Toronto Registry No. D20336/02
DATE: 2002·V·07
CITATION: *Smushkevich v. Gartner*

ONTARIO COURT OF JUSTICE

B E T W E E N :

SEMION SMUSHKEVICH,
Applicant,

— AND —

YVETTE GARTNER,
Respondent.

Before Justice Harvey P. Brownstone
Heard on 6 May 2002
Reasons for Judgment released on 7 May 2002

CIVIL PROCEDURE — Costs — Entitlement — Misconduct in or abuse of litigation process — Mother who wrongfully retained child in Ontario in violation of ongoing California custody case had secured *ex parte* order in Ontario by misleading Ontario court, concealing status of ongoing case in California and failing to provide copy of California court orders and assessment report — She later ignored very strong recommendation from case management judge to return child to California — Mother had thus imposed great expense upon father who attained complete success — Mother ordered to pay $12,500 in costs to father immediately.

CIVIL PROCEDURE — Conduct of hearing — Adjournment — Grounds — Time to retain lawyer — Mother who wrongfully retained child in Ontario in violation of ongoing California custody case had plenty of time to get new lawyer after last one removed self from case — Any request from her at last-minute request for adjournment to get lawyer would be refused because (1) enforcement of foreign custody order was urgent matter to be dealt with promptly; (2) father from California had gone to great expense to appear in Ontario and should not have to make another trip; and (3) valuable court time booked for this case would only be wasted if it were postponed.

CIVIL PROCEDURE — Representation — Party without lawyer — Effect of no representation — Latitude granted by court to unrepresented party — Court went so far out its way as almost to give unrepresented mother unfair advantage — Court let her present her material, despite questionable admissibility, despite relevance of much of her evidence and despite fact that some documents were produced for first time at

hearing without prior service on or notice to father's lawyer.

CIVIL PROCEDURE — Representation — Party without lawyer — Representation by agent — Qualification of agent — Party's brother had grade XIII education, was legally untrained but acquired some legal knowledge in prison where he was a volunteer law librarian — He clearly had no training in family law or in complexities of Hague Convention — As party's brother, he lacked any degree of objectivity — Court refused permission for representation by agent.

CONFLICT OF LAWS — Custody of child — Return of wrongfully retained child — Declining return of child — Grave risk of harm to child — Evidence — Mother merely repeated concerns of which court in California was aware and to which it had given appropriate weight when had made various interim custody orders over past 3 years — Mother had no evidence that Ontario police and courts could afford her and child better protection than appropriate American authorities — Mother's last-minute allegation of child's disclosure of sexual abuse by father lacked credibility and she had no evidence that Ontario court would be in better position to adjudicate on child's best interests than California court — On balance of probabilities, no risk of harm to child if returned to father in California.

CONFLICT OF LAWS — Custody of child — Return of wrongfully retained child — Habitual residence of child — Issue of habitual residence decided under domestic law — Where child was born in California and had set foot in Ontario only under California court order allowing 30-day visits with her mother (except when abducted by her mother), child was habitually resident in California at all times — Child's citizenship (whether Canadian or American) was immaterial — Illegality of mother's residence in United States at time of child's birth was also immaterial — Child's coverage under Ontario public health plan was irrelevant.

CONFLICT OF LAWS — Custody of child — Return of wrongfully retained child — Whether retention wrongful — Parties were in midst of custody dispute in California court for over 3 years — Not only had California court warned mother against self-help remedies and prohibited her from getting Canadian order but she had agreed that California court had jurisdiction to decide custody — Mother's retention of child in Ontario and her deception of Ontario court to grant *ex parte* order were extremely serious and flagrant violations of California court process and amounted to wrongful retention of child in Ontario.

The mother of girl (now almost 4½ years old) was a Canadian living illegally in the United States when she began to cohabit with the father in California some 8 years ago. A year after the child's birth, the parents separated but the girl continued to reside in California, spending time with each parent separately. Within 3 months, the father petitioned the California Superior Court for a custody order and an order to prevent the mother from taking the child out of the state. In fact, with the mother's consent, the California court made an interim joint custody order with the proviso that the child was to remain within the state. Shortly afterwards, the court ordered the preparation of a "psychological custody evaluation" and even allowed the mother to take the child to Canada for 21 days.

In fact, the mother had by this time relocated herself to Canada and took steps to relocate the child to Canada as well. She secured Canadian citizenship and Ontario public health coverage for the child. She ignored the passing of the 21-day limit and for 4 months ignored

repeated orders of the California court for the child's return. She returned with the child only when threatened with the forfeiture of her posted bond and the prospect of the father's being granted sole custody.

Within a short time, the joint custody regime resumed. About half a year later, both parents agreed in court that only the California Superior Court had jurisdiction in this case. The judge also warned that, despite the mother's unilateral registration of her daughter as a Canadian citizen, the child was habitually resident in the United States and the (Hague) *Convention on the Civil Aspects of International Child Abduction* would apply if the mother tried to relocate the child. The judge specifically prohibited her from seeking any court orders in Canada — none of which seemed to have affected the mother. When she had physical custody of the girl during the Christmas period, she once again absconded with the child to Canada and remained ever since. The father promptly launched an application under the Hague Convention. In the meantime, the mother secured an *ex parte* order from the Ontario Court of Justice for custody without access and a restraining order against the father. Her materials barely mentioned any court proceedings in California. Within a month, the father's Hague Convention application reached Ontario.

At a case management conference, the case management judge strongly recommended to the mother that she return the child to California immediately and carry on her custody dispute there. The mother ignored that advice. At trial, the mother, who no longer had a lawyer to represent her, asked the court to allow her brother to act as her agent.

The mother relied heavily on the illegality of her presence in the United States at the time of the child's birth, the child's Canadian citizenship and the child's coverage under the Ontario public health plan. She further argued that returning the child to California would expose the child to a grave risk of physical or psychological harm, arguing that the father and his family were extremely dangerous mobsters capable of killing anyone who opposed them and that she feared for the life of her child and her own — evidence that she had already presented before the court in California. Finally, she alleged that the child had made a disclosure about sexual abuse by the father. After some investigation, the local children's aid society was unable to confirm this. A local social worker in private practice retained by the mother recommended a fuller examination and an assessment.

Held:— The motion for representation by agent was dismissed. The child was habitually resident in California and wrongfully retained in Ontario. The father was to have custody of her so that she could be returned to California. The mother was to pay $12,500 in costs to the father immediately and was barred from starting any further case in Ontario regarding the child until those costs were paid in full.

The mother's brother would not be an appropriate agent to represent her. He had a grade XIII education and was legally untrained but had picked up some legal knowledge while imprisoned in the United States where he was a volunteer law librarian of the custodial facility. His submissions and the documents that he prepared for the mother showed no training in family law or in the Hague Convention. Moreover, as the mother's brother, he lacked any degree of objectivity.

[*Obiter:* If the mother had asked for a last-minute adjournment to get a lawyer (which she did not), her request would have been refused for several reasons. The enforcement of a foreign custody order was an urgent matter that needed to be dealt with promptly. In any event,

the mother had had plenty of time to get a new lawyer and the father, who had gone to great expense to appear at the Ontario hearing, should not have to make another trip simply because the mother was not ready at the last moment. Moreover, valuable court time had been booked for this case that would only be wasted if it now had to be postponed.]

As it turned out, the court went out its way to give the unrepresented mother so much latitude in this complex case that she might actually have ended up with an unfair advantage. The court allowed her to present her material, despite the questionable admissibility, despite and relevance of much of her evidence and despite the fact that some documents were produced for the first time at the hearing itself without prior service on or notice to the father's lawyer.

On the merits of the Convention application, the child had, under the law of Ontario, been habitually resident in California at all times. She had set foot in the province only under a California court order permitting the visits with her mother and never longer than 30 days at a time except when she had been abducted by her mother. She was born in California and had never been in Ontario long enough to be considered habitually resident here. The child's citizenship (whether Canadian or American) was immaterial, as it was but one factor in the determination of habitual residence. The illegality of the mother's residence in the United States at the time of the child's birth was also immaterial. Likewise, the child's coverage under the Ontario public health plan was irrelevant in the absence of any proof that the criteria for getting that coverage mirrored the factors for determining "habitual residence" under the Hague Convention.

For over 3 years, the parties have been litigating their custody dispute in the California Superior Court — a court that not only warned the mother against attempting self-help remedies and prohibited her from seeking a Canadian order but a court that the mother had agreed was to have the jurisdiction to decide custody. In light of that prohibition and the fact that the parties were in the midst of a California custody trial, the mother's conduct was an extremely serious and flagrant violation of the California court process and amounted to a wrongful retention of the child in Ontario within the meaning of Article 3 of the Hague Convention.

On the issue of the risk of harm to the child if returned, the mother's material had no proof directly implicating the father in any illegal activities and she even conceded that he had no criminal record and had never been charged with any offence. Despite the alleged fears for her safety from the father's family, she had never in all her years in California been granted a restraining order or peace bond against any of these people and none of them had ever been charged with or convicted of committing any offence against her. In any event, the court in California was aware of and had given appropriate weight to her concerns when it made its various interim custody orders over the past three years. The mother offered no evidence that the Ontario police and courts could afford her and the child better protection than the appropriate American authorities.

The mother's allegations of sexual child abuse at the eleventh hour lacked credibility. From the social worker whom she had retained, the mother had concealed not only the complete history of the California litigation but also the depth of the assessment process in that California case. This worker also did not have an opportunity to interview the father or to see the child interact with him. Any concerns about the father's inappropriate behaviour with

the child should be raised in the California court where all of the evidence to date regarding the child's best interests was filed. The mother had no evidence that an Ontario court would be in a better position to adjudicate on the child's best interests than the California court. On a balance of probabilities, there was no risk of harm to the child if she were returned to her father.

In this case, the father met with complete success but the mother had put him to great expense to attain it — even in the face of the very strong recommendation to her from the case management judge to return the child to California. To get her *ex parte* custody order, she had misled the Ontario court by concealing the status of the ongoing case in California and by failing to provide a copy of the California court orders and assessment report. There was no reason why she should not be required to pay costs to the father.

STATUTES AND REGULATIONS CITED

California *Uniform Parentage Act*, (being sections 7600 to 7730 of the California *Family Code*), section 7700.

Convention on the Civil Aspects of International Child Abduction, [1983] Can. Tr. Ser. No. 35, Article 11, Article 13(*b*).

Family Law Rules, O. Reg. 114/99, subrule 14(10), Form 14B.

CASES CITED

Attorney General for New Brunswick v. Majeau-Prasad (2000), 229 N.B.R. (2d) 296, 592 A.P.R. 296, 10 R.F.L. (5th) 389, [2000] N.B.J. No. 363, 2000 CarswellNB 359 (N.B.Q.B., Fam. Div.).

Hawke v. Gamble, 1998 CanLII 3281, 65 B.C.L.R. (3d) 319, 43 R.F.L. (4th) 67, [1998] B.C.J. No. 2481, 1998 CarswellBC 2501 (B.C.S.C.).

Hoskins v. Boyd, 1997 CanLII 2367, 90 B.C.A.C. 111, 34 B.C.L.R. (3d) 121, [1997] 6 W.W.R. 526, 147 W.A.C. 111, 28 R.F.L. (4th) 221, [1997] B.C.J. No. 958, 1997 CarswellBC 926 (B.C.C.A.).

Katsigiannis v. Kottick-Katsigiannis, 2001 CanLII 24075, 55 O.R. (3d) 456, 144 O.A.C. 387, 203 D.L.R. (4th) 386, 18 R.F.L. (5th) 279, [2001] O.J. No. 1598, 2001 CarswellOnt 2909 (Ont. C.A.).

Medhurst v. Markle, 1995 CanLII 9273, 26 O.R. (3d) 178, 17 R.F.L. (4th) 428, [1995] O.J. No. 3085, 1995 CarswellOnt 1096 (Ont. Gen. Div.).

Pollastro v. Pollastro, 1999 CanLII 3702, 43 O.R. (3d) 485, 118 O.A.C. 169, 171 D.L.R. (4th) 32, 45 R.F.L. (4th) 404, [1999] O.J. No. 911, 1999 CarswellOnt 848 (Ont. C.A.).

Rechsteiner v. Kendell (1998), 39 R.F.L. (4th) 127, 58 O.T.C. 184, [1998] O.J. No. 1964, 1998 CarswellOnt 2029 (Ont. Fam. Ct.).

Simmons v. Boutlier, 2000 CanLII 22562, 5 R.F.L. (5th) 149, [2000] O.J. No. 5833, 2000 CarswellOnt 492 (Ont. Fam. Ct.).

Stone v. Stone, 1999 CanLII 14253, 4 R.F.L. (5th) 433, [1999] O.J. No. 5266, [1999] O.T.C. 141, 1999 CarswellOnt 4584 (Ont. Fam. Ct.); further ruling at *Stone v. Stone*, 2000 CanLII 20767, 5 R.F.L. (5th) 151, [2000] O.T.C. 87, [2000] O.J. No. 570, 2000 CarswellOnt 486 (Ont. Fam. Ct.).

Thomson v. Thomson, [1994] 3 S.C.R. 551, 173 N.R. 83, 97 Man. R. (2d) 81, [1994] 10 W.W.R. 513, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 6 R.F.L. (4th) 290, 1994 CanLII 26,

[1994] S.C.J. No. 6, 1994 CarswellMan 91.
Thorne v. Dryden-Hall, 1995 CanLII 984, 18 R.F.L. (4th) 15, [1995] B.C.J. No. 2333, 1995 CarswellBC 1172 (B.C.S.C.).

Gary Gottlieb ..... **counsel for the applicant**
Yvette Gartner ..... **counsel for the respondent**

[1] JUSTICE H.P. BROWNSTONE:— These are my reasons for judgment in an application under the (Hague) *Convention on the Civil Aspects of International Child Abduction*, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, 99 U.S.T. 11, 19 I.L.M. 1501, that proceeded before me on 6 May 2002. The child who is the subject of this proceeding is Madison Smushkevich, born on 10 February 1998. At the conclusion of the hearing, I found that the child is habitually resident in California and that she has been wrongfully retained in Ontario by the respondent. I ordered that she be immediately placed in the custody of the applicant so that she can return to California. There was also an order directing the police to assist in the enforcement of this order.

1: RESPONDENT'S LEGAL REPRESENTATION

[2] At the hearing, the respondent Ms. Gartner was not represented by counsel. She first appeared in this court on 20 February 2002, unrepresented, at which time she obtained an *ex parte* temporary custody order. She then retained a lawyer, Mr. John Syrtash, who represented her until 11 April 2002, when he was removed as counsel of record at his request. Rather than make arrangements to retain another lawyer to represent her, the respondent asked the court to permit her brother to speak for her in court. The case management judge, Justice James P. Nevins, permitted the respondent's brother to appear as her agent for case conferences on 22 and 29 April 2002, and the judge's endorsement dated 29 April 2002 specifically required Ms. Gartner to seek leave from me, the hearing judge, prior to the date of the hearing, if she wished to have her brother appear as agent on her behalf at the hearing. On 30 April 2002, Ms. Gartner filed a motion [under subrule 14(10) (procedural, uncomplicated or unopposed matter) of the *Family Law Rules*, O. Reg. 114/99, using Form 14B], seeking such leave. As no evidence was provided stating the brother's legal education or experience in the area of family law, leave was not granted. Ms. Gartner renewed this request before me on 3 May 2002. At that time, her brother, Mr. Michael Gartner, appeared and advised the court that he had a grade XIII education and that, although he had not received any formal legal education, he acquired much legal knowledge while incarcerated in the United States, during which time he performed volunteer services in the law library of the custodial facility. He has received no training in family law or Hague Convention proceedings, as was plainly evident not only from his submissions, but also from documentation that he has helped his sister to prepare and to submit to the court over the last month. He also lacked any degree of objectivity, being the respondent's brother. In accordance with the principles set out in *Stone v. Stone*, 1999 CanLII 14253, 4 R.F.L. (5th) 433, [1999] O.J. No. 5266, [1999] O.T.C. 141, 1999 CarswellOnt 4584 (Ont. Fam. Ct.) [further ruling at *Stone v. Stone*, 2000 CanLII 20767, 5 R.F.L. (5th) 151, [2000] O.T.C. 87, [2000] O.J. No. 570, 2000 Cars-

wellOnt 486 (Ont. Fam. Ct.)]; and *Simmons v. Boutlier*, 2000 CanLII 22562, 5 R.F.L. (5th) 149, [2000] O.J. No. 5833, 2000 CarswellOnt 492 (Ont. Fam. Ct.), Mr. Gartner's request to appear as agent was denied.

[3] Ms. Gartner therefore participated in the hearing without counsel. She did not ask for an adjournment to retain a lawyer — she claimed she could not afford one, although she has been represented by legal counsel in the California proceedings for three years. In any event, I would not have been inclined to grant a last-minute adjournment request for the following reasons:

(1) Hague Convention proceedings are urgent matters that should be dealt with expeditiously (Article 11), especially in cases such as this, where the parties are currently before the court in custody proceedings in the child's home jurisdiction, with a return date of 19 June 2002;

(2) Ms. Gartner has had ample opportunity to retain another lawyer since her lawyer withdrew from the case;

(3) the father went to considerable expense to be present for the hearing (in fact he has attended all court appearances since 29 April 2002) and he ought not to have to make another trip by reason of the mother's not being prepared to proceed; and

(4) valuable court time was set aside for this hearing and would have been wasted had this hearing been postponed.

[4] Hague Convention proceedings are complex and, because Ms. Gartner was unrepresented, I extended every reasonable latitude to her to ensure that she could present her evidence as completely as possible, notwithstanding the questionable admissibility and relevance of much of her evidence and despite the fact that some of her documentation was produced for the first time at the hearing itself, without prior service on opposing counsel. At the hearing, Ms. Gartner read from a lengthy and well-organized prepared statement that referred to legislation (including the Hague Convention) and case law, that thoroughly set out her submission to the court that the child was not habitually resident in California, and in the alternative, that a finding under Article 13(*b*) of the Convention should be made. Her submissions were very impressive; in fact, they may well have been prepared by a lawyer. In all of the circumstances, I am of the view that Ms. Gartner received a full and fair hearing and that she was in no way prejudiced by the fact that she was not represented by a lawyer — in fact, she may have received an unfair advantage by being unrepresented, given the laxity with which evidentiary rulings were made in her favour.

2: FACTS OF THE CASE

[5] The child, Madison Smushkevich, was born on 10 February 1998 in California. She is an American citizen and her mother, who is Canadian, has also obtained Canadian citizenship for her. Madison resided with her parents in California until they separated in March 1999, after which time the child continued to reside in California but spent time with each parent separately. On 18 June 1999, the father filed a petition for custody in the Superior Court of California, requesting, *inter alia*, custody and an order preventing the mother

from taking the child out of California (exhibit A, tab B, page 25). On 9 August 1999, the mother was restrained from taking the child out of California by reason of service upon her of a standard restraining order in the summons under section 7700 the *Uniform Parentage Act*, (being sections 7600 to 7730 of the California *Family Code*) and, on 11 August 1999, the mother signed an acknowledgement to this effect (exhibit D). On 8 September 1999, the California court made the following order on consent of the parties (exhibit A, tab B, pages 27-31):

> 1. joint custody with an alternating one-week schedule;
> 2. neither parent shall change the state of residence of the child without the other parent's written consent or further court order;
> 3. neither parent shall remove the child from the seven southern California counties without the other parent's prior written consent;
> 4. the mother may take the child to Canada for 14 days every Christmas only upon the father's signed, notarized consent for each trip and provided the child is returned to the father's care by December 28.

[6] On 31 January 2000, the California court continued the alternating week custody schedule, again restrained both parties from removing the child from California and ordered a "psychological custody evaluation" (exhibit A, tab E, page 11). (Note: The father refers to orders dated 14 December 1999 and 14 February 2000 but I was unable to locate copies of these orders in the materials filed; however, I am satisfied that an order to this effect was made on 31 January 2000 because this is referred to in Dr. Lund's assessment report and it is clear from her report that she conducted a thorough review of the court file.)

[7] On 5 May 2000, the California court permitted the mother to take the child to Canada for 21 days and ordered her to post a bond in the amount of $7,500 (exhibit A, tab B, pages 33-34). By this time, the mother had relocated herself to Canada and the evidence indicates quite clearly that, at least from that date, her single-minded goal has been to relocate the child to Canada to live with her. She obtained Canadian citizenship for the child and obtained OHIP coverage for the child during the summer of 2000 (exhibit F). She failed to return the child from a 21-day visit to Canada in July 2000 and, on 24 July 2000, the California court ordered the mother to return the child to California by 31 July 2000 (exhibit A, tab B, pages 59-61). She did not do so. On 31 July 2000, the California court ordered the mother to produce the child at the Los Angeles Superior Court on 24 August 2000 (exhibit A, tab B, pages 40-42). She did not do so and the California court ordered that the child be returned no later than 28 August 2000, failing which the posted bond would be forfeited and the father would be granted sole custody. The mother did return the child to California. (Here again, a copy of the last-mentioned order could not be located in the materials, but reference to it is made in several places in the applicant's materials and in Dr. Lund's report found at exhibit A, tab E, page 12; further, the respondent did not challenge the existence of this order.)

[8] On 22 September 2000, the California court ordered the resumption of the alternating week custody schedule (exhibit A, tab B, page 44) and the court-ordered assessment began in September 2000. The mother flew back and forth from Toronto to Los Angeles during the fall of 2000 while the evaluation was in progress.

[9] On 21 March 2001, both parties stipulated before the California court that only the California Superior Court had jurisdiction in this matter. The judge made it clear to the mother's counsel that, notwithstanding the mother's unilateral registration of the child as a Canadian citizen, the child was habitually resident in the United States and the Hague Convention would apply if the mother attempted to relocate the child. The judge specifically restrained and enjoined the mother from seeking any court orders in Canada (exhibit A, tab B, page 38).

[10] On 30 July 2001, the California court established a four-week alternating custody schedule as follows: mother has custody until 8 August 2001; father then has custody until 5 September 2001; mother then has custody until 3 October 2001; and father has custody until the trial date of 2 November 2001 (exhibit A, tab B, pages 45-47).

[11] On 24 October 2001, the court-appointed assessor in California, Dr. Mary Elizabeth Lund, delivered a lengthy and thorough report containing extensive recommendations: that the four-week alternating custody schedule be maintained until September 2002, at which time the father should have primary residence with generous access to the mother (exhibit A, tab E, pages 69-76).

[12] The trial commenced on 2 November 2001 and was scheduled to continue on 30 and 31 January and 1 and 7 February 2002. On 6 November 2001, the California court ordered that, pending further hearing: the mother was to have custody until 1 December 2001; the father was then to have custody until 20 December 2001; and the mother was then to have custody until 20 January 2002. Thereafter, the father was to have custody until the resumption of the trial (exhibit A, tab B, pages 48-51).

[13] Pursuant to the last-mentioned order, the mother picked up the child on 20 December 2001 and has kept the child in her care since that date. On 4 February 2002, the father obtained an order for sole custody from the California court and the bond posted by the mother was forfeited to the extent of $4,000.00 (exhibit A, tab B, page 53). The next day, the California court ordered the mother to "forthwith without excuse" return the child to the father. A hearing date of 5 March 2002 was set (exhibit A, tab B, pages 55-56). The mother did not appear and the California court granted sole custody to the father with "reasonable monitored visitation" to the mother (exhibit A, tab B, page 57). However, that is not a final order, as the trial is scheduled to resume in Los Angeles on 19 June 2002.

[14] On 18 February 2002, the father made application for assistance under the Hague Convention (exhibit A, tab B, pages 62-64). On 20 February 2002, the mother commenced an application for custody in this court and obtained an *ex parte* custody order with no access to the father and a restraining order against the father. Her materials made only the slightest reference to the court proceedings in California. On 28 March 2002, the father's Hague Convention application was brought in the Ontario Superior Court and subsequently transferred to this court on consent (exhibit A, tab B).

[15] The father did not see the child for 4½ months, from 20 December 2001 until 6 May 2002, the date of the hearing.

3: HABITUAL RESIDENCE

[16] I have determined the issue of habitual residence in accordance with the law of Ontario: *Medhurst v. Markle*, 1995 CanLII 9273, 26 O.R. (3d) 178, 17 R.F.L. (4th) 428, [1995] O.J. No. 3085, 1995 CarswellOnt 1096 (Ont. Gen. Div.). I find that the child has at all times been habitually resident in California. She was born there and did not set foot in Ontario until May 2000. Every time that she has been in Ontario, this has been pursuant to a California court order permitting visitation with her mother. The child has never been in Ontario for more than 30 days at a time, except for the wrongful retention that has given rise to these proceedings. Madison has never been in Ontario long enough to be considered habitually resident in Ontario.

[17] The fact that the child is a Canadian citizen (as well as an American citizen) is immaterial, as citizenship is merely one factor to be considered in the determination of habitual residence. The fact that the mother was residing in the United States illegally and that she gave birth to the child in California "against her will", as she put it (because she was required by a bail order to remain in California until her criminal charges there were disposed of) is also immaterial, as we are dealing with the child's habitual residence, not the mother's.

[18] The mother makes much of the fact that she was able to obtain an OHIP card for the child. However, this does not establish that the child is habitually resident in Ontario; it merely establishes that the mother told the Ontario Ministry of Health whatever was necessary to obtain health coverage for the child in Ontario. The mother presented no evidence to show that the criteria for obtaining health coverage in Ontario mirror the factors to be considered in the determination of "habitual residence" under the Hague Convention.

[19] As indicated above, the transcript from the California court proceeding on 21 March 2001 (exhibit A, tab B, page 38) makes it abundantly clear that the child is habitually resident in California. While, strictly speaking, this court is not bound by that determination, I agree with it entirely.

4: WRONGFUL RETENTION

[20] I have found that the mother has wrongfully retained the child in Ontario within the meaning of Article 3 of the Hague Convention. The parties have been litigating the issue of custody in the California Superior Court since 1999 and there are numerous orders restraining the mother from taking the child outside California without the father's prior written consent or court order. She was required to post a bond before bringing the child here. More specifically, the California court order dated 6 November 2001 provided that the mother was to have the child with her in Canada only until 20 January 2002, at which time she was to deliver the child to the father, who was to have custody until the resumption of the trial. The mother violated this order by refusing to return the child to the father, thereby breaching his custody rights — custody rights that he had actually been exercising and would have continued to exercise but for the wrongful retention. Moreover, on 21 March 2001, the mother through her counsel stipulated before the California court that only the California Superior Court had jurisdiction to determine the custody of this child and the court specifically re-

strained and enjoined her from seeking any court orders in Canada. Given that specific order and considering the fact that the parties were (and are) in the middle of a custody trial in California, this is an extremely serious and flagrant violation by the mother.

5: GRAVE RISK OF HARM – ARTICLE 13(*B*)

[21] The mother invoked Article 13(*b*) of the Hague Convention, arguing that the child should not be returned to the father in California by reason of a grave risk that the child, if returned, would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation.

[22] In determining whether the test set out in Article 13(*b*) has been met in this case, I was guided by the principles found in the following cases: *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 173 N.R. 83, 97 Man. R. (2d) 81, [1994] 10 W.W.R. 513, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 6 R.F.L. (4th) 290, 1994 CanLII 26, [1994] S.C.J. No. 6, 1994 CarswellMan 91; *Thorne v. Dryden-Hall*, 1995 CanLII 984, 18 R.F.L. (4th) 15, [1995] B.C.J. No. 2333, 1995 CarswellBC 1172 (B.C.S.C.); *Hoskins v. Boyd*, 1997 CanLII 2367, 90 B.C.A.C. 111, 34 B.C.L.R. (3d) 121, [1997] 6 W.W.R. 526, 147 W.A.C. 111, 28 R.F.L. (4th) 221, [1997] B.C.J. No. 958, 1997 CarswellBC 926 (B.C.C.A.); *Rechsteiner v. Kendell* (1998), 39 R.F.L. (4th) 127, 58 O.T.C. 184, [1998] O.J. No. 1964, 1998 CarswellOnt 2029 (Ont. Fam. Ct.); *Hawke v. Gamble*, 1998 CanLII 3281, 65 B.C.L.R. (3d) 319, 43 R.F.L. (4th) 67, [1998] B.C.J. No. 2481, 1998 CarswellBC 2501 (B.C.S.C.); *Pollastro v. Pollastro*, 1999 CanLII 3702, 43 O.R. (3d) 485, 118 O.A.C. 169, 171 D.L.R. (4th) 32, 45 R.F.L. (4th) 404, [1999] O.J. No. 911, 1999 CarswellOnt 848 (Ont. C.A.); *Attorney General for New Brunswick v. Majeau-Prasad* (2000), 229 N.B.R. (2d) 296, 592 A.P.R. 296, 10 R.F.L. (5th) 389, [2000] N.B.J. No. 363, 2000 CarswellNB 359 (N.B.Q.B., Fam. Div.); *Katsigiannis v. Kottick-Katsigiannis*, 2001 CanLII 24075, 55 O.R. (3d) 456, 144 O.A.C. 387, 203 D.L.R. (4th) 386, 18 R.F.L. (5th) 279, [2001] O.J. No. 1598, 2001 CarswellOnt 2909 (Ont. C.A.).

[23] The mother alleges that the father and his family are heavily involved in the "Russian Mafia" in California and that they are engaged in numerous criminal activities including fraud, money-laundering, prostitution and drug trafficking. She states that the father and his family are extremely dangerous mobsters who are capable of killing anyone who opposes them and that she fears for her life and for the life of her child. She also alleges that the father has been verbally and physically abusive to her and that he has poor parenting skills and that he yells at and belittles the child. The father denies all of these allegations in their entirety. The mother adduced copies of warrants, indictments and press articles referring to persons whom she claims are members of the father's family. She did not produce any documentation directly implicating the father in any illegal activities, or even naming him, and she does not dispute the fact that he has no criminal record and has never been charged with having committed any offence. Moreover, it is the mother, not the father, who was charged with criminal offences of dishonesty in the United States (these charges were dismissed after she successfully completed a diversion program). Further, I find it interesting that the mother claims that she has been living in fear for her life for several years, yet chose to live illegally in California for quite some time during her relationship with the father (since 1994),

rather than return to Canada, where she is a citizen. It is equally interesting that, despite the extremely grave allegations that she has made against the father and his family regarding the threat that they pose to her personal safety, she has never been granted a restraining order or peace bond against any of these people and none of them have ever been charged with or convicted of committing any offence against her.

[24] In any event, and most importantly, the mother raised all of these allegations in the California proceedings and they are referred to in the very thorough and detailed assessment report of Dr. Lund (see pages 18-21). I am satisfied that the court in California has been made aware of the mother's concerns and has given appropriate weight to them in making the custody orders that it has made over the past three years. She has not provided any evidence to support her claim that the Ontario police and courts are more able to protect her and her child than the appropriate authorities in the United States.

[25] The mother did present some new evidence that so far has not been made available to the California court. She claims that, shortly after the child came to visit her in December 2001, the child made a disclosure to her of sexual abuse by the father. The children's aid society investigated this allegation and was unable to validate it. She took the child to see Dr. Linda Janzen, a social worker in private practice, who provided an affidavit and report. Dr. Janzen interviewed the child twice and stated that there is insufficient information to conclude that the child has been sexually abused, although the child's statements are suspicious. Dr. Janzen recommended that "a full investigation or assessment be undertaken of the child's needs and best interests". It is clear from her report that Dr. Janzen was unaware that precisely such an assessment has already been conducted by Dr. Lund in California and that it dismissed all of the mother's allegations against the father and recommended that primary residence be with him. It is also clear that the mother has not given Dr. Janzen anywhere near a complete history of the litigation that has been proceeding in California for the past three years. Dr. Janzen did not have an opportunity to interview the father or to see the child interact with him. I do not find the mother's evidence with respect to the child's disclosures to be credible and I consider it to be very likely that she has coached the child to make certain statements to Dr. Janzen in a last-ditch attempt to prevent or at least to delay the return of the child to the father. Given the evidence provided from the California proceeding (especially Dr. Lund's report) and the mother's blatant violations of the California court orders, I am of the view that these latest allegations that the mother is now advancing against the father are all a part of her overall agenda to keep the child with her and to alienate the child from her father. After having carefully considered the evidence with respect to these allegations of sexual abuse and poor parenting, I am not satisfied on a balance of probabilities that there is any risk of harm to the child if she is returned to her father.

[26] I wish to make one final point in this regard. Even if the mother did have reasonable grounds to believe that the father has behaved inappropriately with the child (and I specifically find that she does not), the proper course of action would have been to bring a motion in the California court to seek a variation of the custody and access order. To date, she has not done so. Instead, she chose to violate the California court order by wrongfully retaining the child and she commenced a custody application in this court. All of the evidence

to date regarding the child's best interests is currently before the California court and the parties are in the middle of a trial there. The mother has not provided any evidence to show that the Ontario court is better able than the California court to adjudicate on the issue of the child's best interests.

6: CONCLUSION

[27] Accordingly, there shall be an order that the child be returned forthwith to the father and returned to California. The police are directed to assist the father in enforcing this order. The mother's custody application is dismissed for want of jurisdiction and the temporary *ex parte* order dated 20 February 2002 is vacated.

[28] Following the hearing, I heard submissions from both parties regarding costs. The father was entirely successful in this proceeding and was put to considerable expense in pursuing it. I was advised by counsel Mr. Gottlieb that Justice Nevins, in his capacity as case management judge, gave a very strong recommendation to the mother that she immediately return the child to California and continue with her custody litigation in that jurisdiction. Despite this, she chose to continue wrongfully to retain the child, forcing the father to pursue this matter to its conclusion. She misled the court on 20 February 2002 in order to obtain an *ex parte* custody order by not disclosing the status of her ongoing litigation in California, and by not providing the judge with a copy of the California court orders and assessment report. In all of the circumstances, I see no reason why she should not be required to pay costs to the applicant. Mr. Gottlieb submitted that his client's costs for proceeding in this court were $12,500. The respondent is ordered to pay costs forthwith to the applicant in the amount of $12,500. She shall not be permitted to commence any proceedings in Ontario regarding this child until such time as this costs order is paid in full and proof thereof is filed with the court.