also note that BM's extradition proceedings are still ongoing. If BM is extradited to France, her evidence was clear that she intended is to leave the children behind in Canada. Consequently, it is quite possible that the children will be separated from their mother regardless of this Court's decision.

[98] Therefore, while I accept that the prospect of being separated from BM is likely causing the children considerable anxiety, I do not find this to be a persuasive argument that would justify invoking the exception under Article 13(b).

ii) Unknown Situation in France

[99] BM suggests that there is little evidence as to what awaits the children if they are returned to France and for this reason, I should allow them to remain in Canada.

[100] I disagree. Both CB and his wife, EB, provided this Court with evidence regarding their current community, current employment and personal family circumstances. They were able to provide details regarding their current residence, the bedrooms they have set up for the children, the other children who reside in the neighborhood, the school they propose to have the children attend and how the children would get to and from school.

[101] Both EB and CB provided insight into how they planned to help the children transition back to life in France. They were both supportive of the children receiving counselling and have already met twice with a psychologist to discuss the children's needs. This psychologist is not the same one that the children have continued to communicate with since coming to Canada, but before the hearing, CB was unaware that BM had even arranged those sessions.

[102] Both CB and EB also testified, and I accept, that they are prepared to facilitate contact between the children and BM's family, if that is what the children want. Several members of BM's family still reside in the town of Manosque, where CB, BM and the children had originally been domiciled. This town is located near EB's parent's residence, with whom CB and EB regularly spend time, so that it would not be difficult for them to arrange for the children to visit with their mother's family.

[103] I am satisfied that the circumstances that the children would be returned to in France have been satisfactorily detailed by CB and that this is not a basis on which this Court can, or should, refuse to return the children under Article 13(b).

iii) Covid-19

[104] BM suggests that the children should not be returned to France as we do not have a clear idea of the dimensions of the Covid-19 pandemic there, or whether travel is safe.

[105] Counsel for the children submitted that this Court may wish to take into account the Covid-19 rates both in France and Alberta. Ms. Hardin advised that according to the National Public Radio, as of November 25, 2020, France remained the hardest hit country in Europe, with more than 2.2 million cases confirmed.

[106] EB testified that they currently reside in a small town in the south of France. She was not aware of how many active Covid-19 cases there were in France, although she indicated there were currently more cases in the north of France than where they live. She noted they were taking all recommended precautions. She indicated that the hospital is about 15 minutes away, but did not know how many Covid patients were being treated there at this time.

[107] The issue of when, and in what circumstances, the Covid-19 pandemic will be sufficient to meet the stringent standard of an Article 13(b) defence has been considered in several recent cases.

[108] In ***Re PT (A Child)***, [2020] EWHC 834 (Fam), the child's father sought the return of his child from England to Spain under the *Hague Convention*. The mother, relying on Article 13(b), argued that since COVID-19 was more advanced in Spain than in the UK, there was a grave risk that returning to Spain would expose the child to physical harm. At the time of the hearing, Spain was only second to Italy in Europe in the number of fatalities caused by the virus (at para 46). The argument was unsuccessful. The High Court of England and Wales (Family Division) found that the risk of the child contracting COVID-19 was not sufficient to amount to "grave harm" under Article 13(b) (at para 47).

[109] In ***C v G***, [2020] IEHC 217, the child's father sought the return of a child who had been removed from Poland to Ireland under the *Hague Convention*. The High Court of Ireland found that directing the return of a 7 year old child to Poland would present a grave risk of psychological harm to the child and place him in an intolerable situation. The Court noted that requiring the child to engage in international travel would expose him, and perhaps his mother, to a grave risk of contracting the disease. The Court further noted there was no evidence as to whether it was even possible to travel to Poland at that time, or to the immigration or quarantine controls, if any, being placed on passengers who arrived (para 29). Importantly, the Court indicated that the facts of the case were very unusual, involving a constellation of circumstances (ie, delay in obtaining legal aid, need for an updated psychological report, the mother's pregnancy and history of miscarriages and the pandemic) and should not stand as a precedent that might encourage other parents to engage in the wrongful removal of their children (para 43).

[110] In ***Kirn v Kirn***, 2020 ONSC 2159, the mother sought the return of the children to Florida under the *Hague Convention*. When faced with an argument surrounding Covid-19, the Court stated "no one knows how long the COVID-19 pandemic will last nor how long the travel

restrictions will continue in place" (***Kirn*** at para 12). The Court held that the children should be returned to Florida as soon as a flight could be booked.

[111] In ***Stefanska***, the Ontario Superior Court ordered the return of children to Poland forthwith. The Court did not consider Covid-19 as a reason to delay the children's return, but did recognize that immediate return was complicated by the pandemic and problems with arranging international travel. As a result of continuing arguments about compliance with the Court's order, the Court fixed a deadline for the children's return (***Stefanska v Chyzynski***, 2020 ONSC 3570). The Court was unconvinced by the mother's speculation that travel would be safer after two further months.

[112] In ***Onuoha v Onuoha***, 2020 ONSC 1815, Justice Madsen in Chambers found the father's application to return his children to Nigeria was not urgent. Notably, the hearing took place on March 24, 2020, right when Covid-19 lockdowns started. Justice Madsen held that although the matter would be considered urgent at any other time, because of Covid-19 it was not urgent at the present moment (at para 10):

> This is not the time to hear a motion on the return of children to another jurisdiction. Indeed, were the father to be successful, any order would likely not be capable of being implemented for weeks or even months. It would be foolhardy to expose the children to international travel in the face of the Travel Advisory, risking the restrictions and complications adverted to therein. Considering the language of the Chief's Notice, the children's "safety" and "well-being" are protected, for the time being, by remaining where they are in the care of their mother in Ontario. While the matter is very important to the parties, it is not in my view currently "urgent".

[113] However, on November 10, 2020, Justice Madsen heard the matter again and did order the return of children to Nigeria (***Onuoha v Onuoha***, 2020 ONSC 6849). He found that if a parent follows applicable safety precautions, then "risk during travel can be managed" and Covid-19 was not a reason to delay travel (at paras 144-147). Further, Justice Madsen noted that "unlike in March of this year when this matter came before me for an "urgency" determination, global travel has resumed, albeit with precautions in place" (at para 145).

[114] In ***Rainey v Summers,*** 2020 ONSC 6165, the father sought the return of his child to Missouri, USA. The Court found the mother's concerns regarding Covid-19 could not be used to unilaterally change the child's habitual residence or the custody and access order. Specifically, the Court found that so long as both parents would do their best to protect their child from Covid-19, the child could travel internationally (***Rainey*** at para 23).

[115] I recognize that the Covid-19 pandemic is a rapidly evolving situation. No evidence was presented regarding the availability of flights to France, or any travel restrictions or quarantine requirements in France that might impact on how, or when, the children would even be able to return. However, based on the limited evidence provided to me during the hearing, I am unable to conclude that the risk of the children contracting Covid-19 if they are directed to return to France, as opposed to remaining in Canada, is sufficient to amount to the grave risk of harm required to satisfy Article 13(b).

iv) Allegations of Abuse and Fear of CB

[116] BM and the children are firm in their belief that BCB was sexually abused by CB and that CGB was abused, in some fashion, by CB's father when she was around three years old. Until recently, CGB denied having been hurt or touched inappropriately by her father. However, CGB claims to have recently recalled an incident of alleged sexual abuse by CB. Of note is the fact that this recollection occurred only a couple of weeks before CGB was scheduled to testify at her mother's extradition hearing in September 2020.

[117] Clearly, returning children to an abusive and violent parent would place them in an "*inherently* intolerable situation" and satisfy Article 13(b): ***Pollastro*** at para 35. The sexual abuse of a child is an offence that is abhorrent to Canadian society and is deserving of condemnation in the clearest of terms: see ***R v LFW***, 2000 SCC 6 at para 31, [2000] 1 SCR 132. However, sexual abuse allegations may be made for a variety of reasons and proof of the abuse is a prerequisite for establishing grave risk of harm.

[118] There are instances in which allegations of sexual abuse have been found to be unsupported despite one parent's categorical belief: see ***M(CA) v M(D)*** (2003), 67 OR (3d) 181, 43 RFL (5th) 149 (CA); ***CMB v WSB***, 2011 ONSC 3027; ***SS v AS***, 2020 ABQB 810; ***RC v TP***, 2019 ABQB 575. The courts must be wary of the possibility of influence by the custodial parent over the child. The courts must not only consider the nature of the alleged harm, but also the evidence supporting the allegations: ***JP v TNP***, 2016 ABQB 613 at para 40.

[119] In *Hague Convention* cases, even where abuse is either probable or proven, there is a presumption that the legal and social systems of the country of habitual residence are adequate to provide for the protection of the child: ***DR v AAK***, 2006 ABQB 286 at para 49; ***Bačić v Ivakić***, 2017 SKCA 23 at para 62.

[120] In this case, the allegations of physical abuse have not been proven. The police in France investigated the allegations concerning BCB and closed their file in 2017 after concluding there was insufficient evidence to support charges (Affidavit of CB sworn January 15, 2020, Exh "B"). Regarding CGB, the first time that any allegation of physical abuse by CB was even made was only a few months ago, just prior to CGB testifying during BM's extradition hearing in September, 2020. No information was provided as to whether CGB's recent allegation is even under investigation.

[121] Further, as Dr. Torres noted, of all of the various professionals who had interviewed the children in France, the only one who she believed approached the assessment of the children from an evaluative, rather than therapeutic perspective, was the Court-appointed Expert in the divorce proceedings, Dr. Kurkdjian. Dr. Torres explained that when assuming a therapeutic role, a psychologist simply accepts what the client tells them and works with that information. However, when taking on an evaluative role, a psychologist will look at multiple sources of information and then assess the data that is received from the various sources. Dr. Torres noted that Dr. Kurkdjian concluded that the children were attached to both parents. With respect to BCB, Dr. Kurkdjian did not "note or detect any hint of possible sexual abuse" by CB. (Affidavit of CB sworn January 15, 2020, Exh "A").

[122] Finally, in her Voice of the Child Report, Dr. Torres' own observations of the children in relation to the abuse allegations included the following:

- CGB confirmed that CB had not touched or hurt her (p.8). CGB stated she was not close to her father, she does not trust him, she does not miss him and she is afraid of him (p.8). Her reasons for her feelings were vague. She demonstrated inconsistent and contradictory statements and behaviour (p.15).
- BCB's behaviour was incongruent with his statements regarding his alleged abuse by CB. Further, his descriptions of the experiences were limited, without depth, detail or substance and were inconsistent with other documents in terms of the frequency of the alleged abuse. Dr. Torres noted that, consistent with the Court Expert's observations in France in 2016, BCB did not report symptoms, and lacked the appearance of a traumatized child from a behavioural and emotional standpoint. BCB's verbal descriptions were inappropriate for his age, with no demonstrated practical comprehension of their meaning (p. 15).
- CGB did not exhibit any indication of post-traumatic distress, despite the fact that BM told her she was hurt by her grandfather when she was young (p. 15).
- Both children gave responses that appeared rehearsed or conditioned (pp. 14-15).

[123] Dr. Torres testified that she had refused a request to update her February, 2020 Voice of the Child Report, or to meet with the children again, as there is considerable authority which suggests that repeatedly interviewing a child regarding alleged incidents of abuse can result in the child just agreeing to abuse-related suggestions, can increase the risk of the child confusing events, can lead to the child becoming more entrenched if they do not feel believed, and can exacerbate the dangers of parental coaching. Dr. Torres noted there is also an element of suggestibility, particularly if the interviewer is an authority figure – such as the police, a lawyer or judge. She indicated that the information from the children can become "compromised" in such situations. Dr. Torres was therefore not surprised by the recent allegation made by CGB in the extradition proceedings that she had also been abused by CB, despite the fact that this had been denied repeatedly by her since the initial investigation had been commenced in France in 2015.

[124] In light of this evidence, I am unable to conclude, on a balance of probabilities, that the alleged abuse has been proven to have occurred. As a result, I do not find that there is a grave risk that the children would be exposed to physical harm if they were returned to France.

[125] However, regardless of my finding that the alleged abuse has not been proven to have occurred, it is argued by both BM and children's counsel that the fact that the children strongly believe they have been abused by CB, and have held those beliefs now for a number of years, means there is a grave risk that the children will be exposed to psychological harm, or otherwise placed in an intolerable situation, if they were ordered to return to France.

[126] There are a number of challenges associated with the assessment of the risk of psychological harm to the children in this case.

[127] First, the only expert evidence on this issue was from Dr. Torres, who unfortunately has not met with the children in the last year. Therefore, she acknowledged that many of her comments and observations were simply generalizations, rather than conclusions reached based on her actual assessments of the children's current condition.

[128] Second, I am reluctant to place much, if any, weight on evidence given by BM regarding this issue as I did not find her evidence to be credible, or reliable, for the reasons outlined

previously. I am particularly cautious given BM's statement that she will "do anything" to prevent CB from having access to the children.

[129] Third, while I recognize that I am already bound by Justice Ouellette's ruling that the children have not reached an age or a degree of maturity where it would be appropriate to take into account their views, his conclusion was further supported by Dr. Torres' oral testimony. Dr. Torres noted that both children would still be in the concrete stage of development, and at the age of conformity. It is expected that children of this age share the thoughts and views of their attachment or authority figure, namely BM. Dr. Torres noted that BCB and CGB's psychological testing had confirmed they both had a high need to conform.

[130] Fourth, while I am prepared to accept that the children are fearful of CB, I am not satisfied that the reasons for their fears are as straightforward as BM is suggesting. I note that in her Voice of the Child Report, Dr Torres indicated that the children's views seemed to be a reflection of BM's statements, feelings and perceptions (p.16). Further, Dr. Torres indicated that CGB's fears and anxiety in particular may have been exacerbated by BM indicating that she and her brother may be separated from her and returned to live in France. According to Dr. Torres, BM encouraged CGB to talk to people about this and CGB may therefore feel responsible if things do not turn out the way she wants them to (p. 15).

[131] Dr. Torres testified that while it would be "distressing" for the children if the terms of the Divorce Judgment were implemented immediately upon their return to France, she was not prepared to use word "traumatic". The parties' Divorce Judgment currently provides that CB has sole custody and BM is to have supervised visits with the children. It must be kept in mind however that the Divorce Judgment was granted in December, 2017, after BM had removed the children from the country, and in her absence.

[132] Dr. Torres noted that while this situation might be difficult for everyone in the beginning, the children will be able to recover with the right help, support and a nurturing environment. Dr. Torres indicated that this assumes that both parents will be part of this process. She expressed her belief in the resiliency of children generally.

[133] Dr. Torres was asked what an "ideal" therapeutic process for the children would look like. As she had not conducted a full evaluative assessment of the family, this was an area in which Dr. Torres was only prepared to make some general comments. Dr. Torres noted that in situations involving alienating behavior by one parent, therapy for the children may be of little effect unless they are separated from the alienating parent. Otherwise, the children tend to show much resistance and become entrenched in their beliefs.

[134] Dr. Torres provided further details regarding the types of behavior that may be considered "alienating". She indicated that even when a parent truly believes that he or she is protecting a child from harm, obstructing the parent-child relationship by limiting contact (which she referred to as "restrictive gate-keeping"), or by telling the children they were abused, is still considered a form of alienation. Based on this definition, which I accept, it is clear that BM has engaged in alienating behavior. The fact that the counselling efforts undertaken with the children in Canada last year were unsuccessful is therefore unsurprising.

[135] In the absence of compelling evidence to the contrary, I am required to presume that the Courts of another contracting country are equipped to make, and will make, suitable arrangements for a child's welfare upon return: ***Finizio v Scoppio-Finizio*** (1999), 46 OR (3d)

226 at paras 34-35 (CA). The Courts in France have already demonstrated their willingness to protect the children's well-being: first, by directing CB's access be supervised while the abuse allegations were investigated by the police; and second, by appointing a Court Expert in the divorce proceedings to complete a psychological medico-legal assessment of the family.

[136] It is of note that the final recommendation of the Court Expert, Dr. Kurkdjian, was that the parties maintain joint parental authority and that CB's parenting time be increased gradually, as the children had only spent limited time with him since the separation. This approach is similar to what I would expect of a Canadian Court. Even CB's counsel, in written argument, raised the suggestion that, upon their return to France, the children's counsellor may recommend that they stay with another relative during an initial period of father-child reconciliation counselling. However, this would be something arranged through the French Courts, not ours.

[137] I therefore conclude that BM has not satisfied her burden of establishing, on a balance of probabilities, that the children will suffer grave risk of psychological harm, or be placed in an intolerable situation, if they are returned to France. In reaching this decision, in addition to the factors discussed above, I have also taken into account the fact that BM has indicated she will be returning to France with the children; that BM stated that she intends to continue to support the children and is willing to be involved in whatever therapy is set up for them upon their return; that the children have maintained strong relationships with various other relatives in France who will be a further source of support for them; and finally, the expressed willingness of CB and his wife, EB, to facilitate contact between the children and their maternal relatives, and to provide the children with appropriate psychological or other support to assist with their transition.

[138] I have already concluded that there is insufficient evidence to meet the high threshold required to establish the grave risk of either physical or psychological harm required by Article 13(b). In these circumstances, a child's objections to return based on fear will rarely be relied on by a Court to exercise its discretion not to return the child: ***Stefanska*** at para 79. I am of the view that where a determination has already been made by this Court that the children have not reached the age or level of maturity where their views should be taken into account, any reliance by me on the children's expressed fears in deciding whether the children must be returned, would be unwise and inappropriate.

6. Conclusion

[139] To summarize, on the four issues that were before the Court for determination at this hearing, I find as follows:

(a) The children were wrongfully removed from France by BM. CB did not consent or acquiesce to their removal.
(b) These proceedings were not commenced within one year from the date of the children's wrongful removal.
(c) The children are not settled in their new environment.
(d) There is not a grave risk that returning the children to France would expose them to physical or psychological harm, or otherwise place the children in an intolerable situation.

[140] Accordingly, I therefore direct that pursuant to Article 12 of the *Hague Convention*, the children, CGB and BCG, shall be returned to France forthwith.

[141] This Court also has jurisdiction to incorporate into an order made pursuant to Article 12 such undertakings as may be necessary to secure the safe and prompt return of the children and to provide for the transition period between the time when a Canadian Court makes a return order and the time at which the children are placed before the courts in the country of their habitual residence: ***Habima v Mukundma***, 2019 ONSC 1871 at para 60; ***JP v TNP*** at paras 31, 47. Neither party, nor counsel for the children, addressed whether this Court should consider imposing any such undertakings or conditions on the parties.

[142] Should the parties, or children's counsel, wish to make further submissions to me in this regard, they are directed to do so, in writing, by March 5, 2021. I would request that any such submissions be limited in length to 5 pages.

Heard on the 5th, 6th, 7th and 26th days of January 2021.
Dated at the City of Edmonton, Alberta this 26th day of February 2021.

D. J. Kiss
J.C.Q.B.A.

Appearances:

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for the Children