Citation: *Chan v. Chow*
2001 BCCA 276

Date: 20010424
Docket: CA028052
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ANNIE CHAN

PETITIONER
(APPELLANT)

AND:

SHUNG-KAI CHOW, ALSO KNOWN AS HENRY JOEL,
ALSO KNOWN AS HENRY CHOW, ALSO KNOWN AS HENRY CHAU

RESPONDENT
(RESPONDENT)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine
The Honourable Madam Justice Proudfoot

R.L. Taylor — Counsel for the Appellant

Respondent appearing in person

Place and Date of Hearing: Vancouver, British Columbia
14 March 2001

Place and Date of Judgment: Vancouver, British Columbia
24 April 2001

Written Reasons by:
The Honourable Madam Justice Proudfoot

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Madam Justice Proudfoot:

[1] This is an appeal from the order of a Supreme Court judge in Chambers pronounced on 11 December 2000 dismissing the appellant's application for the return of the child of the marriage, Emily Kassie Chow ("Emily"), to Hong Kong pursuant to the ***Hague Convention on the Civil Aspects of International Child Abduction*** (the "***Convention***"). The Chambers judge also had before her a cross-application made by the respondent for an order of sole custody of Emily. After dismissing the appellant's application, the Chambers judge ordered that determination of the custody of Emily proceed by way of trial in the Supreme Court of British Columbia. Further, the appellant was granted interim custody pending trial on the condition that she remains within the Lower Mainland.

[2] At the outset of the appeal, the appellant made a motion for admission of evidence that was apparently before the Supreme Court but was not included in the material before this court. In addition, the appellant applied to introduce evidence that was not before the Supreme Court. Because of the unusual nature and facts of this case, in my view, all of this evidence should, and will, be admitted. It is important that all relevant evidence be before the court to assist it in resolving this complex matter.

Facts

[3] Due to the nature of the proceeding, it is necessary to go into a great deal of detail in setting out the facts, particularly those facts pertaining to the residences of Emily. Ms. Chan, the appellant, and Mr. Chow, the respondent, were married in Edmonton, Alberta on 14 August 1993. Emily was born on 18 May 1994. The parties lived together in Edmonton until they separated on 27 December 1995. Emily lived with Ms. Chan in an Edmonton transition house from

the time of separation until sometime in February 1996. The evidence revolving around why Ms. Chan and Emily moved to the transition house is incomplete and therefore unclear.

[4] On 26 January 1996, Ms. Chan was granted an *ex parte* order of interim custody. It is not clear why the application was made on an *ex parte* basis because Mr. Chow's whereabouts were certainly known. In any event, what next occurred was that Ms. Chan left Edmonton with Emily in February 1996 and flew to Australia. This occurred unbeknownst to Mr. Chow. In late 1996 (the date is not clear from the material filed) Ms. Chan left Australia and moved with Emily to Hong Kong.

[5] In the meantime, on 30 April 1996, in Alberta, Mr. Chow was granted interim custody of Emily and the order of 26 January 1996 was set aside.

[6] In late 1996, Mr. Chow located Emily and her mother in Hong Kong. He travelled to that country and the parties lived there together as a "family" for a short period of time. In early 1997, after the parties had again separated, Ms. Chan moved to her own apartment in Hong Kong.

[7] On 22 April 1997, the parties were granted a Divorce Judgment and Corollary Relief Order (without oral evidence) by the Alberta Court of Queen's Bench. Part of that order reads:

> It is ordered that the Petitioner and the Respondent shall have shared/joint custody of the infant child of the marriage, EMILY KASSIE CHOW, born May 18, 1994, with each party to have the child approximately 50% of the time.

[8] Mr. Chow submitted that it was agreed between the parties at the time of divorce that he would "have the final say in the determination of the place and type of education Emily will receive." Mr. Chow's position is that it was always his intention that Emily would be educated in Canada.

[9] Sometime after the separation in 1997, Mr. Chow left Hong Kong and moved to Ontario to operate a restaurant. He returned to Hong Kong in April 1998 and tried to take Emily back to Canada without Ms. Chan's knowledge or consent. According to the evidence, Ms. Chan stopped Mr. Chow at the Hong Kong Airport before he and Emily could board a plane headed to Vancouver.

[10] The next known happening was the joining of Mr. Chow in Ontario by Ms. Chan and Emily in July 1998. Again, almost all of what happened in Emily's life between the separation of the parties in Hong Kong in 1997 and July 1998 is unclear. But it is known that the parties made a further attempt to reconcile in Ontario.

[11] The restaurant Mr. Chow operated in Ontario was not a success and in August 1998, the parties moved to Vancouver, British Columbia. In the fall of 1998, Ms. Chan attended secretarial school in Vancouver in an attempt to upgrade her employment skills. The parties remained in Vancouver until June 1999, at which time they returned to Hong Kong.

[12] Shortly after returning to Hong Kong the parties separated for the final time. From the time of the parties' last separation approximately one month after returning to Hong Kong, to January 2000, Emily lived with Ms. Chan from Monday to Thursday and with Mr. Chow from Friday to Sunday. From January 2000 to March 2000, Emily lived with Mr. Chow from Monday to Thursday and Ms. Chan from Friday to Sunday.

[13] The arrangement apparently changed after Ms. Chan obtained employment. It appears both required babysitting assistance as Mr. Chow was also employed. Further, while in Hong Kong, Emily attended a daycare centre from July 1999 to January 2000 and she attended kindergarten from January 2000 to 6 March 2000.

[14] On 6 March 2000, Mr. Chow brought Emily back to Vancouver without Ms. Chan's knowledge or consent. It is apparent that one of the reasons for his return to Canada was that his business in Hong Kong was not successful. From 6 March 2000 until 28 November 2000, Emily lived with Mr. Chow in Vancouver.

[15] On 24 November 2000, Ms. Chan commenced proceedings in the Supreme Court of British Columbia to have Emily returned to Hong Kong pursuant to the ***Convention***. Ms. Chan was granted an *ex parte* order on that date pursuant to which the police were directed to apprehend Emily and place her in the care of Ms. Chan pending the hearing of the application for return. Ms. Chan then travelled to Vancouver on 28 November 2000. Emily has been living with Ms. Chan ever since because on 11 December 2000, pursuant to the order on appeal, Ms. Chan was granted interim custody pending trial. A condition of Ms. Chan's interim custody is that she is to continue to reside in the Lower Mainland. Ms. Chan currently lives in Richmond, B.C., and Emily is enrolled in grade 1 at an elementary school in that city.

[16] That brings Emily's residence chronology up to date, but before leaving the facts, I wish to note some further matters of significance. When both parties lived in Hong Kong in 1996 and 1997, it appears that Mr. Chow, a citizen of Hong Kong, sponsored Ms. Chan and Emily so that they could become landed and obtain residence there. This sponsorship has since been withdrawn. The permit for Emily to remain in Hong Kong expires on 16 June 2001.

[17] Mr. Chow is living and working in Alberta. He was sentenced in relation to a criminal matter and is required to reside in Alberta for two years from January 2001. It seems clear that he would be able to travel to Vancouver for a custody hearing. He appeared in person with the permission of his probation officer at the hearing of the appeal. However, in my view, it is very doubtful that he would be able to travel to Hong Kong or anywhere outside of Canada for a custody hearing in the next two years.

[18] Further, while it is not precisely clear when and why, sometime during the period Emily was with Ms. Chan alone (likely in 1997), Emily resided in Mainland China with a relative. This occurred without Mr. Chow's knowledge or consent and having the child located caused Mr. Chow a great deal of worry and expense.

[19] Ms. Chan has had her immigration status to remain in the Lower Mainland extended to 1 May 2001. Emily has an Australian passport that appears to expire on 4 August 2002. For safekeeping, Emily's birth certificate and passport were ordered deposited with the Supreme Court Registrar pending further order of the Court.

The Hague *Convention*

[20] As can be seen, this proceeding revolves around the application of the ***Convention*** to the facts of this case. As a result, it is useful to set out the relevant portions of the ***Convention*** before describing the decision below or the issues on appeal.

[21] The objects of the ***Convention*** are expressed in Article 1 as follows:

> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[22] The following Articles of the ***Convention*** are also relevant on appeal:

> **Article 3**
>
> The removal or retention of a child is to be considered wrongful where-
>
> > (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
> >
> > (b) at the time of removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.
>
> **Article 4**
>
> The Convention shall apply to any child who was habitually resident in a contracting state immediately before any breach of custody or access rights. The Convention shall cease to apply when the child obtains the age of 16 years.
>
> **Article 5**
>
> For the purposes of this Convention-
>
> (a) **"right of custody"** shall include rights relating to the care of the person of the child, and in particular, the right to determine the child's place of residence.
>
> **Article 12**
>
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the

> child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> **Article 13**
>
> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-
>
> > (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
> >
> > (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

The Chambers Judgment

[23] The Chambers judge dismissed Ms. Chan's application for two principal reasons. First, she held that because Emily was not "habitually resident" in Hong Kong immediately before her removal, the ***Convention*** did not apply. On this point, the Chambers judge essentially found that Emily's habitual place of residence was Canada, and therefore her return to Canada could not amount to a "wrongful removal" from Hong Kong. Second, the Chambers judge held that in the event she was wrong in concluding that Emily was not "habitually resident" in Hong Kong, the application nevertheless failed because it was not shown to her that Ms. Chan's "rights of custody" under Hong Kong law had been breached. The Chambers judge held that when "there is a joint custody arrangement, it is not a breach of custody, per se, to take the child to Canada from Hong Kong when there was no restraining order as part of the final orders dealing with the child custody of Emily." (at para. 9).

[24] As mentioned in the first paragraph of these Reasons, after dismissing Ms. Chan's application, the Chambers judge ordered that the matter of Emily's custody proceed to trial as if the petition was a writ of summons. She then awarded Ms. Chan interim custody pending trial.

Issues on Appeal

[25] On appeal, Ms. Chan argues the Chambers judge erred in concluding that Emily was not "habitually resident" in Hong Kong immediately before her removal and that she erred in concluding that Emily was not "wrongfully removed" from Hong Kong within the meaning of Article 3.

[26] Alternatively, the appellant argues the Chambers judge erred "in concluding that she had not been provided with and/or did not have sufficient authority upon which she could conclude that the respondent's removal of Emily was wrongful." This alternative argument concerns the Chamber judge's opinion that the absence of proof of Hong Kong law was a factor preventing her from concluding that Emily was "wrongfully removed."

[27] Finally, Ms. Chan argues the Chambers judge erred by failing to give appropriate effect to the principle that custody of, and access to, children should be decided in the jurisdiction where the best evidence is available, her argument being that that jurisdiction is Hong Kong. This ground of appeal concerns that part of the Chambers judge's decision that set down Emily's custody hearing in the Supreme Court of British Columbia.

Discussion

[28] In my view, four questions require answering on appeal:

> 1. Was Hong Kong the "habitual residence" of Emily immediately before her removal? (Articles 3 and 4).
>
> 2. Did Emily's removal from Hong Kong breach the "rights of custody" of Ms. Chan, notwithstanding that the parties had joint/shared custody at the time the child was removed? (Articles 3, 5, and 13).
>
> 3. Is there a grave risk that if Emily is returned she will be exposed to physical or psychological harm or otherwise be placed in an intolerable situation? (Article 13).

> 4. If the ***Convention*** does not apply, or if Emily is not to be returned under the ***Convention***, do the courts of British Columbia have the jurisdiction to make a custody order in this case?

[29] The third question was not addressed by the Chambers judge. In light of the facts of this case, and my conclusions with respect to the first two questions, it must be considered on appeal.

> ***1) Was Hong Kong the "Habitual Residence" of Emily Immediately Before her Removal?***

[30] The first question is the natural starting point, for if Emily was "habitually resident" in Hong Kong immediately before her removal, then the court must move on to decide whether she was "wrongfully removed" from that jurisdiction in breach of the "rights of custody" of Ms. Chan. On the other hand, if Emily was habitually resident in Canada immediately before her removal, then it follows that the ***Convention*** has no application to this case, and the appeal must be dismissed.

[31] For the purposes of the ***Convention***, the best and most useful definition of "habitually resident" can be found in ***Re J. (A Minor) (Abduction: Custody Rights)***, [1990] A.C. 562 at 578 (H.L.) where Lord Brandon stated:

> The first point is that the expression "habitually resident" as used in Article 3 of the Convention is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet become habitually resident in country B. The fourth point is that, where a child of J's age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.

[32] I accept this definition, particularly, the following points:

> 1) The question is a question of fact to be decided by reference to all the circumstances of the case.
>
> 2) An "habitual residence" is established by residing in a place for an appreciable period of time, with a "settled intention."
>
> 3) A child's "habitual residence" is tied to the habitual residence of his or her custodian(s).

[33] The leading authority on the meaning of having a "settled intention or purpose", is ***R. v. Barnet London Borough Council***, [1983] A.C. 309 (H.L.) where Lord Scarman stated at p. 344:

> And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed, his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

[34] There is also a useful discussion of this concept in *Cheshire and North's Private International Law*, 13th ed. (London: Butterworths, 1999) at pp. 166-167:

> There must be a degree of settled intention or purpose. This is not concerned with being settled in a country. Instead it describes one's purpose in living where one does. The element of "animus" required is less than that for domicile. There is no need to show a person intended to stay there permanently or indefinitely. The settled intention can be for a limited period, a period limited by the immediate purpose such as employment. Thus a person can be

> habitually resident in a country even though he intends at some future date to move to another country.
>
> * * *
>
> According to Lord Brandon in *Re J (A Minor) (Abduction: Custody Rights)*, the settled intention refers to residing on a long-term basis. On the other hand, according to the Court of Appeal in *M v. M (Abduction: England and Scotland)* the settled purpose refers to "part of the regular order of his life for the time being, whether of short or of long duration". Under Scots law it is sufficient if there is an intention to reside for an appreciable period. These differences in terminology should not be regarded as important since "A settled purpose is not something to be searched for under a microscope. If it is there at all it will stand out clearly as a matter of general impression."

[35] Before I apply the above authorities to the facts of this case, I should consider whether the definition of "habitually resident" found in ss. 44(2) and (3) of the ***Family Relations Act***, R.S.B.C. 1996, c. 128, has any application to this proceeding. The matter is important because there is conflicting authority on the question in the Court below: see, for instance, ***Petnehazi*** v. ***Kresz***, [1999] B.C.J. No. 1238 and ***Hewstan*** v. ***Hewstan***, 2001 BCSC 368. The question is also important because the definition in the ***Act***, although similar to Lord Brandon's, is not the same. Sections 44(2) and (3) of the ***Act*** read as follows:

> (2) A child is habitually resident in the place where the child resided
>
> (a) with both parents,
>
> (b) if the parents are living separate and apart, with one parent under a separation agreement or with the implied consent of the other parent or under a court order, or
>
> (c) with a person other than a parent on a permanent basis for a significant period of time,
>
> whichever last occurred.
>
> (3) The removal or withholding of a child without the consent of the person who has custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.

[36] In my view, a significant distinction is made in the ***Act*** between parental and non-parental care. In ss. 44(2)(a) and (b), a child merely has to "reside" with one or both parents to be deemed habitually resident in a place, whereas if the child is with a non-parent, he or she needs to reside with that person on a "permanent basis for a substantial period of time." In my opinion, the length and intensity of the time of stay and "settled intention" considerations referred to by Lord Brandon are either not as important under the ***Act*** if a child has resided with a parent (meaning less time spent and less of a "settled intention" need be shown), or their importance is enhanced if a child has resided with a non-parent. I do not propose to say that the differences in these definitions would change the outcome of this case, but I can see how it might in other cases.

[37] The ***Family Relations Act*** itself deals with the different applications of the ***Convention*** and the ***Act*** in s. 55. The relevant parts of that section read as follows:

> 55 (1) In this section, "convention" means the Convention on the Civil Aspects of International Child Abduction signed at the Hague on October 25, 1980.
>
> (2) Subject to subsection (4), the provisions of the convention have the force of law in British Columbia.
>
> . . .
>
> (5) Subsections (1) to (4) and the convention apply in respect of a child who, immediately before a breach of custody or access rights, was habitually resident in a contracting state but do not apply in respect of a child described in subsection (6).
>
> (6) Part 3 applies in respect of
>
> (a) a child who is in Canada and who, immediately before a breach of custody or access rights, was habitually resident in Canada,

> (b) a child who, immediately before a breach of custody or access rights, was habitually resident in a state other than a contracting state,
>
> (c) a child who, immediately before a breach of custody or access rights, was resident, but not habitually resident in a contracting state, and
>
> (d) any other child affected by an extraprovincial order, other than a child in respect of whom subsections (1) to (4) and the convention apply.

[38] Section 44(2), the "habitual residence" definition section, is found in Part 3 of the ***Act***. Therefore, if Emily is found to have been "habitually resident" in Hong Kong then ss. 55 (1) to (4) of the ***Act*** and the ***Convention*** apply and Part 3 of the ***Act*** does not apply due to the provisions in s. 55(6).

[39] I recognize that an argument can be made that ss. 55(1) to (4) and the ***Convention*** should apply exclusively only after a child has been deemed "habitually resident" in a Contracting State other than Canada. If that is so, then the definition in s. 44(2) could be considered relevant in determining the preliminary question of the child's "habitual residence." After much reflection, I believe this a circular problem that is not capable of resolution by a simple interpretation of the ***Act***. However, the Supreme Court of Canada's decision in ***Thomson*** v. ***Thomson***, [1994] 3 S.C.R. 551, and practical considerations point to the conclusion that the ***Family Relations Act*** definition should not be considered relevant in interpreting the meaning of "habitually resident" as found in the ***Convention***.

[40] Although it was not strictly necessary, La Forest J. for the majority in ***Thomson*** discussed the interrelationship between the ***Convention*** and the equivalent Manitoba legislation dealing with territorially complex child custody matters, **the *Child Custody Enforcement Act***, R.S.M. 1987, c. C360. At p. 603 he stated:

> I think it advisable, however, to set forth my views on the interrelationship of the Convention and the other provisions of the Act in circumstances such as arose here. As I see it, those provisions and the Convention operate independently of one another. This result appears obvious when an application is made solely under the Convention or solely under the Act. One procedure may provide advantages that the other does not.

[41] Over and above the preceding authority, I believe a difficulty with holding that the ***Family Relations Act*** definition is relevant under the ***Convention*** is the problem of other jurisdictions following suit, particularly in situations where their domestic definitions of "habitually resident" are quite different than Lord Brandon's definition. If this is done, worldwide consistency in the application of the ***Convention*** will be lost.

[42] The final consideration in my conclusion that the definition in the ***Act*** has no bearing on the meaning of "habitually resident" under the ***Convention*** is the recognition that the ***Convention*** and Part 3 of the ***Act*** serve different purposes. The ***Convention*** is concerned with protecting custody rights, whether they belong to a parent or not. On the other hand, Part 3 of the ***Act*** is not just concerned with enforcement of custody rights. It is also concerned with whether it is proper for courts in British Columbia to make or vary orders for custody of children involved in complex proceedings, both territorially and in terms of family relationships.

[43] After that lengthy digression, I emphasize that the question at hand is whether Emily was "habitually resident" in Hong Kong immediately before her removal. I answer that question in the affirmative for the reasons given below.

[44] It is clear, based on the authorities, that the parties' nine months residence in Hong Kong easily satisfies the "appreciable period of time" requirement of Lord Brandon's definition, see for instance, ***Convention: Re F (A Minor) (Child Abduction)*** [1992] 1 F.L.R. 548 (C.A.), ***In re S (A Minor) (Custody: Habitual Residence)*** [1998] A.C. 750 (H.L.), and ***Kinnersly-Turner*** v. ***Kinnersly-Turner***, [1996] O.J. No. 3749 (C.A.).

[45] As for a "settled intention or purpose" Mr. Chow and Ms. Chan had reconciled and moved to Hong Kong with Emily as a family in June 1999. After they separated, they shared Emily on an approximately fifty-fifty basis. Each had accommodation arranged for themselves and Emily.

[46] Mr. Chow had a business in Hong Kong and worked in Hong Kong. Ms. Chan obtained employment in that jurisdiction. Emily was enrolled in daycare and then in kindergarten in Hong Kong. Mr. Chow, a Hong Kong resident, initially sponsored Ms. Chan and Emily for immigration purposes.

[47] Based on this evidence, it seems to me that both Ms. Chan and Mr. Chow had a "settled intention" to make Hong Kong "home" for the time they resided there. As Emily's "habitual

residence" was tied to theirs, I find that Emily was "habitually resident" in Hong Kong at the time of her removal.

> ***2) Did Emily's Removal from Hong Kong Breach the "Rights of Custody" of Ms. Chan, Notwithstanding that the Parties had Shared/Joint Custody at the time the Child was Removed?***

[48] The next question to consider is whether Emily was "wrongfully removed" from Hong Kong. In other words were Ms. Chan's "rights of custody" under Hong Kong law breached by the removal?

[49] "Right of custody" is defined in Article 5 of the ***Convention*** as follows:

> a) **"right of custody"** shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

[50] The laws of Hong Kong were not before the Chambers judge, or this court on appeal. The private international law rule that applies in cases of this kind is that if foreign law is not pleaded or proved, it is assumed to be the same as the *lex fori*, unless proven otherwise: see J-G. Castel, ***Canadian Conflict of Laws***, 4th ed. (Toronto: Butterworths Canada Ltd., 1997) at 161. The laws of Hong Kong were not proven to be different than the laws of British Columbia in this case. Hence, the court must interpret the question of whether Ms. Chan's "rights of custody" were breached under Hong Kong law by considering the meaning of "right of custody" in the ***Convention*** and by applying the law of British Columbia in the absence of Hong Kong law.

[51] In my opinion, Ms. Chan's "rights of custody" arise in this case by way of the joint custody agreement that was made a part of their 1997 Divorce Order. Article 3 of the ***Convention*** reads in part, "rights of custody mentioned in subparagraph (a) above, may arise in particular...by reason of a judicial or administrative decision." I take that to mean any judicial or administrative decision, not just a judicial or administrative decision from the law of the state where the abduction occurred.

[52] The meaning of "joint custody" was canvassed by Huddart Co. Ct. J. (as she then was) in ***Anson*** v. ***Anson*** (1987), 10 B.C.L.R. (2d) 357 at 367:

> In essence, in a joint custody arrangement, the parents continue to share the same duties, rights, responsibilities and input as cohabiting parents save and except for those responsibilities of everyday parenting that go with physical care and control. Usually, neither custodian is given final decision-making authority. The parties have to consult each other and decided what is best for the child.

[53] Clearly, Ms. Chan's joint custody rights were breached in this case when Mr. Chow spirited Emily away without her approval. Further support for this conclusion can be found in the Article 5 definition of "right of custody", which places emphasis on a custodial parent's right to determine the child's place of residence; a right that Mr. Chow ran roughshod over in this case.

[54] If I am wrong in interpreting Article 3 to mean any operative judicial or administrative decision concerning custody, and not just one from the place where the abduction occurred, I also believe that Ms. Chan's "rights of custody" arise and were breached by "operation of law." Again, in the absence of Hong Kong law, we must consider British Columbia law on the subject. For that, we go to s. 27(4) of the ***Family Relations Act*** which reads as follows:

> (4) If a tribunal of competent jurisdiction
>
> (a) makes an absolute decree of divorce,
>
> (b) renders judgment granting a divorce and a certificate has been or could be issued under the ***Divorce Act*** (Canada) stating that the marriage was dissolved,
>
> (c) makes an order for judicial separation, or
>
> (d) declares a marriage to be null and void,
>
> a person granted custody by order in the proceeding is sole guardian unless a tribunal of competent jurisdiction transfers custody or guardianship to another person.

[55] In this case, a case of joint custody, it follows that both parties have joint guardianship of Emily. In being joint guardians, they both had to agree on the residence of Emily, and one could not have removed her over the other's objections. Levine J. (as she then was) in the recent case of ***Hewstan v. Hewstan***, 2001 BCSC 368, made the same finding on the facts of that case, saying at para. 35:

> There is no contradictory evidence as to the law of the UK, and I accept the opinion of the solicitor. The UK law is similar to that of British Columbia. Under Section 27 of the Act, parents who live together are joint guardians of a child. As joint guardians of the person of the child, each of them has rights of custody. There can be no doubt that one parent, having joint guardianship over the person of the child, cannot remove a child from the jurisdiction without the consent of or over the objections of the other. Nor is there any basis to find that the father was not exercising his rights of custody at the time the mother left England. The parents were living together. There is no evidence that the arrangement for the care of the children had changed despite the deterioration of the marriage. I therefore find that the removal of the children from the UK was in breach of the father's rights of custody.

[56] In my view, then, Ms. Chan had "rights of custody" by virtue of the Divorce Order and by "operation of law." Further, her "rights of custody" were breached by Mr. Chow when he took Emily to Vancouver without her consent.

[57] Before turning to the third question, I wish to discuss the significance, or lack of significance in this case, of the absence of a non-removal clause in the 1997 Divorce Order. Mr. Chow argues that as there was no clause in the joint custody order prohibiting him from removing the child from Hong Kong, it cannot be considered a "wrongful removal." In my view, the absence of a non-removal clause does not help Mr. Chow's position.

[58] Such a clause is frequently inserted in a sole custody order to ensure the other party permanent access. A non-removal clause was not necessary to ensure this in this case as the parties had joint custody and therefore each had an equal say concerning the residence of the child. Ms. Chan could not remove this child and neither could Mr. Chow. I cannot see how the removal in this case did not breach Ms. Chan's "rights of custody", the absence of a non-removal clause notwithstanding. It cannot be in the best interests of children to allow joint custodians free rein in moving their children over the objection of the other joint custodian.

> ***3) Is there a Grave Risk that if Emily is Returned she will be Exposed to Physical or Psychological Harm or otherwise be Placed in an Intolerable Situation? (Article 13).***

[59] The third matter to be answered on appeal concerns whether Emily should be returned to Hong Kong. Again, Article 13(b) of the ***Convention*** reads as follows:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-
>
> . . . . .
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[60] The leading Canadian case on the meaning of "grave risk of physical or psychological harm or an otherwise intolerable situation" is ***Thomson***, *supra*. At p. 596 La Forest J. had this to say:

> It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. 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...In *Re A. (A Minor) (Abduction)*, *supra*, Norse L.J., in my view correctly, expressed the approach that should be taken, at p. 372:
>
> > ...the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree...that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'.

[61] There is no doubt that any time a child is transferred from one parent to another some psychological harm accompanies this. However, as made clear in ***Thomson***, that alone is not sufficient to invoke Article 13(b) of the ***Convention***.

[62] In the case at bar, I am satisfied that Mr. Chow has met the burden of establishing a grave risk for the following reasons. First, Mr. Chow says he has withdrawn his sponsorship of Ms. Chan and Emily in Hong Kong. The evidence before us is that Ms. Chan and Emily can only stay in Hong Kong until 16 June 2001, a date clearly marked on Emily's passport. An underlying purpose of the ***Convention*** is the achievement of continuity in the residences of children. If Emily is returned to Hong Kong, she will be forced to move once more in the next few months, an intolerable situation for her in my mind.

[63] The second and equally important reason is that Ms. Chan has had a very unstable living pattern. In 1996, she abducted the child from Alberta, took the child to Australia, and later moved to Hong Kong. I use the term "abduction" because at that time Ms. Chan alone had interim custody of Emily. In ***Thomson*** at p. 588, the Court made clear that under the ***Convention***, the "rights of custody" of a court are breached if a child is removed from a jurisdiction where an interim order is made and a permanent order is pending.

[64] There is the further concern that at some time Emily was transferred from the care of Ms. Chan to that of a relative in Mainland China without Mr. Chow's knowledge or consent. It is unclear if this occurred in 1996 or 1997; but, in any event, Ms. Chan's behaviour leaves a good deal to be desired when one is attempting to ensure stability in this child's life.

[65] There is the added concern and grave risk that Emily will be "hidden" from Mr. Chow once more. Mr. Chow's custody rights or access rights would be immensely jeopardized in this situation. This is a particularly grave risk due to the final difficulty that arises in this case which is that Mr. Chow is serving a two year conditional sentence in Alberta and likely cannot travel outside Canada for that period. This means he cannot protect his and Emily's interests in any foreign custody proceeding in the next two years.

[66] For these reasons, I conclude that Article 13(b) applies to override the obligation that would normally arise to return Emily to Hong Kong.

4) If the *Convention* Does Not Apply, or if Emily is Not to be Returned under the *Convention*, do the Courts of British Columbia have the Jurisdiction to make a Custody Order in this Case?

[67] As the decision has been made that Emily will not be returned to Hong Kong, one must then consider the jurisdiction of the courts of British Columbia to make a custody order in this case. The ***Convention*** partially deals with this question in Article 16.

[68] Article 16 reads as follows:

> 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.

[69] For the purposes of this case, the import of that section is that the ***Convention*** does not prevent the courts of this province from deciding the merits of this custody dispute. The next question is whether the same can be said for the ***Family Relations Act***.

[70] Part 3 of the ***Family Relations Act*** deals with jurisdictional matters and its provisions are directly applicable, particularly ss. 44 and 45. The relevant parts of s. 44 read as follows:

> (1) A court must exercise its jurisdiction to make an order for custody of or access to a child only if
>
> . . .
>
> (b) although the child is not habitually resident in British Columbia, the court is satisfied that
>
> (i) the child is physically present in British Columbia at the commencement of the application for the order,
>
> (ii) substantial evidence concerning the best interests of the child is available in British Columbia,
>
> (iii) no application for custody of or access to the child is pending before an extraprovincial tribunal in another place where the child is habitually resident,

> (iv) no extraprovincial order in respect of custody or access to the child has been recognized by a court in British Columbia,
>
> (v) the child has a real and substantial connection with British Columbia, and
>
> (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia.

[71] I will now consider the satisfaction of these prerequisites in the case at bar:

> 44(1) A court must exercise its jurisdiction to make an order for custody of or access to a child only if
>
> . . .
>
> (b) although the child is not habitually resident in British Columbia the court is satisfied that
>
> (i) the child is physically present in British Columbia at the commencement of the application for the order,

Emily was physically present in British Columbia at the time Mr. Chow made his cross-application for sole custody, and remains physically present in this jurisdiction.

[72] Section 44(1)(b)

> (ii) substantial evidence concerning the best interests of the child is available in British Columbia,

In my opinion, there is substantial evidence available in British Columbia concerning Emily's best interests. This includes the substantial body of material filed as a result of these court proceedings, and the evidence of potential witnesses who have had contact with the parties while they lived in the Vancouver area from August 1998 to June 1999 and from 6 March 2000 to the present.

[73] Section 44(1)(b)

> (iii)no application for custody of or access to the child is pending before an extraprovincial tribunal in another place where the child is habitually resident,

There is no application pending.

[74] Section 44(1)(b)

> (iv) no extraprovincial order in respect of custody or access to the child has been recognized by a court in British Columbia,

No court in this province has recognized the Alberta consent order in the sense used in s. 48 of the ***Act***.

[75] Section 44(1)(b)

> (v) the child has a real and substantial connection with British Columbia, and

Emily resided in British Columbia with her parents for approximately one year prior to their return to Hong Kong. She has since resided here for over one year, is attending school while living with her mother and for all intents and purposes is settled here.

[76] Section 44(1)(b)

> (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia.

In light of the many moves that these parties have made, I believe that British Columbia is the most appropriate jurisdiction to determine the merits of Emily's custody, or at least, there is no other jurisdiction that is more appropriate. Again, Emily is here, Ms. Chan is here, and Mr. Chow can travel to British Columbia with the permission of his probation officer for the hearing. Ms. Chan has also retained and been represented by counsel in this jurisdiction. All in all, on balance, Emily's connection to British Columbia is stronger than, or at least as strong, as any connection to another jurisdiction.

[77] I therefore find that the Chambers judge was correct in setting the matter down for trial in the Supreme Court, as the Court does have jurisdiction pursuant to s. 44(1)(b).

[78] In any event, I would have found that the Court may exercise jurisdiction given the wording of s. 45(b)(ii), which reads:

> 45. Despite sections 44 and 48, a court may exercise its jurisdiction to make or to vary an order in respect of the custody of or access to a child if
>
> (a) the child is physically present in British Columbia, and
>
> (b) the court is satisfied that the child would, on the balance of probability, suffer serious harm if the child
>
> . . .
>
> (iii) is removed from British Columbia.

[79] Having already concluded that returning Emily to Hong Kong with her mother alone would create a "grave risk" of psychological harm and would be intolerable, it follows that if Emily is removed from British Columbia, she would, on a balance of probability, suffer serious harm.

[80] For the foregoing reasons, the Supreme Court of British Columbia is the appropriate forum to decide the issue of the custody of Emily.

[81] I would dismiss the appeal.

"The Honourable Madam Justice Proudfoot"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Levine"