SUPREME COURT OF CANADA

Citation: Office of the Children's Lawyer *v.* Balev, 2018 SCC 16

Appeal Heard: November 9, 2017
Judgment Rendered: April 20, 2018
Docket: 37250

Between:

Office of the Children's Lawyer
Appellant

and

John Paul Balev and Catharine-Rose Baggott
Respondents

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Defence for Children International-Canada and Barbra Schlifer Commemorative Clinic
Interveners

Coram: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Reasons for Judgment: (paras. 1 to 91)	McLachlin C.J. (Abella, Karakatsanis, Wagner, Gascon and Brown JJ. concurring)
Joint Dissenting Reasons: (paras. 92 to 161)	Côté and Rowe JJ. (Moldaver J. concurring)

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OFFICE OF THE CHILDREN'S LAWYER *v.* BALEV

Office of the Children's Lawyer *Appellant*

v.

John Paul Balev and
Catharine-Rose Baggott *Respondents*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of British Columbia,
Defence for Children International-Canada and
Barbra Schlifer Commemorative Clinic *Interveners*

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2017: November 9; 2018: April 20.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Sharpe and Miller JJ.A.), 2016 ONCA 680, 133 O.R. (3d) 735, 405 D.L.R. (4th) 98, 84 R.F.L. (7th) 291, [2016] O.J. No. 4800 (QL), 2016 CarswellOnt 14331 (WL Can.), setting aside a decision of the Ontario Divisional Court (Marrocco, Sachs and Varpio JJ.), 2016 ONSC 55, 344 O.A.C. 159, 70 R.F.L. (7th) 34, [2016] O.J. No. 5 (QL), 2016 CarswellOnt 7 (WL Can.), setting aside a decision of the Ontario Superior Court of Justice (MacPherson J.), 2015 ONSC 5383, [2015] O.J. No. 4490 (QL), 2015 CarswellOnt 13100 (WL Can.), granting the respondent father's application for return of the children to Germany. Judgment accordingly, Moldaver, Côté and Rowe JJ. dissenting.

Caterina E. Tempesta, *Sheena Scott*, *Katherine Kavassalis* and *James Stengel*, for the appellant.

Steven M. Bookman, *Chris Stankiewicz* and *Gillian Bookman*, for the respondent John Paul Balev.

Patric Senson and *Tammy Law*, for the respondent Catharine-Rose Baggott.

Donnaree Nygard and *Michael Taylor*, for the intervener the Attorney General of Canada.

Caroline Brett and *Rochelle S. Fox*, for the intervener the Attorney General of Ontario.

Freya Zaltz, for the intervener the Attorney General of British Columbia.

Jeffery Wilson, *Farrah Hudani* and *Jessica Braude*, for the intervener Defence for Children International-Canada.

Deepa Mattoo and *Tiffany Lau*, for the intervener the Barbra Schlifer Commemorative Clinic.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 ("*Hague Convention*"), sets out the rules that apply to the parental abduction of children across international borders. The question before us concerns the application of the *Hague Convention* concept of habitual residence — a concept not defined in the treaty, but much considered by the courts of subscribing states around the world.

[2] The story begins in Germany, where the family — a father, a mother, and two children, all citizens of Canada — were living. Because the children were struggling in school, the parents decided that the mother should take the children to Canada for 16 months to experience the Canadian school system. During that period, the father purported to revoke his consent and brought an action under the *Hague Convention* for an order that the children be returned. While he pursued remedies in the German courts — unsuccessfully — the period of consent expired and the mother remained in Canada with the children. After the father resumed the application, a judge of the Ontario Superior Court of Justice ordered that the children be returned to Germany. The Divisional Court reversed this decision. The Court of Appeal reinstated it. That decision was appealed to this Court.

[3] I note at the outset that events have rendered this appeal moot. The children were returned to Germany in accordance with the application judge's order. Custody proceedings ensued. The German courts granted the mother sole custody, and the children returned to Canada. However, the issues raised in this appeal are important, and the law on how cases such as this fall to be decided requires clarification. Hence these reasons.

[4] A finding that the children were habitually resident in Germany at the time of the alleged wrongful retention is a requirement for a return order under the *Hague Convention*. The parties and interveners put forward three approaches to determining the habitual residence of the children. The appellant, the Office of the Children's

Lawyer ("OCL"), argues for a child-centred approach, which emphasizes the situation and perspective of the children at the time of the application for their return to the original country. The respondent father argues for an approach based on the intention of the parents at the time the children left their original country. The respondent mother, and a number of interveners, argue for a hybrid approach, which treats the circumstances of the children and the intentions of the parents as factors to be considered in achieving a just result which fulfills the objectives of the *Hague Convention*.

[5] For the reasons that follow, I conclude that this Court should adopt the hybrid approach to determining habitual residence under Article 3 of the *Hague Convention*, and a non-technical approach to considering a child's objection to removal under Article 13(2).[1]

[6] Because this appeal is moot, it is not necessary to decide whether the application judge erred in ordering the children returned to Germany.

II. Background

A. *Facts*

[1] Although this provision is not numbered in the *Hague Convention* (unlike Article 13(a) and Article 13(b)), it is generally referred to as Article 13(2).

[7] The mother and father were married in Ontario in 2000. They moved to Germany in 2001 and acquired permanent resident status. They had two children, B. and M., who were born in Germany in 2002 and 2005.

[8] The family lived together in Dreieich, in a home that the parents purchased in 2008. The children attended school in Germany, apart from two visits to Ontario during which time the children attended school in St. Catharines. The parents separated in 2011, but reunited in 2012. During the period of separation, the father had custody of the children.

[9] The children struggled in school, and the parents agreed that the mother should take the children to Canada for the 2013-2014 school year. The father gave his consent for the children to stay in Canada until August 15, 2014, and he agreed to transfer physical custody of the children to the mother temporarily so that the children could be enrolled in school. The father's consent letter contemplated the possibility of extension, but not early termination, of the temporary stay.

[10] The children arrived in Canada on April 19, 2013, and began attending school in St. Catharines four days later. The mother and the children left the bulk of their belongings in Germany. The father maintained weekly contact with the children through Skype and telephone calls, and he visited the children twice in Ontario. One of these visits took place during the alleged wrongful retention.

[11] Because he suspected that the mother would not return the children to Germany at the end of the school year, the father resumed custody proceedings in Germany and purported to revoke his consent to the mother's temporary custody in March 2014. He commenced an application seeking the return of the children to Germany pursuant to the *Hague Convention* on April 11, 2014, through the Central Authority in Germany; this application was received by the Ontario Central Authority on May 5, 2014. On June 26, 2014, he commenced the application before the courts in Ontario. Around the same time, in March of 2014, the father also pursued custody (and relief under the *Hague Convention*) before the German courts. Pursuant to a consent order from the Ontario court dated July 17, 2014, the mother remained in Ontario with the children. During this time, on August 15, 2014, the original consent agreement lapsed. This then became the alleged wrongful retention triggering return under the *Hague Convention*. The father was ultimately unsuccessful before the German courts, and on February 6, 2015, counsel for the father requested that the matter be set for a hearing before the Ontario court.

[12] On April 21, 2015, the application judge requested that the OCL become involved to represent the interests of the children.

[13] The children were ultimately returned to Germany on October 15, 2016. The mother initiated proceedings in the German courts for custody and access, and was awarded sole custody. The children returned to Canada on April 5, 2017.

B. *Judicial History*

(1) Superior Court of Justice, 2015 ONSC 5383

[14] The application judge, MacPherson J., found that the children had “become integrated into their community” in Ontario. She nevertheless held that the children were habitually resident in Germany immediately prior to the alleged wrongful retention. She found that the parents did not have a “settled intention” that the children would stay in Canada, and that the father consented only to a temporary stay in Canada for an educational exchange.

[15] Having concluded that a case for return to Germany had been established, the application judge turned to the exceptions under the *Hague Convention*. She rejected the mother’s argument that the children had “settled in” under Article 12 because the father had commenced proceedings within a year of the wrongful retention, barring an Article 12 defence. Under Article 13(2), she found that the children were of an age (9 and 12) and degree of maturity at which she could consider their views. However, she concluded that the children had not expressed “substantial” objections with the requisite “strength of feeling”. The application judge ordered the return of the children to Germany.

(2) Superior Court of Justice — Divisional Court, 2016 ONSC 55, 344 O.A.C. 159

[16] The Divisional Court allowed the mother’s appeal. In its view, the key question was whether the habitual residence of the children had changed from Germany

to Ontario while they lived in Ontario with the father's consent, precluding the father from claiming their return under the *Hague Convention*. The court found that the children's habitual residence had changed because the parents had a "settled intention" that the children would live temporarily in Canada, and during this time the children became integrated into the community, speaking English, attending school, and living with their mother and their maternal grandparents.

(3) Court of Appeal, 2016 ONCA 680, 133 O.R. (3d) 735

[17] The Court of Appeal allowed the father's appeal and restored the order of the application judge. It held that where the parents have joint custody, one parent cannot unilaterally change the habitual residence of a child. Further, a child's habitual residence does not shift when one parent gives consent to a time-limited stay in another jurisdiction.

[18] While a child's acclimatization may be relevant to determining habitual residence in some circumstances, if an application is brought within one year of a wrongful removal or retention, evidence that a child has "settled in" is not relevant: Article 12. The Court of Appeal therefore concluded that the children were habitually resident in Germany at the relevant time, and that there had been a wrongful retention pursuant to Article 3 of the *Hague Convention*.

[19] With respect to Article 13(2), the Court of Appeal accorded deference to the application judge's findings that the children's objections to return were not

substantial and did not exhibit the requisite strength of feeling. Therefore, the Court of Appeal ordered that the children be returned to Germany.

[20] Following the release of the Court of Appeal's decision, the OCL applied for leave to appeal to this Court. The Court of Appeal and this Court dismissed an application for a stay pending this appeal. The children were returned to Germany where the German courts awarded custody to the mother. The children are now back in Canada.

III. Analysis

[21] The parents in this case agreed that the mother would take the children from Germany to Canada for educational purposes. Subsequently, the father sued under the *Hague Convention* for return of the children to Germany. We are asked to determine what principles apply when a parent in another country seeks to have children in Canada returned under the *Hague Convention*.

A. *The Hague Convention*

[22] The *Hague Convention* was concluded on October 25, 1980. With more than 90 contracting parties, it ranks as one of the most important and successful family law instruments completed under the auspices of the Hague Conference on Private International Law. Canada has been a party from the beginning. The *Hague Convention* is implemented by legislation in every province and territory.

[23] The harms the *Hague Convention* seeks to remedy are evident. International child abductions have serious consequences for the children abducted and the parents left behind. The children are removed from their home environments and often from contact with the other parents. They may be transplanted into a culture with which they have no prior ties, with different social structures, school systems, and sometimes languages. Dueling custody battles waged in different countries may follow, delaying resolution of custody issues. None of this is good for children or parents.

[24] The *Hague Convention* is aimed at enforcing custody rights and securing the prompt return of wrongfully removed or retained children to their country of habitual residence: see Article 1; *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp. 579-81. The return order is not a custody determination: Article 19. It is simply an order designed to restore the *status quo* which existed before the wrongful removal or retention, and to deprive the "wrongful" parent of any advantage that might otherwise be gained by the abduction. Its purpose is to return the child to the jurisdiction which is most appropriate for the determination of custody and access.

[25] Prompt return serves three related purposes. First, it protects against the harmful effects of wrongful removal or retention: see R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (2013), at p. 96; E. Gallagher, "A House Is Not (Necessarily) a Home: A Discussion of the Common Law Approach to Habitual Residence" (2015), 47 *N.Y.U.J. Int'l L. & Pol.* 463, at p. 465; *Thomson*, at p. 559; *Re B. (A Minor) (Abduction)*, [1994] 2 F.L.R. 249 (E.W.C.A.), at p. 260.

[26] Second, it deters parents from abducting the child in the hope that they will be able to establish links in a new country that might ultimately award them custody: see E. Pérez-Vera, "Explanatory Report", in *Acts and Documents of the Fourteenth Session (1980)*, t. III, *Child Abduction* (1981)[2], at p. 429; see also *W. (V.) v. S. (D.)*, [1996] 2 S.C.R. 108, at para. 36; Gallagher, at p. 465; A. M. Greene, "Seen and Not Heard?: Children's Objections Under the Hague Convention on International Child Abduction" (2005), 13 *U. Miami Int'l & Comp. L. Rev.* 105, at pp. 111-12.

[27] Finally, prompt return is aimed at speedy adjudication of the merits of a custody or access dispute in the forum of a child's habitual residence, eliminating disputes about the proper forum for resolution of custody and access issues: see Schuz, at p. 96; Gallagher, at p. 465.

[28] The heart of the *Hague Convention*'s prompt return mechanism is Article 3, which provides that the removal or retention of a child is wrongful (a) where it is in breach of custody rights under the law of the state in which the child was habitually resident immediately before the removal or retention and (b) where those rights were actually being exercised or would have been exercised but for the wrongful removal or retention. Crucially for the purposes of this appeal, the concept of habitual residence is not defined in the treaty.

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[2] The Explanatory Report was drawn up after the conclusion of the *Hague Convention* by E. Pérez-Vera, the Rapporteur of the Commission. It has been influential in the interpretation of the *Hague Convention* and has been cited in numerous cases internationally: see R. K. Gardiner, *Treaty Interpretation* (2nd ed. 2015), at p. 403.

[29] If the requirements of Article 3 are established, Article 12 requires the judge in the requested state to order “the return of the child forthwith” unless certain exceptions apply. These exceptions can be summarized as follows:

1) The parent seeking return was not exercising custody or consented to the removal or retention (Article 13(a));
2) There is grave risk that return would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 13(b));
3) The child of sufficient age and maturity objects to being returned (Article 13(2));
4) The return of the child would not be permitted by fundamental human rights and fundamental freedoms of the requested state (Article 20); and,
5) The application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment (Article 12).

[30] Only one requirement of Article 3 is challenged in this case — whether the children were habitually resident in Germany at the time of the wrongful retention. And only the third exception remains relevant — the children’s alleged objection to being returned to Germany.

B. *Principles of Treaty Interpretation*

[31] The *Hague Convention* is implemented in Ontario by s. 46(2) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. Since the purpose of that section is to implement the underlying convention, this Court must adopt an interpretation consistent with Canada's obligations under it: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 51.

[32] Canada is a party to the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 ("*Vienna Convention*"), which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose": Article 31(1); see also *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802, at para. 22. These international principles generally parallel the domestic approach to statutory interpretation: see R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 279.

[33] A clear purpose of multilateral treaties is to harmonize parties' domestic laws around agreed-upon rules, practices, and principles. The *Hague Convention* was intended to establish procedures common to all the contracting states that would ensure the prompt return of children: see preamble. The objective of multilateral treaty making "would be seriously weakened if the courts of every country interpreted [the treaty at issue] without any regard to how it was being interpreted and applied elsewhere": *Connaught Laboratories Ltd. v. British Airways* (2002), 61 O.R. (3d) 204 (S.C.J.), at para. 46. To avoid frustrating the harmonizing purpose behind the *Hague Convention*, domestic courts should give serious consideration to decisions by the courts of other

contracting states on its meaning and application: see *Vienna Convention*, Article 31(3)(b); *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 50; *Stag Line, Limited v. Foscolo, Mango and Co.*, [1932] A.C. 328 (H.L.), at p. 350; *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446 (H.L.), at p. 471; *Air France v. Saks*, 470 U.S. 392 (1985), at pp. 403-4; *L.K. v. Director-General, Department of Community Services*, [2009] HCA 9, 237 C.L.R. 582, at para. 36.

[34] The parties before us raised two further interpretive issues. The first is whether the *Hague Convention* conflicts with the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 ("*CRC*"). For present purposes, there is no conflict between the two conventions. Both conventions seek to protect the best interests of children — the one by deterring child abduction and promoting prompt resolution of custody disputes, and the other by ensuring that decision making focuses on the best interests of the child. Both conventions seek to protect the child's identity and family relations. The *Hague Convention* does this by mandating the return of a child to the place of his or her habitual residence (Article 3) so that a custody determination may be made in that place — a place normally central to a child's identity; Article 8 of the *CRC* rests on the same policy. Both conventions seek to prevent the illicit transfer and retention of children: see *CRC*, Article 11; United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child* (rev. 3rd ed. 2007), by R. Hodgkin and P. Newell, at pp. 143-47. And both conventions accept the principle that a child of sufficient maturity should have a say in where the child lives, as discussed below in connection with Article 13(2) of the *Hague Convention*.

[35] The second issue raised is whether the *Hague Convention* should be interpreted consistently with the *Canadian Charter of Rights and Freedoms*, and in particular the s. 6 guarantee of right of return and the s. 7 guarantee of liberty and security of person. The answer is no. The *Charter* cannot be used to interpret the *Hague Convention* or any international agreement: see *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, at para. 64; *Vienna Convention*, Articles 27 and 31. In any event, when the *Hague Convention* is interpreted as set out in these reasons, no conflict with ss. 6 or 7 of the *Charter* is made out.

C. *Approaches to Habitual Residence Under Article 3*

[36] The father in this case applied under the *Hague Convention* for the return of the children. To establish a case for return under Article 3, the father had to show that at the time immediately before the alleged wrongful retention (i.e., upon the expiry of the father's consent on August 15, 2014) the children were habitually resident in Germany. Within the overall scheme of the *Hague Convention*, the purpose of habitual residence in Article 3 is to define the children to whom the *Hague Convention* applies. If the children were not habitually resident in Germany at the time of the alleged wrongful retention, the *Hague Convention* does not apply.

[37] The requirement that the child's habitual residence be in the state of the parent seeking return serves to ensure that the state to which the child is returned is the proper state to determine custody. In principle, custody should be determined in the state in which the child is habitually resident. This supports the goals of mitigating

psychological trauma to the child, respecting the jurisdiction of the state of habitual residence to make decisions on custody and access, and deterring abductions and wrongful retentions.

[38] Under Canadian law, whether habitual residence is viewed as a question of fact or a question of mixed fact and law, appellate courts must defer to the application judge's decision on a child's habitual residence, absent palpable and overriding error: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10, 25, and 36. The need for deference may be inferred from the intention of the original states parties (see Pérez-Vera, at p. 445) and the decision not to define habitual residence in the body of the *Hague Convention*. The goal was to avoid legal technicalities and to adopt a fact-based determination: see Pérez-Vera, at p. 445.

[39] This brings us to the central question in this case — how should an application judge approach the determination of habitual residence under Article 3? The parties and the interveners offer three different approaches for determining a child's habitual residence: the parental intention approach, the child-centred approach, and the hybrid approach.

[40] The parental intention approach determines the habitual residence of a child by the intention of the parents with the right to determine where the child lives: see *Mozes v. Mozes,* 239 F.3d 1067 (9th Cir. 2001), at pp. 1076-79; *Gitter v. Gitter*, 396 F.3d 124 (2nd Cir. 2005), at pp. 131-33; *R. v. Barnet London Borough Council, Ex*

parte Nilish Shah, [1983] 2 A.C. 309, at p. 343.[3] Under this approach, time-limited travel to which the parents agree does not change the child's habitual residence. "Where the children are sent abroad to live with relatives or for educational purposes, their habitual residence will not change where the parents intend for them to return, but may change after a period of time where there is no such intention": Schuz, at p. 187, fn. 87. Where the parents have agreed that the child will stay outside the country of habitual residence for a limited time, that intent governs throughout the agreed period, and allows the parent in the original country to mount a claim for the child's return under the *Hague Convention* at the end of the agreed period. This approach currently dominates Canadian jurisprudence, where courts in a number of jurisdictions consider parental intent to be the primary consideration in determining a child's habitual residence: see, for example, *Chan v. Chow*, 2001 BCCA 276, 90 B.C.L.R. (3d) 222, at paras. 30-34; *Korutowska-Wooff v. Wooff* (2004), 242 D.L.R. (4th) 385 (Ont. C.A.), at para. 8; *A.E.S. v. A.M.W.*, 2013 ABCA 133, 544 A.R. 246, at para. 20; *Rifkin v. Peled-Rifkin*, 2017 NBCA 3, 89 R.F.L. (7th) 194, at para. 2; *S.K. v. J.Z.*, 2017 SKQB 136, at paras. 44-47 (CanLII); *Monteiro v. Locke* (2014), 354 Nfld. & P.E.I.R. 132 (Prov. Ct.), at paras. 13-22.

[41] The child-centred approach determines a child's habitual residence under Article 3 by the child's acclimatization in a given country, rendering the intentions of the parents largely irrelevant. It is backward-focused, looking to the child's connections

[3] *Shah* did not concern habitual residence, but rather the term "ordinary residence". Nonetheless, it was taken up for use in *Hague Convention* cases. *Shah* stated: ". . . a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration" (p. 343, per Lord Scarman).

with the state, rather than the more forward-looking parental intention model: see *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), at p. 1401; *Feder v. Evans-Feder*, 63 F.3d 217 (3rd Cir. 1995), at p. 224. No Canadian jurisdiction currently follows the child-centred approach, although courts in Quebec followed this approach (see *Droit de la famille — 2454*, [1996] R.J.Q. 2509 (C.A.)) until 2017, when it was abandoned in favour of the hybrid approach (see *Droit de la famille — 17622*, 2017 QCCA 529, at paras. 20, 27 and 29-30 (CanLII)).

[42] Finally, the hybrid approach holds that instead of focusing primarily or exclusively on either parental intention or the child's acclimatization, the judge determining habitual residence under Article 3 must look to all relevant considerations arising from the facts of the case at hand. As noted above, in Canada, the hybrid approach has been adopted in Quebec: see *Droit de la famille — 17622*, at paras. 29-30.

[43] On the hybrid approach to habitual residence, the application judge determines the focal point of the child's life — "the family and social environment in which its life has developed" — immediately prior to the removal or retention: Pérez-Vera, at p. 428; see also *Jackson v. Graczyk* (2006), 45 R.F.L. (6th) 43 (Ont. S.C.J.), at para. 33. The judge considers all relevant links and circumstances — the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.

[44] Considerations include "the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State" and the child's nationality: *Mercredi v. Chaffe*, C-497/10, [2010] E.C.R. I-14358, at para. 56. No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances: see *Droit de la famille — 17622*, at para. 30. Relevant considerations may vary according to the age of the child concerned; where the child is an infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of": *O.L. v. P.Q.* (2017) C-111/17, (C.J.E.U.), at paras. 43-45.

[45] The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children: see *Mercredi*, at paras. 55-56; *A. v. A. (Children: Habitual Residence)*, [2013] UKSC 60, [2014] A.C. 1, at para. 54; *L.K.*, at paras. 20 and 26-27. However, recent cases caution against over-reliance on parental intention. The Court of Justice of the European Union stated in *O.L.* that parental intention "can also be taken into account, where that intention is manifested by certain tangible steps such as the purchase or lease of a residence": para. 46. It "cannot as a general rule by itself be crucial to the determination of the habitual residence of a child . . . but constitutes an 'indicator' capable of complementing a body of other consistent evidence": para. 47. The role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case": para. 48.

[46] It follows that there is no "rule" that the actions of one parent cannot unilaterally change the habitual residence of a child. Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal: see *In re R. Children*, [2015] UKSC 35, [2016] A.C. 76, at para. 17; see also *A. v. A.,* at paras. 39-40.

[47] The hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions": *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013), at p. 746. It requires the application judge to look to the entirety of the child's situation. While courts allude to factors or considerations that tend to recur, there is no legal test for habitual residence and the list of potentially relevant factors is not closed. The temptation "to overlay the factual concept of habitual residence with legal constructs" must be resisted: *A. v. A.,* at paras. 37-39.

D. *The Hybrid Approach Should Be Adopted in Canada*

[48] The hybrid approach should be adopted in Canada for the following reasons: (1) the principle of harmonization supports the hybrid approach; and (2) the hybrid approach best conforms to the text, structure, and purpose of the *Hague Convention*.

(1) The Principle of Harmonization Supports the Hybrid Approach

[49] As discussed above, a prime consideration in interpreting treaties is the principle of harmonization. The aim of treaties like the *Hague Convention* is to establish uniform practices in the adhering countries. This Court has faithfully followed this precept: see, for example, *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at paras. 82, 126, and 178; *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, at paras. 30 and 42. It follows that this Court should prefer the interpretation that has gained the most support in other courts and will therefore best ensure uniformity of state practice across *Hague Convention* jurisdictions, unless there are strong reasons not to do so.

[50] In recent years, many *Hague Convention* states have adopted a hybrid approach. Absolute consensus has not yet emerged. But the clear trend is to rejection of the parental intention approach and to adoption of the hybrid approach. Recent decisions from the European Union, the United Kingdom, Australia, New Zealand, and the United States endorse the hybrid approach.

[51] The Court of Justice of the European Union adopted the hybrid approach to determining habitual residence in *Mercredi*. It recently confirmed this approach in *O.L.*, holding that a child's habitual residence "corresponds to the place which reflects some degree of integration by the child in a social and family environment", and must be established "taking account of all the circumstances of fact specific to each individual case": para. 42. The court held that while parental intention may be relevant in some cases, it must be approached with caution. The European Union comprises 28

countries. The decisions of its Court of Justice bring nearly one-third of the over 90 countries that subscribe to the *Hague Convention* under the umbrella of the hybrid approach to habitual residence.

[52] The Supreme Court of the United Kingdom followed suit in *A. v. A.*, abandoning the parental intention approach to habitual residence in favour of the hybrid approach. Baroness Hale of Richmond concluded that the European approach was preferable to that earlier adopted by the English courts, which had incorrectly shifted the focus of the habitual residence inquiry "from the actual situation of the child to the intentions of his parents": para. 38. The purposes and intentions of the parents are "merely one of the relevant factors": para. 54. The Supreme Court recently confirmed the hybrid approach in *In re R*.

[53] A similar movement away from parental intention and towards the hybrid approach can be seen in New Zealand and Australia. The New Zealand Court of Appeal, in *Punter v. Secretary for Justice*, [2007] 1 N.Z.L.R. 40, expressly rejected counsel's submission that parental purpose should determine a child's habitual residence: see paras. 91-108. Instead, the court described the considerations relevant to habitual residence in these terms (at para. 88):

> . . . the inquiry into habitual residence [is] a broad factual inquiry. Such an inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration. In this catalogue, . . . settled purpose (and with young children the settled

> purpose of the parents) is important but not necessarily decisive. It should not in itself override what McGrath J called . . . the underlying reality of the connection between the child and the particular state . . . .

[54] The High Court of Australia approved *Punter* in *L.K.* Notably, that court observed that while *Punter*'s references to "settled purpose" directs attention to the intentions of the parents, the question of habitual residence must still be decided "by reference to all the circumstances of any particular case": para. 44, quoting *In re J. (A Minor) (Abduction: Custody Rights)*, [1990] 2 A.C. 562 (H.L.), at p. 578 (emphasis added in *L.K.*).

[55] Finally, while courts in the United States disagree on the appropriate approach to determining habitual residence, there is strong support for the hybrid approach: see *Redmond*, at p. 746; *Martinez v. Cahue*, 826 F.3d 983 (7th Cir. 2016), at p. 990; *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003), at pp. 898-99; *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259 (3rd Cir. 2007), at pp. 271-72; *Karkkainen v. Kovalchuk*, 445 F.3d 280 (3rd Cir. 2006), at p. 297. In *Silverman*, the Eighth Circuit Court of Appeals for the United States considered a number of factors relevant to that case: the degree of settled purpose from the perspective of the children, the change in geography (with possessions and pets), the abandonment of the prior residence (including sale of the family home), the passage of time, the parent's application for benefits, the children's enrolment in school, and, "to some degree", the intentions of the parents at the time of the move: see pp. 898-99. In *Tsai-Yi Yang*, the Third Circuit Court of Appeals focused on the circumstances of the child in determining habitual

residence, but also considered the intentions of the parents to be relevant: see pp. 271-72. And in *Redmond*, the Seventh Circuit Court of Appeals considered both the intentions of the parents and the circumstances of the child in determining habitual residence, commenting that "[i]n substance, all circuits — ours included — consider *both* parental intent *and* the child's acclimatization, differing only in their emphasis": p. 746 (emphasis in original).

[56] It is true that, at one time, many courts applied a parental intention approach to determining habitual residence under the *Hague Convention*. But more recent cases indicate a clear shift from the parental intention approach to the hybrid approach. A large number of countries — among them countries with which Canada has close legal ties — now adopt a hybrid approach to determining habitual residence under the *Hague Convention*. Within Canada, Quebec courts have recently decided to join this international trend: see *Droit de la famille — 17622*, at paras. 29-30.

[57] The desirability of harmonization weighs heavily in favour of following the dominant thread of *Hague Convention* jurisprudence, unless there are strong reasons to the contrary. As discussed below, no such reasons have been shown. I conclude that this Court should follow the current trend of *Hague Convention* jurisprudence and reject the parental intention approach in favour of the hybrid approach.

(2) The Hybrid Approach Best Conforms to the Text, Structure, and Purpose of the *Hague Convention*

[58] There are good reasons why courts around the world are adopting the hybrid approach. The hybrid approach best adheres to the text, structure, and purpose of the *Hague Convention*.

[59] The hybrid approach best fulfills the goals of prompt return: (1) deterring parents from abducting the child in an attempt to establish links with a country that may award them custody, (2) encouraging the speedy adjudication of custody or access disputes in the forum of the child's habitual residence, and (3) protecting the child from the harmful effects of wrongful removal or retention.

[60] The hybrid approach deters parents from attempting to manipulate the *Hague Convention*. It discourages parents from attempting to alter a child's habitual residence by strengthening ties with a particular state (see my colleagues' reasons, at paras. 134-35; *Mozes*, at p. 1079), for two reasons: (1) parental intent is a relevant consideration under the hybrid approach, and (2) parents who know that the judge will look at *all* of the circumstances will be deterred from creating "legal and jurisdictional links which are more or less artificial" (Pérez-Vera, at p. 429).

[61] By contrast, the parental intention approach facilitates manipulation of the *Hague Convention* scheme. It may lead parents to exercise intention in ways that artificially maintain the child's habitual residence in the initial state: see Gallagher, at p. 480; S. I. Winter, "Home is where the Heart is: Determining 'Habitual Residence' under the Hague Convention on the Civil Aspects of International Child Abduction" (2010), 33 *Wash. U.J.L. & Pol'y* 351, at p. 377; *Ruiz v. Tenorio*, 392 F.3d 1247 (11th

Cir. 2004), at p. 1254. The parental intention approach may also allow parents to create artificial jurisdictional links by way of an agreement stipulating the parents' shared intent as to the child's habitual residence: see *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010). The hybrid approach guards against these manipulations.

[62] The hybrid approach also promotes prompt custody and access decisions in the most appropriate forum, and thus offers the best hope of *prompt* return of the child. The parental intention and child-centred approaches may, on their face, seem less complex and hence more likely to lead to speedy determination of the habitual residence of the child. But the reality is different. The parental intention approach in practice often leads to detailed and conflicting evidence as to the intentions of the parents: see Schuz, at p. 211. When parents disagree as to their intentions, the application judge may be faced with a large volume of evidence, including oral evidence, on those intentions. The hybrid approach is not an "invitation to litigate": my colleagues' reasons, at para. 149. On the contrary, it is the best assurance of a prompt return of the child and resolution of custody.

[63] This point was pivotal in the recent decision of the Court of Justice of the European Union in *O.L.* The court, employing a hybrid approach, stated that "to consider that the initial intention of the parents is a factor of crucial importance in determining the habitual residence of a child would be detrimental to the effectiveness of the return procedure and to legal certainty" (para. 56), and could "compel the national courts either to gather a substantial quantity of evidence and testimony in order

to determine with certainty that intention, which would be difficult to reconcile with the requirement that a return procedure should be expeditious, or to issue their judgments while not in possession of all the relevant information, which would result in legal uncertainty" (para. 59). In a similar manner, the child-centred approach may lead to conflicting evidence, including expert evidence, on the child's connection to country A and country B. The hybrid approach, by contrast, allows the judge to make an order on all the evidence. In particular, treating parental intention as one consideration among many means that the application judge "may not necessarily have to come to a definitive conclusion as to which parent's version is more accurate": Schuz, at p. 212.

[64] The hybrid approach also favours choice of the most appropriate forum. It focuses on the factual connections between the child and the countries in question, as well as the circumstances of the move — considerations that "mirror the closest connection test often used in determining the *forum conveniens*": Schuz, at p. 210. This allows for custody and access disputes to be adjudicated in the most convenient forum with the best available evidence: see *Punter*, at para. 187. The hybrid approach thus avoids the problem that a child may be found to be habitually resident in a country with which the child has little or no connection: see Schuz, at pp. 209-10.

[65] Finally, by focusing on the actual circumstances of the child, the hybrid approach best protects children from the harmful effects of wrongful removal or retention. Unlike the parental intention approach and the child-centred approach, it

allows all relevant factors to be considered in a fact-based inquiry that does not rely on formulas or presumptions: see *Redmond*, at p. 746.

[66] There is no conflict between the hybrid approach and the "settled in" exception under Article 12: see my colleagues' reasons, at paras. 120-21 and 131-32. Article 12 comes into play only after habitual residence is determined, and functions to provide a limited exception to the requirement that a child wrongfully removed or retained be returned to his or her habitual residence. It may be that on the hybrid approach habitual residence favours return of the child, but that the one-year period and settling in indicate that the child should not be uprooted and returned to his or her place of habitual residence.

[67] Nor does the hybrid approach "ignor[e] the fact that a child could develop genuine links to a new jurisdiction following a wrongful removal or retention": my colleagues' reasons, at para. 146; see also para. 149. Habitual residence is determined immediately prior to the wrongful removal or retention: see Articles 3 and 4. Subsequent links are relevant only to the exception under Article 12.

[68] In sum, the hybrid approach represents a principled advance on the parental intention and child-centred approaches. It recognizes that the child is the focus of the analysis, but acknowledges that it may be necessary to consider parental intention in order to properly assess the child's connections to a country: see Schuz, at p. 192. It is an incremental response to the jurisprudence and the fact-based nature of the inquiry required by the *Hague Convention*.

[69] In doing these things, the hybrid approach faces the shortcomings of the parental intention approach directly and moves beyond them. The fact is that the parental intention approach is unable to provide answers in all cases. Courts using this approach have admitted that in some circumstances — such as where parental intent is ambiguous or inconclusive — parental intent is not determinative, and they have considered objective factors connecting the child to the jurisdiction: see my colleagues' reasons, at para. 116; *Gitter*, at p. 134; *Punter*, at para. 107; *Murphy v. Sloan*, 764 F.3d 1144 (9th Cir. 2014), at p. 1152; *Rey v. Getta*, 2013 BCCA 369, 342 B.C.A.C. 30, at paras. 23 and 32-33. Similarly, courts using the child-centred approach have recognized that parental intention is a relevant factor: see *Redmond*, at p. 746; *Feder*, at p. 224. The hybrid approach simply acknowledges that absolute approaches to determining habitual residence under the *Hague Convention* do not work.

[70] The reality is that every case is unique. The application judge charged with determining the child's habitual residence should not be forced to make a blinkered decision that disregards considerations vital to the case under review. Nor should an approach that tolerates manipulation be adopted. The application judge is best placed to weigh the factors that will achieve the objects of the *Hague Convention* in the case at hand. In the end, the best assurance of certainty lies in following the developing international jurisprudence that supports a multi-factored hybrid approach.

[71] I conclude that the hybrid approach to habitual residence best conforms to the text, structure, and purpose of the *Hague Convention*. There is no reason to decline

to follow the dominant trend in *Hague Convention* jurisprudence. The hybrid approach should be adopted in Canada.

[72] I come to the question of whether under the hybrid approach, a child's habitual residence can change while he or she is staying with one parent under the time-limited consent of the other.

[73] Applying the hybrid approach, the application judge considers the intention of the parents that the move would be temporary, and the reasons for that agreement. But the judge also considers all other evidence relevant to the child's habitual residence. The court must do so mindful of the risk of overlaying the factual concept of habitual residence with legal constructs like the idea that one parent cannot unilaterally change a child's habitual residence, or that a parent's consent to a time-limited stay cannot shift the child's habitual residence. The court must also avoid treating a time-limited consent agreement as a contract to be enforced by the court. Such an agreement may be valuable as evidence of the parents' intention, and parental intention may be relevant to determining habitual residence. But parents cannot contract out of the court's duty, under Canadian laws implementing the *Hague Convention*, to make factual determinations of the habitual residence of children at the time of their alleged wrongful retention or removal.

[74] As this appeal is moot, it is unnecessary to decide whether the application judge's decision that the children were habitually resident in Germany was properly

upheld by the Court of Appeal. For the purposes of the next issue, I proceed on the assumption that the father established the requirements of Article 3.

E. *The Child's Objection Under Article 13(2) of the Hague Convention*

[75] The *Hague Convention* provides exceptions to the general rule that the child must be returned forthwith to the country of habitual residence if he or she has been wrongfully removed or retained and the application has been commenced within one year. One of these exceptions is Article 13(2), which provides:

> 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.

[76] The exceptions to the rule that the child should be returned to the country of the child's habitual residence are just that — exceptions. Their elements must be established, and they do not confer a general discretion on the application judge to refuse to return the child. Article 13(2) is an exception to the general rule that a wrongfully removed or retained child must be returned to her country of habitual residence, and it should not be read so broadly that it erodes the general rule: see Pérez-Vera, at p. 434. This, however, does not preclude a fact-based, common-sense approach to determining whether the elements of Article 13(2) are established, as discussed below.

[77] The application judge's discretion to refuse to return the child to the country of habitual residence arises only if the party opposing return establishes that: (1) the child has reached an appropriate age and degree of maturity at which his or her views can be taken into account, and (2) the child objects to return: see Pérez-Vera, at pp. 433 and 450; Schuz, at p. 319; P. McEleavy, "Evaluating the views of abducted children: trends in appellate case-law" (2008), 20 *C.F.L.Q.* 230, at p. 232; *De Silva v. Pitts*, 2008 ONCA 9, 232 O.A.C. 180, at para. 42; *Thompson v. Thompson*, 2017 ABCA 299, at para. 16 (CanLII); *In re M. (Abduction: Rights of Custody)*, [2007] UKHL 55, [2008] 1 A.C. 1288, at para. 46.

[78] Although much ink has been spilled on precisely what must be shown, it is telling that the *Hague Convention* does not specify particular requirements or procedures to establish sufficient age and maturity and an objection. Basically, it is for the application judge to determine, as a matter of fact, whether those elements are established. In most cases, the object of Article 13(2) can be achieved by a single process in which the judge decides if the child possesses sufficient age and maturity to make her evidence useful, decides if the child objects to return, and, if so, exercises his or her judicial discretion as to whether to return the child.

[79] Determining sufficient age and maturity in most cases is simply a matter of inference from the child's demeanor, testimony, and circumstances: see *Thompson*, at para. 17; *England v. England*, 234 F.3d 268 (5th Cir. 2000), at pp. 273-74, per DeMoss J., dissenting; M. Fernando and N. Ross, "Stifled Voices: Hearing Children's

Objections in Hague Child Abduction Convention Cases in Australia" (2018), 32 *Int'l J.L. Pol'y & Fam.* 93, at pp. 102-3. In some cases, it may be appropriate to call expert evidence or have the child professionally examined: see *R.M. v. J.S.*, 2013 ABCA 441, 566 A.R. 230, at paras. 25-26; Greene, at pp. 127-28. However, this should not be allowed to delay the proceedings.

[80] As in the case of age and maturity, the child's objection should be assessed in a straight-forward fashion — without the imposition of formal conditions or requirements not set out in the text of the *Hague Convention*.

[81] If the elements of (1) age and maturity and (2) objection are established, the application judge has a discretion as to whether to order the child returned, having regard to the "nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations": *In re M.*, at para. 46.

F. *Delay*

[82] The time it took to bring this *Hague Convention* application to hearing and resolve the ensuing appeals was unacceptably long. In another context, this Court has recently decried a culture of complacency towards delay within the justice system: see *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 4. Complacency towards

judicial delay is objectionable in all contexts, but some disputes can better tolerate it. *Hague Convention* cases cannot.

[83] The first object of the *Hague Convention* is the prompt return of children: see Article 1(a). For this reason, contracting states are required, by Article 2, to "use the most expeditious procedures available" to secure within their territories the implementation of the *Hague Convention*'s objects.

[84] Article 11 specifically requires the contracting states' judicial authorities to "act expeditiously in proceedings for the return of children". Responsibility for performing Canada's Article 11 obligation falls to judges and court administrators. This is unusual, but it is not unheard of. Canada is a party to other treaties that depend, in part, on judicial action to ensure performance.

[85] When international agreements come before the courts, performance of Canada's obligation to apply and interpret them according to the rules of treaty interpretation falls to Canada's judges. Lord Diplock made this point, in respect of United Kingdom courts, in *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251 (H.L.), at p. 283:

> By ratifying the Convention, Her Majesty's Government has undertaken an international obligation on behalf of the United Kingdom to interpret future treaties in this manner and since under our constitution the function of interpreting the written law is an exercise of judicial power and rests with the courts of justice, that obligation assumed by the United Kingdom falls to be performed by those courts.

[86] *R. v. Zingre*, [1981] 2 S.C.R. 392, is another example. The central question was whether the Court should make an evidentiary order in favour of Swiss investigators acting under a Swiss-British extradition treaty binding on Canada. Justice Dickson (as he then was), at p. 409, noted that by granting the order the Court would ensure Canada's performance of its treaty obligation to Switzerland:

> The argument in favour of granting the order in the case at bar does not rest merely on the notion of "comity". It rests on treaty. In responding affirmatively to the request which has been made the Court will be recognizing and giving effect to a duty to which Canada is subject, by treaty, under international law. [Emphasis added.]

[87] So it was up to the judicial authorities in this case to ensure Canada lived up to its obligation to act expeditiously. I am doubtful that we did so. While each of the three Ontario courts involved in the process gave their judgments quickly, the proceeding still moved too slowly. The key steps in this proceeding, and ensuing delays, were as follows:

(a) 26 June 2014: The father commences his *Hague Convention* proceeding by application in the Ontario Superior Court of Justice at St. Catharines. This was about six weeks before August 15, 2014, when the father's time-limited consent ended.

(b) 9 March 2015: The application comes on for hearing before MacPherson J., *a delay of nearly seven months after the expiry of the consent agreement*. The application judge attributes this delay to

the father's decision to proceed in Germany despite having commenced (and not discontinued) in Ontario.

(c) 21 April 2015: The application is heard for a second day to consider submissions on whether the court should order the appointment of the Office of the Children's Lawyer. The court did so, requiring that the OCL act on an expedited basis to provide evidence as to the children's objections to returning to Germany.

(d) 7 August 2015: The OCL files evidence in the proceeding, now *nearly one year after the expiry of the consent period*.

(e) 27 August 2015: Three days after the third and final day of the hearing, MacPherson J. orders the children's return to Germany with reasons for judgment.

(f) 30 November 2015: The Divisional Court hears the mother's appeal, *three months after MacPherson J.'s order*.

(g) 5 January 2016: The Divisional Court allows the appeal from MacPherson J.'s order.

(h) 31 August 2016: The Court of Appeal for Ontario hears the father's appeal from the decision of the Divisional Court. *Over two years*

have now passed since the expiry of the father's time-limited consent.

(i) 13 September 2016: The Court of Appeal allows the appeal and restores MacPherson J.'s order. The Court of Appeal notes (at para. 82) that *by this time the children have already been in Ontario for more than three years* and "moving them back to Germany is likely to be difficult".

(j) 14 October 2016: The OCL files a notice of application for leave to appeal to this Court and a stay of execution of the Court of Appeal's order. The OCL also applies to the Court of Appeal for a stay. Benotto J.A. of the Court of Appeal dismisses the application in that court. Justice Moldaver dismisses the stay application in this Court.

(k) 15 October 2016: The children return to Germany, *26 months after the expiry of the father's time-limited consent*.

(l) 27 April 2017: This Court grants the OCL's application for leave to appeal, *over six months after it was filed*.

(m) 1 May 2017: Having learned the appeal may be moot, the Court seeks submission from the parties.

(n) 9 November 2017: At the hearing of the appeal in this Court, all parties acknowledged, by this point, that the appeal would have no bearing on the residence of the children.

[88] Despite the quick work of all the judges below in deciding the case before them and releasing reasons for their decisions, this proceeding was unacceptably delayed. The hardship and anxiety that such delays impose on children are exactly what the *Hague Convention*'s contracting parties sought to prevent by insisting on prompt return and expeditious procedures.

[89] In light of this appeal, this Court has taken steps to ensure that *Hague Convention* cases are flagged internally and expedited by our registry. I hope other Canadian courts will consider what further steps they can take to ensure that *Hague Convention* proceedings are determined using the most expeditious procedures available. Judges seized of *Hague Convention* applications should not hesitate to use their authority to expedite proceedings in the interest of the children involved. Unlike much civil litigation in Canada, *Hague Convention* proceedings should be judge-led, not party-driven, to ensure they are determined expeditiously.

IV. Conclusion

[90] This Court adopts the hybrid approach to determining habitual residence under Article 3 of the *Hague Convention*, and a non-technical approach to considering the child's objection under Article 13(2).

[91] The children were returned to Germany, and the German courts granted the mother custody. The children are now living with their mother in Canada, and there are no outstanding legal issues. There will be no award of costs.

The reasons of Moldaver, Côté and Rowe JJ. were delivered by

CÔTÉ AND ROWE JJ. —

I. Overview

[92] The *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 ("*Hague Convention*" or "*Convention*"), establishes an international legal framework that aims to deter the abduction of children across state borders. In certain circumstances, it requires courts to order the return of a child to another country, if the child was "wrongfully removed or retained" in a different jurisdiction. This analysis turns, in part, on where the child was "habitually resident" at the time of the alleged removal or retention. The meaning of habitual residence in Article 3 of the *Convention* is the central issue in this appeal.

[93] The father, one of the respondents, filed an application under the *Convention* seeking to have his two children returned from Canada to Germany. In his view, their mother wrongfully retained the children in Canada by refusing to return them to Germany after the expiry of the father's letter of consent, which permitted the

children to travel to and live in Canada with their mother for a period of roughly 16 months.

[94] The application judge found that the children were habitually resident in Germany at the time of their retention in Canada and ordered their return to Germany (2015 ONSC 5383). The Divisional Court allowed the mother's appeal, concluding that the children's habitual residence had changed to Canada during their stay (2016 ONSC 55, 344 O.A.C. 159). The Court of Appeal for Ontario restored the order of the application judge, finding that the children's habitual residence did not change from Germany during their stay in Canada pursuant to the father's time-limited consent (2016 ONCA 680, 133 O.R. (3d) 735).

[95] We agree with the Court of Appeal. In our view, the children were habitually resident in Germany at the time of the alleged wrongful retention in Canada because there was no shared parental intent for Canada to become the children's habitual residence. To the contrary, the father's consent permitting the children to travel to and live in Canada was expressly time limited. Therefore, we would dismiss the appeal.

II. Facts

[96] The mother and father were married in Ontario in 2000 and moved to Germany in 2001. Their two children were both born in Germany — in 2002 and 2005,

respectively. In 2011, the parents separated and the father was granted interim custody of the children.

[97] By September 2012, the parents had reunited, and the family once again lived together until April 2013. At that point, the children were experiencing difficulties in school. These academic troubles were, at least in part, what prompted the move to Canada. The father, who remained in Germany, signed a letter of consent permitting the children to travel to and live in Canada with their mother until August 15, 2014. He also signed a notarized letter temporarily transferring custody to the mother, so that the children could be enrolled in school. The father characterized the move as an "educational exchange" opportunity that would allow the children to spend the 2013-2014 school year in Canada. Both children moved to Canada with their mother in April 2013 pursuant to this mutually agreed-upon arrangement.

[98] The father revoked his consent in March 2014, five months before it was set to expire. He subsequently commenced a *Hague Convention* proceeding in Ontario. The Ontario proceedings were delayed for approximately 10 months while he sought relief in Germany — in particular, a custody application (which was dismissed on the basis that the German courts lacked jurisdiction while the children were living in Canada) and a *Hague Convention* petition (which he eventually withdrew at the suggestion of the German court).

[99] After the Ontario proceedings and subsequent appeals concluded — with the Court of Appeal reinstating the application judge's return order — the children

returned to Germany in October 2016. Custody proceedings then took place in Germany, where the family court granted the mother sole custody in December 2016. The children returned to Canada to live with their mother in April 2017. As the children now live in Canada under the exclusive custody of their mother, this appeal is moot. The Court agreed to hear this case to resolve the important question of how habitual residence should be determined in subsequent *Hague Convention* proceedings.

III. The *Hague Convention*

[100] The *Hague Convention* was adopted in response to the problem of international parental child abduction, which became a growing concern by the mid-1970s. It provides a mechanism for courts in one country to order the return of a child to another country where it finds that the child was wrongfully removed or retained. The concept of habitual residence is central to this framework.

[101] Article 12 of the *Convention* contains the return provision that authorizes a court to issue a return order. It states:

> 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.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the

child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

[102] Article 3 of the *Convention* defines the circumstances in which a removal or retention is wrongful, thereby triggering the return mechanism in Article 12:

The removal or the 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 sub-paragraph *(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.

[103] Under these provisions, courts presented with return applications pursuant to Article 12 must perform a two-step analysis. The first step is to determine the child's habitual residence immediately before the wrongful removal or retention. If the child was removed from his or her habitual residence or retained in another country by one parent in breach of the other parent's custody rights, then that removal or retention is deemed to be wrongful under Article 3. This triggers the return provision in Article 12.

[104] The second step is to determine whether an exception to the return order applies, such that the child should not be returned to his or her habitual residence. Three articles of the *Convention* contain exceptions. First, Article 12 provides that if one year or more has passed since the date of the wrongful removal or retention, the court can consider whether the child "is now settled in its new environment", in which case the court has discretion to refuse to make the order. There is no dispute that this exception does not apply here because the father brought his application within one year of the alleged wrongful retention — namely, following the expiration of his time-limited consent on August 15, 2014.

[105] Second, Article 13 provides that, notwithstanding Article 12, certain other exceptions may warrant a refusal of a return order. These exceptions are: where the parent left behind has consented to, or acquiesced in, the child's removal or retention; where there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or where the child objects to return and is of an age and degree of maturity at which it is appropriate to take account of his or her views.

[106] Finally, Article 20 provides a further exception where the child's return would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms.

[107] Any of these exceptions could apply only after a court has made an initial determination as to where the child was habitually resident at the time of the removal

or retention. This approach is sensible: if the child was not habitually resident in the country to which the petitioner is seeking a return order, there is no need to consider whether any exception applies as no return order will be made.

[108] The central dispute in this appeal is at the first step of the analysis: deciding where the children are habitually resident under Article 3 (for purposes of determining whether to issue a return order under Article 12).

IV. Habitual Residence Under Article 3

[109] Three approaches have emerged in international jurisprudence for determining habitual residence, which the majority defines as follows: the *parental intention approach*, which "determines the habitual residence of a child by the intention of the parent(s) with the right to determine where the child lives" (para. 40); the *child-centred approach*, which "determines a child's habitual residence under Article 3 by the child's acclimatization in a given country, rendering the intentions of the parents largely irrelevant" (para. 41); and the *hybrid approach*, in which the application judge "must look to all relevant considerations" in order to "determin[e] the focal point of the child's life — 'the family and social environment in which its life has developed' — immediately prior to the removal or retention" (paras. 42-43).

[110] In our view, habitual residence should be ascertained via the parental intention approach. In applying this approach to most cases, the determination of habitual residence will turn on a straightforward question: where did the parents last

mutually intend for the child to be habitually resident?[4] Where the evidence allows the court to answer this question, the determination of habitual residence ends there. This approach focuses on the intentions of the parents as the key element in the analysis, not the strength of the relevant contacts between the child and the competing jurisdictions.

[111] The majority agrees that parental intent must play some role in the habitual residence analysis, at least in some subset of cases. By adopting the hybrid approach, however, the majority dilutes the importance of parental intent as the primary variable in favor of a multi-factor test. The result, in our respectful view, is an unprincipled and open-ended approach — untethered from the text, structure, and purpose of the *Convention* — that creates a recipe for litigation. In what follows, we set out the merits of the parental intention approach, assess the risks and weaknesses inherent in the hybrid approach, and apply the correct approach based on parental intention to determine habitual residence in this case.

A. *The Parental Intention Approach*

[112] The parental intention approach determines habitual residence with reference to the intentions of the child's custodial parents. The central focus of this inquiry, in most cases, will be the last mutually shared intent of the parents (or of the persons entitled to fix the child's residence) as to where the child was to be habitually

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[4] Although we use the term "parents" as shorthand in the context of this case, the relevant inquiry focuses on the intentions of the persons with "the right to determine the child's place of residence" (*Hague Convention*, Article 5) — which may be, for example, a child's legal guardians rather than biological parents.

resident. In the most common scenario, where a child has spent most of his or her life in one jurisdiction and then moves to another, a court must ascertain whether both parents intended for the new jurisdiction to become the child's habitual residence, or whether the intent was for the stay to be temporary. If only one parent intends for the move to be permanent, the prior jurisdiction remains the child's habitual residence. If both parents intend for the move to be permanent, and the child does subsequently move to the new jurisdiction, the child's habitual residence has changed.

[113] In looking to objective evidence of shared parental intent, courts should consider the expressed intentions of both parents. If the parents have agreed in writing that the move to the new jurisdiction is meant to be temporary, then that agreement should be given decisive weight. Beyond expressed intentions, however, courts may "look at actions as well as declarations" (*Koch v. Koch*, 450 F.3d 703 (3d Cir. 2006), at p. 715). For example, if a mother travels with her child to a new country, holding only a temporary visitor's visa and taking few of her belongings with her, such evidence would be probative of a lack of intent for the new jurisdiction to become child's habitual residence (see, e.g., *Delvoye v. Lee*, 329 F.3d 330 (3d Cir. 2003), at p. 334). Conversely, if a family takes all of their belongings with them and sells their home in the first jurisdiction, such evidence would tend to support the opposite conclusion. Evidence of this nature can offer insight where the parties' statements or expressed intentions do not point to a clear answer.

[114] Where shared parental intent is made explicit in an agreement, or is otherwise clear from the evidence before the application judge, it should be determinative of habitual residence, absent exceptional circumstances. One such circumstance was raised by Sharpe J.A. in the court below: ". . . where a consensual time-limited stay is so long that it becomes time-limited in name only and the child's habitual residence has changed" (C.A. reasons, at para. 49). In such cases, where a purportedly time-limited stay in a foreign jurisdiction has stretched on for many years, it may not be realistic to say that the parents still intend for the child to be habitually resident in the first jurisdiction (see *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), at pp. 1075-76).

[115] This accords with the approach of some American courts, which recognize a narrow exception for where the evidence "unequivocally points to the conclusion that the child has acclimatized to the new location" (*Gitter v. Gitter*, 396 F.3d 124 (2nd Cir. 2005), at p. 134; see also *Mozes*, at p. 1081). Such cases are rare and require evidence of more than simply "settling in" to a new location in order for shared parental intent to be disregarded (see R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (2013), at p. 189, fn. 104).

[116] In most cases, evidence of parental intent — such as an explicit agreement between both custodial parents — will be sufficient to establish habitual residence. However, where evidence of shared parental intent is inconclusive, courts may then look to other objective evidence to determine the habitual residence of the child. This

aligns with how other courts have applied the parental intention approach (see e.g., *Murphy v. Sloan*, 764 F.3d 1144 (9th Cir. 2014), at p. 1152; *Rey v. Getta*, 2013 BCCA 369, 342 B.C.A.C. 30, at para. 33). In *Murphy*, for example, the Ninth Circuit Court of Appeals found that where parental intent was not dispositive, "[c]ertain circumstances related to a child's residence and socialization in another country . . . may change the calculus" (p. 1152). The point, however, is that courts may only look to additional evidence pertaining to the child's contacts in each jurisdiction where evidence of parental intent is inconclusive. In other words, if the court can make a finding regarding the last shared intent of both custodial parents — which, as we have stated, will be the case in most situations — that shared intent must be the decisive variable in the habitual residence analysis.

[117] As the majority notes, "Canada is a party to the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 ('*Vienna Convention*'), which provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'" (para. 32).

[118] We agree. In our view, the parental intention approach is mandated by (1) the ordinary meaning of the text and the structure of the *Convention*, (2) the object and purpose of the *Convention*, and finally (3) policy concerns. We consider each in turn.

(1) Text and Structure

[119] A focus on shared parental intent is dictated by the text and structure of the *Convention*. There are three strong indications that parental intent should be the decisive factor.

[120] First, Article 12 contains two distinct provisions depending on when a *Convention* proceeding is initiated. When proceedings have been commenced one year or more after the alleged wrongful removal or retention, a court need not order the child's return if "it is demonstrated that the child is now settled in its new environment". Alternatively, when proceedings are commenced within one year, there is no such exception. In such cases, the *Convention* is clear: the court "shall order the return of the child forthwith". The fact that Article 12 does not include a "settling in" provision for when a proceeding is initiated within one year is a strong indication that evidence of settling in should not play any role in the analysis of habitual residence.

[121] For this reason, the range of facts that may support a habitual residence determination under the parental intent approach is not completely open ended. In most cases, only evidence that is germane to the question of parental intent will be relevant. Given the structure of the *Convention*, it would not be proper to consider evidence that speaks to the strength or quality of the child's connections to each jurisdiction where evidence of shared parental intent is clear. Indeed, other objective evidence — including evidence of social or cultural integration — may be relevant to a determination of whether a child has "settled in" to his or her new environment. But as Article 12 makes clear, that analysis is only permitted where the proceeding is

commenced one year or more after the alleged wrongful removal or retention. And, even then, it occurs only *after* the court reaches a determination as to the child's habitual residence.

[122] Second, the two-step analysis required by the *Convention* differentiates the concept of habitual residence (at stage one) from evidence regarding the child's circumstances (which pertain to some of the discretionary exceptions to a return order at stage two). Article 13 contains two exceptions that specifically focus on the circumstances of the child: whether there is a grave risk of harm if the child is returned, and whether a child objects to a return. Incorporating considerations of this nature into the preliminary determination of habitual residence would inappropriately collapse the steps of the analysis, as the intervener the Attorney General of Canada observed in its submissions to the Court.

[123] Third, Article 5 provides that custody rights include "the right to determine the child's place of residence". Thus, although the *Convention* does not directly define habitual residence, it at least envisions that parents, by virtue of their custody rights, must have some influence over where their child is deemed to be habitually resident. The majority's approach minimizes the rights provided for in Article 5 by equivocating as to the role that parental intent should play in determining habitual residence.

(2) Purpose

[124] The clear purpose of the *Convention* also supports an approach based on parental intention. This Court identified the purpose of the *Convention* in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at p. 579: "It is clear . . . that the primary object of the Convention is the enforcement of <u>custody</u> rights" (emphasis in original). This is evident from the *Convention* itself. Article 1 states that its objects are "to secure the prompt return of children" who are wrongfully removed or retained, and "to ensure that rights of custody and of access" are respected across international borders. These objects operate harmoniously: ensuring the prompt return of children who are wrongfully removed is the essential means by which rights of custody and access are respected and protected.

[125] The object of a legal proceeding under the *Convention* is not to determine whether an order returning the child to another country, or residing with a particular parent, is in the child's best interests. This follows from Article 16, which states that a court "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". Subject to the specific exceptions to return in Article 13, custody proceedings, not *Convention* proceedings, are the appropriate forum for this analysis. The *Hague Convention* can be seen as addressing a more preliminary question: in which jurisdiction should a custody determination be made? In the context of this case, for example, custody proceedings took place in Germany after it was determined that the children should be returned to their habitual residence. This is how the system is intended to work. It is in those subsequent proceedings, not in the initial *Hague Convention* application, that a court is

entitled (and in the best position) to assess the individual child's best interests with respect to custody.

[126] This is not to suggest that the interests of children are irrelevant to the *Convention*. Rather, as La Forest J. discussed in *Thomson*, the *Convention* is concerned with the interests of children *generally*, "not the interest of the particular child before the court" (p. 578). It advances the interests of children generally by ensuring their prompt return in cases where they are removed from their habitual residence, thus discouraging parental abductions in the first instance. The concept of habitual residence must be interpreted in light of these principles.

[127] If respect for custody rights is the guiding purpose of the *Convention*, as the majority at least partially acknowledges (at para. 24), it follows that parental intent should be a central focus — if not the presumptively determinative focus — in assessing habitual residence. This case, in which the father granted a time-limited consent for his children to live in another country, offers a prime example of why this must be so. If the children's habitual residence changed to Canada notwithstanding the fact that the father did not consent to them living here on a permanent basis, his custody rights would be effectively disregarded. Examining habitual residence from the perspective of the parents' last shared mutual intent protects rights of custody and access because it prevents one parent from unilaterally changing a child's habitual residence and thereby preventing the child's return to the left-behind parent.

(3) Policy

[128] Finally, policy reasons support the parental intention approach as well. This approach to habitual residence creates comparatively clear and certain law: absent shared parental intent, neither parent has anything to gain by abducting a child (or retaining a child after the expiration of a time-limited consent) because the child's habitual residence will remain the original country, absent exceptional circumstances. Nor does an abducting parent have anything to gain by drawing out the legal proceedings in the hopes that the child will develop deeper connections to the second jurisdiction. Therefore, the parental intent approach best aligns with the *Convention*'s purposes by protecting custody rights and deterring abductions that may result from any approach that permits, or even facilitates, unilateral changes to habitual residence.

[129] Moreover, by making evidence of shared intentions presumptively determinative (especially where there is a written agreement), the parental intent approach creates a strong incentive for parties to create a record of their intentions, which would reduce subsequent litigation and needless appellate review. In this case, for example, the Divisional Court — had it adopted the approach we propose — would have been bound by the written agreement and would have quickly upheld the return order without the delay of relitigating and reweighing the evidence. The case would have been resolved expeditiously and the children would have been returned to Germany more quickly — an outcome that would have benefitted all parties.

B. *The Hybrid Approach*

[130] According to the majority, the hybrid approach requires judges to look "to all relevant considerations arising from the facts of the case at hand", and therefore "the list of potentially relevant factors is not closed" (paras. 42 and 47). By incorporating other factors that could supplant parental intent into the determination of habitual residence — which effectively permits one parent to unilaterally change a child's habitual residence without the other parent's consent *even in the face of an express agreement* — the majority's hybrid approach blurs the distinction between custody adjudications and *Hague Convention* applications and undermines the *Convention*'s goals. We cannot escape the conclusion that the majority's approach is, in substance, a determination of who should be awarded custody.

[131] Assessing this approach in light of (1) the text and structure of the *Convention*, (2) the purpose of the *Convention*, and (3) policy concerns, we conclude that the majority's reasons bring about unnecessary confusion in the determination of habitual residence and undermine the certainty that the *Convention* seeks to create.

(1) Text and Structure

[132] First, the hybrid approach is inconsistent with the text of the *Convention*. By inviting courts to consider an open list of unspecified factors that any individual judge deems to be relevant, the majority ignores the explicit distinction made by Article 12 of the *Convention*. As we have discussed, that provision clearly distinguishes the evidence that may be considered for applications brought within one year of the wrongful removal or retention, from that which may be considered for applications

brought on or after that time. The hybrid approach renders this express textual distinction meaningless by encouraging courts in *all cases* to consider evidence of "settling in".

[133] For example, any assessment of the child's family and social connections in each country undoubtedly requires courts to look to whether a child has settled in to the new country, irrespective of whether the proceedings were initiated within one year of the removal or retention. So too is the case with other factors the majority alludes to and that are typically considered by other courts applying the hybrid approach — conditions of the stay (*Mercredi v. Chaffe*, C-497/10, [2010] E.C.R. I-14358, at para. 56), the location of friends and social networks (*Punter v. Secretary for Justice*, [2007] 1 N.Z.L.R. 40 (C.A.), at para. 192), the child's living and schooling arrangements (*Punter*, at para. 88), and the geographic and family origins of the parents and the child (*Punter*, at para. 88; *Mercredi*, at para. 56). These factors may all require evidence of whether and to what extent a child is settled into his or her new environment. This development is not faithful to the text of the *Convention*.

[134] For these same reasons, the hybrid approach blurs the distinction between habitual residence and the exceptions to a return order. It does so by incorporating aspects of the child's circumstances into the first stage of the analysis rather than respecting the disjunctive two-step process established by the *Convention*'s structure. It also creates a significant risk that *Convention* proceedings will functionally devolve into custody proceedings by focusing the analysis on the child's individual connections

to each jurisdiction — in effect, by asking the court to consider whether the child would be better off in one country rather than the other. This belies the notion that the *Convention* is concerned with the best interests of children generally rather than the interests of the specific child before the court (*Thomson*, at p. 578), and that *Convention* proceedings should not be concerned with the merits of custody disputes (Article 16).

(2) Purpose

[135] Second, the hybrid approach undermines the primary purpose of the *Convention*: deterring abductions by enforcing parental rights of custody and access. It does so by effectively stripping the *Convention* of its deterrent effect. Given that parental intent can be outweighed or undercut by the connections a child develops to the new jurisdiction, an abducting parent — in the most common case, a parent who refuses to return a child after a period of consent expires — stands to benefit by quickly establishing roots in a new home (*Mozes*, at p. 1079). In other words, the uncertainty generated by this *ad hoc* approach benefits would-be abductors. This unhappy consequence is most glaring when one considers that, by marshalling sufficient evidence "of all relevant factors", an abducting parent can now effectively vitiate an express agreement regarding the time-limited nature of the child's stay in the foreign jurisdiction.

[136] In light of this concern, even courts that apply the hybrid or child-centred approaches have recognized the need to "ensure that neither parent is acting unilaterally to alter a joint understanding reached by the parents" (*Karkkainen v. Kovalchuk*, 445

F.3d 280 (3rd Cir. 2006), at p. 292; see also *Punter*, at para. 173; *Feder v. Evans-Feder*, 63 F.3d 217 (3rd Cir. 1995), at p. 221). Thus, courts applying the hybrid approach often afford considerable weight to parental intent — suggesting, for example, that a child's new residence must exhibit the "necessary quality of stability" before shared intent can be set aside (*In re R. (Children)*, [2015] UKSC 35, [2016] A.C. 76, at para. 21).

[137] Unfortunately, the majority disregards the weight of this international jurisprudence (a factor it otherwise finds dispositive in adopting the hybrid approach) by rejecting any concerns about unilateral changes to habitual residence and declining to express a view on the relative importance of parental intent (paras. 44-46). The fact that the hybrid approach is "unencumbered with rigid rules" is cold comfort for left-behind parents whose custody rights can now be disregarded by a judge-made doctrine that permits an abducting parent to unilaterally alter mutually agreed-upon living arrangements.

(3) Policy

[138] Finally, the majority advances three principal policy arguments in favor of its position. With respect, we are of the view that the majority overstates these arguments, and that a focus on shared parental intent is preferable on policy grounds as well.

[139] The first policy argument proposed by the majority is that the hybrid approach has been adopted by other courts, which points to an emerging international

consensus (para. 50). In our view, this factor should not be afforded significant weight since, as we have described, the hybrid approach stems from an improper analysis of the *Convention*'s text, structure, and purpose.

[140] There is also strong jurisprudential support for the parental intent model. As the majority acknowledges, a number of leading courts — including nearly every appellate court in this country to have considered the issue — have adopted and reaffirmed approaches to habitual residence that emphasize the primacy of parental intent to varying degrees (see, e.g., *Murphy*, at p. 1150; *Mozes*, at pp. 1073-80; *Gitter*, at p. 134; *Mauvais v. Herisse*, 772 F.3d 6 (1st Cir. 2014), at pp. 11-12; *Guzzo v. Cristofano*, 719 F.3d 100 (2nd Cir. 2013), at pp. 107-9; *Larbie v. Larbie*, 690 F.3d 295 (5th Cir. 2012), at p. 310; *Koch*, at p. 717; *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004), at pp. 1253-54; *R. v. Barnet London Borough Council, Ex parte Nilish Shah*, [1983] 2 A.C. 309; *Korutowska-Wooff v. Wooff* (2004), 242 D.L.R. (4th) 385 (Ont. C.A.), at para. 8; *Rifkin v. Peled-Rifkin*, 2017 NBCA 3, 89 R.F.L. (7th) 194, at para. 2; *A.E.S. v. A.M.W.*, 2013 ABCA 133, 544 A.R. 246, at paras. 20 and 23). This is especially true in the United States, where relatively few (if any) jurisdictions have adopted a hybrid model in which no guidance is offered to lower courts as to how the various factors should be weighed or analyzed. Indeed, some of the American cases that the majority cite apply an approach that is entirely different than the one the majority adopts in its own reasons (see, e.g., *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003), at p. 898 ("The [lower] court should have determined the degree of settled purpose from the children's perspective . . . ."); *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499

F.3d 259 (3rd Cir. 2007), at p. 271 ("We have defined habitual residence as '[focusing on the] degree of settled purpose from the child's perspective.'") quoting *Baxter v. Baxter*, 423 F.3d 363 (3rd Circ. 2005), at p. 369).

[141] Furthermore, much of the international jurisprudence cited by the majority does not speak to situations where *evidence of parental intent was clear*. Rather, the cases cited involve situations where, *faced with inconclusive or ambiguous evidence about parental intent*, the court was required to consider other objective evidence in the determination of habitual residence.

[142] In *Punter*, for example, the parents agreed to a shuttle agreement, where the children were to spend two years in New Zealand, followed by two years in Australia. The ongoing nature of a shuttle agreement made the intent of the parents as to the habitual residence of the children more difficult to ascertain (para. 169). This lack of clarity is what led the court to consider other factors.

[143] Similarly, in *L.K. v. Director-General, Department of Community Services*, [2009] HCA 9, 237 C.L.R. 582, evidence of parental intent was found to be "ambiguous" (para. 29). In fact, the court's principal rationale for not giving the parents' intention controlling weight in their analytical framework was that intention is often ambiguous (paras. 28 and 32). The case is silent on what role the parents' intent should play where the application judge finds that it is clear.

[144] In *Mercredi*, I-14358, the mother had sole custody of the child when she moved the child from England to Réunion (para. 23). Unlike the present case, the father had no rights of custody. That case therefore offers no guidance on how to approach a case where the shared and settled intention of the parents, both of whom have some parental rights, is clear.

[145] Thus, the international jurisprudence cited by the majority does not foreclose the possibility of assigning controlling weight to parental intent where the court finds that evidence of shared parental intent is clear.

[146] The second policy argument is that the hybrid approach comports with the *Convention*'s purposes (majority reasons, at paras. 59-61). With respect, we disagree. As we have explained, the hybrid approach permits one parent to unilaterally change a child's habitual residence, which undercuts custody rights and encourages parents to remove or retain children if they are able to quickly develop ties to the new jurisdiction. The suggestion that parents will be deterred from creating "legal and jurisdictional links which are more or less artificial" (para. 60) begs the question of what constitutes an "artificial" link and how a judge would distinguish such links from genuine connections. More importantly, it ignores the fact that a child could develop genuine links to a new jurisdiction following a wrongful removal or retention. The very fact that such connections would, under the majority's approach, counsel in favor of a change in habitual residence is what encourages (or at minimum, rewards) abductions and retentions — all at the expense of the left-behind parent's custodial rights. It is

rather the certainty generated by the parental intent approach that prevents such manipulation and best advances the *Convention*'s goals.

[147] The third argument is that the hybrid approach "offers the best hope of *prompt* return of the child" (majority reasons, at para. 62 (emphasis in original)). Again, with respect, this hope is deeply misguided, as concerns about practical efficacy cut strongly in favor of adopting the parental intent approach.

[148] It is important to recognize that *any* approach to habitual residence will involve some difficult cases where judges are called upon to make tough decisions. But under the parental intent approach, there are many cases that are straightforward. Where there is unambiguous evidence of what the parents intended, the parental intent model offers a clear and predictable answer to the question of habitual residence. This is one such case: the father executed a short, time-limited consent, and there was no dispute that the last mutually shared intention was that the children were habitually resident in Germany. Moreover, if the parental intent approach was to be adopted moving forward, there would be even stronger incentives for parties to expressly specify their intentions upfront (as the father did here) because those intentions would be afforded presumptively determinative weight.

[149] By adopting the hybrid model, the majority offers parties an invitation to litigate even in clear cases like this one — because even in the face of unambiguous and binding agreements, there is always the possibility that evidence of other factors can outweigh parental intent. (It is not entirely clear when or how, under the majority's

analysis; but all the more reason to try.) The scope of this litigation will be broad: the majority instructs judges to look at "all relevant factors" because "the list . . . is not closed" (paras. 47 and 65). The end result will be expensive and prolonged litigation in which parties are encouraged to seek discovery into everything from school and medical records to tax returns and credit card statements. All the while, the child continues to develop connections to the new jurisdiction that might, on some accounts, bolster the argument that his or her habitual residence has changed. This is a far cry from the prompt and fair decisions that majority envisions.

[150] Even in the subset of cases where shared parental intent is not immediately apparent, it is far from clear that the hybrid approach is superior. This is because there are still strong incentives for the parties to litigate the issue of intent (as well as any other factors that may be considered under the hybrid approach), and to devote significant time and resources to doing so. These incentives are particularly strong where resource asymmetries between the parties may encourage one side to leverage litigation threats as a pressure tactic in the context of negotiations. Thus, it is beside the point that the judge may not need to definitely resolve the issue — the hybrid model will still lead to protracted and expensive proceedings. And even if the judge need not resolve the question of parental intent, the hybrid approach simply replaces that form of indeterminacy with another: balancing incommensurate variables with little to no guidance as to how much weight they should be afforded in the final analysis.

[151] As this discussion suggests, the essential problem with the hybrid approach, at the level of policy, is its indeterminacy. It is easy for this Court to make broad proclamations instructing judges to "look to all relevant considerations" and to determine the relative weight assigned to each as they see fit (majority reasons, at para. 42) — but what does that actually mean for judges who are required to carry out that instruction in the context of specific cases? And what evidence would the parties need to put forward for a judge to make this type of determination? These concerns multiply as more factors (and additional facts providing context for those factors) are put forward by litigants.

[152] The result of this approach, we fear, is to grant judges unbridled discretion to consider or to disregard whatever they deem to be appropriate, leading to outcomes that may be as inconsistent as they are unpredictable. The effects will be felt most acutely by parents and potential litigants who will lack any discernable guidance as to how they should order their family affairs. This is particularly important in the context of educational exchanges, family visits, or other forms of international travel, where the majority's approach effectively vitiates the purpose of time-limited consents. If one parent can override such an agreement by presenting competing evidence based on "all relevant factors", then the certainty provided for by time-limited consent agreements is only ever illusory. Other courts have discussed this problem at length:

> Without intelligibility and consistency in [how the Convention is applied], parents are deprived of crucial information they need to make decisions, and children are more likely to suffer the harms the Convention seeks to prevent. Imagine, for example, a parent trying to decide whether to travel

> with a child to attempt reconciliation with an estranged spouse in another country, or whether to consent to a child's trip abroad to stay with in-laws. Such parents would be vitally interested in knowing under what circumstances a child's habitual residence is likely to be altered, and it is cold comfort to be told only that this is "a question of fact to be decided by reference to all the circumstances of any particular case." Parents faced with this response would likely regard the introduction of a few judicial "presuppositions and presumptions," . . . with more relief than alarm. [Footnotes omitted; citations omitted.]
>
> (*Mozes*, at pp. 1072-73)

[153] In summary, we view the majority's approach as embedding indeterminacy in a context that simply cannot tolerate it. Multi-factor balancing tests can play a helpful role in certain contexts. Unfortunately, this is not one of them: the *Convention* requires swift and predictable decisions, and the hybrid model provides neither. As we turn to below, this case convincingly illustrates the comparative advantages of the parental intention approach.

C. *Application*

[154] The relevant point in time for determining the children's habitual residence in this case is August 15, 2014 — the date on which the father's period of consent expired.[5] There is no question that the children were habitually resident in Germany prior to their trip to Canada in April 2013. The only issue is whether their habitual

[5] There is no dispute that the mother's *removal* of the children to Canada was not wrongful because the father consented to the move. At issue is whether the mother's *retention* of the children in Canada after the father's time-limited consent expired was wrongful.

residence changed from Germany to Canada during the roughly 16 months that they lived here.

[155] In our view, Germany remained the children's habitual residence. There is an express agreement indicating that the father only consented to a temporary stay in Canada. The validity of this agreement is not disputed. Thus, there was no shared intent for Canada to displace Germany as the children's habitual residence. Even if a prolonged period in another jurisdiction can, in some extreme cases, become "time-limited in name only" (C.A. reasons, at para. 49), a period of just 16 months in another country falls well short of that standard. With respect, the majority's reluctance to apply their new framework to the facts of this case is indicative of the extent to which its open-ended analysis will prove unhelpful to judges who must apply this approach moving forward.

[156] That said, we agree with the majority that this case involved unacceptably long delays (see majority reasons, at paras. 82-89). Regardless of how courts approach the question of habitual residence, the *Convention* requires that return applications are litigated and decided expeditiously. In our view, a clear statement by this Court that delay will not affect the determination of habitual residence would encourage the efficient and expeditious resolution of disputes. This underscores why we believe that a focus on shared parental intent is preferable to the majority's approach.

V. Objections Under Article 13(2)

[157] After a court has determined that a child has been wrongfully removed from his or her country of habitual residence, Article 13(2) of the *Convention* provides judges with discretion to refuse to issue a return order on the basis of the child's objections. Article 13(2) states:

> 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.

If both criteria are satisfied (the child objects, and the child has attained a sufficient age and degree of maturity), the judge *may* decline to issue a return order, but is not required to do so. We offer some guidance on how that discretion should be exercised under the majority's framework.

[158] The majority adopts "fact-based, common-sense approach" (para. 76) that invites judges to consider the totality of the circumstances. Several aspects of the majority's analysis warrant elaboration. First, a child's objection should not be determinative, or even presumptively determinative, of whether a court should exercise its discretion to refuse a return order. Second, the policy objectives of the *Hague Convention* must be considered in determining whether to refuse a return order. In our view, this must include the express objective of protecting rights of custody and access. Third, the issue is not solely what the child wants, and the analysis is not to be treated as an application for custody. Each of these points are consistent with the majority's

admonition that Article 13(2) should not be read broadly such that it would erode the general rule of habitual residence (para. 76).

[159] In light of these considerations, we are of the view that Article 13(2) should not be lightly invoked so as to systematically undermine custody rights of left-behind parents. Judges should therefore apply this exception in a manner that does not routinely override shared parental intent. Indeed, to allow a child's objections to routinely trump evidence of shared parental intent would render the determination of habitual residence entirely superfluous. Thus, as the majority notes, the exceptions in Article 13(2) "are just that — exceptions", and they "do not confer a general discretion on the application judge to refuse to return the child" (para. 76). In our view, courts should pay careful attention to ensure that a child's objections are not the result of the undue influence of one parent. Similarly, when assessing the nature and strength of the child's objections, courts should be cognizant of the fact that the effect of refusing a return order is that a child will not be returned to his or her habitual residence, and the *status quo* prior to the removal or retention will not be restored. That reality must factor into the analysis.

[160] The assessment of evidence relative to the objections of children under Article 13(2) and the subsequent decision as to whether those objections justify refusing to issue a return order are both discretionary decisions. Consequently, the application judge's decision relative to Article 13(2) is entitled to deference (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10, 25 and 36). In

this case, the application judge concluded that the children had not expressed objections with the requisite strength of feeling. We do not find any reversible error in this analysis, nor does the majority point to any such error. As a result, there is no basis to refuse a return order after concluding that Germany was the children's habitual residence.

VI. Conclusion

[161] Although the appeal is factually moot, we would nonetheless dismiss the appeal based on our finding that the application judge correctly determined that the children were habitually resident in Germany at the expiry of the time-limited consent granted by their father, and there was no basis to decline to issue a return order under Article 13(2).

Judgment accordingly, MOLDAVER, CÔTÉ and ROWE JJ. dissenting.

Solicitors for the appellant: Office of the Children's Lawyer, Toronto; Houghton, Slonlowski, Stengel, Welland (Ontario).

Solicitors for the respondent John Paul Balev: Bookman Law Professional Corporation Barristers, Toronto.

Solicitors for the respondent Catharine-Rose Baggott: Senson Law, Toronto; Tammy Law, Barrister and Solicitor, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener Defence for Children International-Canada: Wilson Christen, Toronto.

Solicitor for the intervener the Barbra Schlifer Commemorative Clinic: Barbra Schlifer Commemorative Clinic, Toronto.