

The Canadian Immigration System
&
The Convention on the Rights of the Child

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PREAMBLE

This paper is prepared for and delivered at the invitation of the Danish Association All Children's Rights, host of the Conference on Protecting the Rights of Children, held at the Danish Parliament on 27 October 2007.

Warren Creates*, the author of this paper, was invited to attend and present as an expert on Canada's immigration and asylum programs, including the country's treatment of the best interests of the child.

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INTRODUCTION

The notion of human rights has progressed from a remote concept to a global theory that has been solidified through the implementation of the 1948 United Nations *Universal Declaration of Human Rights* (“UDHR”). In 1989, the development of universal human rights took another step forward as the international community determined that children require a mechanism to ensure their unique rights in the world. The result was the adoption of the United Nations *Convention on the Rights of the Child* (“CRC”). Currently, 191 countries have signed and ratified the CRC, which makes the Convention one of the most universally accepted human rights documents.¹ The United States and Somalia are the only countries which have not ratified the CRC. The catalyst for such widespread acceptance is that the Convention provides children with a unique and comprehensive set of rights. All previous human rights documents had focused on a child’s need for protection, whereas the 54 articles in the CRC go beyond the usual undertakings (i.e. providing health, education and welfare) and by doing so guarantee a child’s right to individuality, self-interest and participation.² Despite the successful and broad acceptance of the CRC, many party states have neglected to put the Convention’s rights and principles into practice in their own domestic laws. While the universal recognition of the CRC has changed the outlook of children’s rights, the current challenge is to ensure that countries who sign the Convention implement the principals contained therein at the state level. But what are the incentives that will inspire countries to make the effort of instilling the CRC into their domestic laws? Beyond protecting the basic needs and rights of children, the Convention gives children a unique voice and fosters their growth to adulthood. The CRC forces states to take a child-centric perspective, as well as protecting and nurturing the growth of children in every aspect of life: family, schooling, health, political and social participation. The exceptional feature of the CRC is that in addition to providing a

¹ Geraldine Sadoway, “Children at Risk” at 10.

² Cynthia Price Cohen, “The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children” I.J.R.L., Vol. 3 No. 4, at 676.

comprehensive set of human rights, it also endorses the concept that children must have a voice in decisions that affect them. This results in state's giving children a platform to voice their opinions on laws, policies, and programs. By providing for a child's basic needs and fostering their participation in society, the *CRC* not only benefits a country's youth, but helps provide for healthy children, family unity and an engaged youth citizenry. By creating these pillars a nation that domestically incorporates and puts the *CRC* into practice fosters a promising future for itself; the children who benefit from the *CRC* will eventually become adults who will be an important and influential demographic for a socially, economically, and politically successful country.

In the immigration context, Canada is a clear example of a state which for many years neglected to implement the Convention domestically. Although Canada ratified the *CRC* in 1991, it did not incorporate the Convention into the country's immigration legislation until 2002. On the surface, one might be tempted to assume that the decision to finally implement the Convention was motivated by Canada's desire to uphold its international obligations. However, history shows that the government did not put the *CRC* into practice based on any aspiration to satisfy its international commitment to implement the Convention. The incorporation of the *CRC* into the country's immigration law only came after the Convention gained judicial recognition by the Supreme Court of Canada in its decision of *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] ("*Baker*").³ Prior to the *Baker* case, Canada's immigration legislation did not require any consideration of a child's interests. This was problematic for any child affected by the outcome of a parent's immigration proceeding because of the possible deportation of the parent. However, the *Baker* case changed this practice by being the decisive voice that obligated, arguably even shamed, Canada to accept the *CRC*'s "best interests of the child" principle into the country's immigration law.

³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

The purpose of this paper is to illustrate the practical outcome of the Supreme Court's decision in *Baker* in regards to Canada's immigration system, and how this example may be instructive for advocates in other states to follow a similar path. To satisfy the latter objective, this paper is separated into three sections. First, the paper will discuss the difficulty surrounding the implementation of the Convention by countries at the state level. Second, the paper will give an account of the Supreme Court's decision to incorporate the *CRC* into Canada's immigration law. Finally, the paper will evaluate the outcome of the *Baker* decision by reviewing the practical application of the case on Canada's immigration system.

IMPLEMENTATION OF THE *CRC*

By ratifying the *CRC* in 1991, Canada and other party states committed to guaranteeing the rights of children by developing initiatives, policies and laws that endorse the principles and rights contained in the Convention. Although the *CRC* sets out 54 articles, the Convention can be summarized as containing three overriding principles and four main rights. The 3 overriding principles are: the best interests of the child, non-discrimination, and the right to participate; and the 4 main rights are: humanitarian rights, child-family rights, protection rights, and individual personality rights.⁴ The 'best interests of the child' principle is one of the most important aspects for guaranteeing the well-being of children. Under article 3 of the *CRC*, countries which ratified the Convention pledged that any decision concerning a child must take into consideration their best interests, whether undertaken by public or private institutions, courts of law, administrative

⁴ *Supra note 2*, at 681.

Geneva Convention, Canada protects individuals who are unable to return to their resident country because of a fear of persecution based on their race, religion, nationality, membership in a particular social group or political opinion.⁸ Secondly, in Canada an individual can claim refuge as a “person in need of protection,” which is based on a risk of torture, a risk to their life or to a risk of cruel and unusual treatment or punishment.⁹ If the claim for a Convention refugee or protected person is accepted, the applicant receives the status of ‘protected person’. This means that the individual can remain in Canada and apply to become a permanent resident. Finally, an alternative to a refugee or protected person claim is that of making a plea based on humanitarian and compassionate (“*H & C*”) grounds. At any time, a person may apply to the Minister of Citizenship and Immigration to remain in Canada based on *H & C* considerations. However, to put *H & C* claims into context, historically only about 3% of *H & C* applicants are successful. Therefore, it is not a realistic mechanism that safeguards all failed refugee claimants and people subjected to deportation orders.

Prior to the introduction of the *IRPA* in 2002, Canada’s former immigration legislation did not take into account the interests of a child. However, in 1996 Canada’s refugee tribunal did develop and adopt a special guideline entitled “*Child Refugee Claimants: Procedural and Evidentiary Issues*,”¹⁰ which dealt with children who applied for refugee status in Canada without being accompanied by an adult family member. Based on the unique circumstances that children face when applying for refugee status by themselves, the overriding principle in the Guideline is the adherence to the “best interests of the child” principle. In the Guidelines the Federal Tribunal, an independent administrative and quasi-judicial body comprised of board members who adjudicate refugee protection claims, created a right for every unaccompanied

⁸ *Immigration and Refugee Protection Act* (2001), c. 27, section 96.

⁹ *Immigration and Refugee Protection Act* (2001), c. 27, section 97. (1).

¹⁰ Immigration and Refugee Board, Ottawa, Canada (1996). See Online: http://www.irb-cisr.gc.ca/en/references/policy/guidelines/child_e.htm

child to have his or her best interests considered throughout the refugee process. In making a determination relating to an unaccompanied child who is the subject of a refugee claim, Canadian authorities must consider several factors such as the age, gender, cultural background and past experiences of the child. In addition, to help serve the best interests of a child, there is a requirement for the government to designate an independent adult representative for unaccompanied child claimants to help them through the refugee adjudication process. However, despite the positive treatment towards unaccompanied children and regardless of the fact that Canada was one of the first countries to develop special procedural guidelines for minor refugee claimants that was based on the *CRC*, Canada did not, until much later, uphold its obligation under the *CRC* to incorporate the Convention into the country's immigration legislation.

Before the enactment of the *IRPA* in 2002, during a refugee or deportation hearing the interests of a family were normally only dictated by the merits of the parent's claim. The interests of a child in the outcome of the proceeding were neglected regardless of the child's vulnerability to losing a parent. As an example, the 1995 decision in *Langner v. Canada (M.E.I)* ("*Langner*")¹¹ illustrates how a child's interests were neglected under Canada's previous immigration regime. In the *Langer* case, the Federal Court Trial Division judge determined that the interests of two Canadian-born children whose parents were ordered deported did not have to be considered by government authorities. The Court stated that:

The parents' decision to take their children to Poland when the removal order is executed cannot be blamed on government action...in the event of the children's departure with their parents, it will result only from the parents' decision, a personal decision made without government intervention and with which the government has nothing to do...we must assume that the parents' decision as to whether or not to take their children to Poland will be made solely on the basis of the best interests of the children.¹²

¹¹ *Langner v. Canada (Minister of Employment and Immigration)*, (1995), 29 C.R.R. (2d) 184; 184 N.R. 230 (F.C.A.); leave to appeal to S.C.C. refused, *Langner v. Minister of Employment and Immigration*, [1995] 3 S.C.R. vii; (1995), 30 C.R.R. (2d) 188; 193 N.R. 400.

¹² *Langner v. Canada (1995) 184 N.R. 230 at para. 26 and 27.*

Based on this paragraph, the Court suggested that the Canadian government was not obligated to consider the private interests of the children. Despite the best interests of the Canadian-born children to stay in Canada with their parents, the Court solely based its decision on the merits of the parent's claim. Although the parents in this case tried as early as 1995 to invoke the use of the *CRC*, the decision illustrates that merely ratifying the Convention has a diminutive consequence on domestic jurisprudence. Fortunately, in a subsequent case (i.e. *Baker v. Canada*) the Supreme Court of Canada did not validate the precedent set out in the *Langner* case and helped reverse the harmful practice of disregarding children's interests.

Baker v. Canada:

A Watershed for the Best Interests of a Child

Ms. Baker entered Canada in 1981 as a visitor from Jamaica. After Ms. Baker's status expired (she was a simple "over-stay"), she remained in the country and made a living working unlawfully as a domestic worker until she was detected and ordered deported in 1992. While in Canada she gave birth to four (4) children, all of whom by virtue of their birth in Canada became citizens of Canada. After Ms. Baker received her deportation order, she applied to stay in the country based on *humanitarian and compassionate* grounds. The argument in favour of the application was based on the fact that Ms. Baker was the primary source of financial and emotional support for her Canadian-born children. At Ms. Baker's admissibility hearing, her counsel requested that the children be permitted to speak and to have independent counsel. However, the requests were denied and the children were not allowed to participate in the proceeding.¹³ Despite the vulnerability of the children, the immigration officer refused Ms.

¹³ Sharryn Aiken & Sheena Scott, "*Baker v. Canada (Ministry of Citizenship and Immigration) and the Rights of Children*," 15 J.L.S.P. 211, 2000, at 214.

Baker's application. As a result, she was ordered deported and her children had to decide whether to stay in Canada (as of right due to their Canadian citizenship) or to leave with their mother to a foreign country to which they had absolutely no attachment. Given the detrimental outcome the decision of the immigration officer had on the family, Ms. Baker appealed the judgment. She used the *CRC* as one basis for her plea, however, both higher courts (the Federal Court Trial Division and the Federal Court of Appeal) rejected the applicability of the Convention. Both courts ruled that the *CRC* did not form part of Canada's domestic law and as a result dismissed Ms. Baker's appeal. Specifically, the Court of Appeal commented that since the *CRC* was not incorporated into Canada's immigration law, the court did not have an obligation to give weight to the best interests of her children.¹⁴ Consequently, Ms. Baker made a final appeal to Canada's highest court, the Supreme Court of Canada. The Supreme Court allowed the appeal, which meant that the Court would hear Ms. Baker's Case. This was an important threshold given that leave to appeal is granted only if the Court feels that the case involves a question of public importance or if it raises an important issue of law.

The Supreme Court decided to hear Ms. Baker's appeal on the basis of the applicability of the Charter of Rights and Freedoms and the *CRC*. In regards to the *CRC*, the Court considered if the Convention could be interpreted and applied in a domestic legal dispute without being officially incorporated into domestic law. The debate focused on whether the government should have considered the best interests of Ms. Baker's children while reviewing her application to stay in Canada. Ms. Baker's claim was that even in the absence of the *CRC*'s explicit incorporation into Canada's immigration law, the Court could infer "implicit incorporation" by reference to the objectives and values that are instilled in Canada's immigration legislation.¹⁵ One of the legislation's objectives is to facilitate family reunification. Section 3(c) of Canada's

¹⁴ *Ibid.*, at 218.

¹⁵ *Ibid.*, at 219.

immigration legislation (now captured under section 3(1)(d) of the *IRPA*) expressly states that an objective of the Act is “to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad.”¹⁶ The purpose of explicitly stating the goal of keeping families together in Canada’s immigration law is to ensure that immigration decisions, where appropriate, take into account the importance of a united family.

At the Supreme Court, the majority for the Court determined that the *CRC* was not directly binding on the domestic laws of Canada because Parliament had not specifically incorporated it, or any part of it, into the country’s immigration law. In spite of this, the justices for the majority acknowledged that the values reflected in international humanitarian rights law could help inform the function of statutory interpretation and judicial review.¹⁷ The Court recognized two important values. First, the Court commented on the principle of family reunification, by stating that “*the obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(c).*”¹⁸ Furthermore, the Court stated that the principles in the *CRC* “*placed an emphasis on the rights, interests, and needs of children and special attention to childhood, which are important values that should be considered in reasonably interpreting the ‘humanitarian’ and ‘compassionate’ considerations.*”¹⁹ Based on the latter determinations, the Court decided that there was a need for the state to consider the interests of Ms. Baker’s children. Writing for the majority of the Court, Madame Justice L’Heureux-Dubé wrote:

I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker’s children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned.²⁰

¹⁶ *Supra* note 9, s. 3(1)(d).

¹⁷ *Supra* note 3, at para. 70.

¹⁸ *Ibid.*, at para. 68.

¹⁹ *Ibid.*, at para. 73.

²⁰ *Ibid.*, at para. 73.

Given that the immigration officer was not sensitive to the needs of Ms. Baker's children to live in their country of birth and nationality (i.e. Canada) with their primary caregiver, the decision to deport her was made in an unreasonable manner. As a result, the Court sent the case back for re-determination by the Immigration Department so that the interests of Ms. Baker's children would be thoroughly considered. Ultimately, at the review of the case by the Immigration Department, Ms. Baker was granted permanent resident status.

The 1999 decision of the Supreme Court in *Baker* constituted a watershed for taking the best interests of children seriously. The Court's judgment represented an incremental, but nonetheless important advancement, in the development of Canadian jurisprudence and the legal fabric relating to the rights of children.²¹ The case established that the *CRC* must be used as an interpretative tool to help determine the language and powers contained in domestic legislation. Consequently, the decision assured the significance of the *CRC*'s interplay with Canada's domestic immigration law and decision-making power. Specifically, the outcome of the decision resulted in two considerable changes in Canada's immigration law. First, the decision created several rights for children in an immigration context. These rights are: the right to have a parent advocate for their best interests, the right to submit their own case in writing, and the right to have their best interests treated as an important factor and given substantial weight.²² Secondly, the decision fostered the explicit inclusion of the 'best interests of the child' principle into the *IRPA* which was later enacted in 2002. This inclusion by Parliament was a clear pledge by the country's lawmakers to ensure that Canada's new immigration law complied with the Supreme Court of Canada's earlier judgment in *Baker*.

²¹ *Supra note* 13, at 214.

²² *Ibid.*, at 217.

THE AFTERMATH & THE CRC's PRACTICAL APPLICATION

The *Baker* case is a positive illustration of how the courts can be used to incorporate an international convention into the domestic law of a nation without it having yet been formally incorporated by a legislative body. The outcome of the *Baker* case went well beyond setting a judicial precedent, as it eventually forced the Canadian government to incorporate the *CRC* into the *IRPA*. Under the new immigration legislation the “best interests of the child” principle was included in two different sections of the Act. The first inclusion was under section 28 (2) which dictates the residency requirements that permanent resident’s of Canada must satisfy to maintain valid residency status. The residency obligation under the section stipulates that a permanent resident must be physically present in Canada for 730 days (two years) in every five-year period. Individuals who cannot meet this requirement lose their residency status and will be ordered to leave the country. However, subsection 28(2)(c) of the Act provides a very significant exemption in cases involving the presence of a child:

[A] determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.²³

Therefore, if the immigration officer believes that it is in the best interests of a child to have their parent remain a permanent resident of Canada, then the officer can discount the parent’s failure to satisfy the residency obligation set out in section 28 (2). This means that the parent would not lose their residency status and could remain in Canada with their family.

²³ *Supra* note 9, s. 28(2)(c).

In addition, the *IRPA* explicitly includes the ‘best interests of the child’ principle under section 25(1), which deals with *H & C* applications for permanent resident status. The section states that:

The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister’s own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.²⁴

This section of Canada’s immigration law sets out an explicit obligation for the government to consider the best interests of a child whenever the outcome of an *H & C* case may affect a child. Despite the clear language in section 25(1), the *IRPA* does not set out how the *CRC* principle should be practically applied in individual cases. Therefore, it is useful to give an illustration of how the ‘best interests of the child’ principle has been implemented by courts in Canadian immigration cases.

As a starting point, the Supreme Court’s decision in *Baker* stated that the government must give a child’s best interests substantial weight by being “alert, alive and sensitive” to the child’s needs. An important point is that the Court specified giving ‘substantial weight’ to the interests of a child. However, this does not entail that a child’s interests will always be the prevailing factor in *H & C* cases. The practical application of the principle is that it must first be evaluated and then weighed against all other relevant factors. Subsequent to the Supreme Court’s judgment in *Baker*, the Federal Court of Appeal’s decision in *Hawthorne v. Canada* set out how the ‘best interests of the child’ principle should be applied. Writing for the majority, Justice Décaré stated:

²⁴ *Supra* note 9, s. 25(1).

The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child....To simply require that the officer determine whether the child's best interests favour non-removal is somewhat artificial...For all practical purposes, the officer's task is to determine, in the circumstances of each case, the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent.²⁵

The Court's statement sets out the practical method of applying the *CRC* principle. To ascertain a child's best interests, the decision-maker must consider the benefits and hardships a child would face if a parent remained in Canada or was removed from the country. The concept of "irreparable harm" is typically a focal consideration when determining the hardship a child would face. Irreparable harm refers to some prejudice that is beyond the inherent harm that deportation of a parent would cause. Therefore, when determining the degree of hardship the examination is focused on whether the harm that is faced is exceptionally grave and equates to more than just the unfortunate hardship associated with the breakup or relocation of a family.²⁶ In Canada's immigration jurisprudence establishing irreparable harm helps substantiate a claim to stay in Canada. However, it still must be weighed against all other relevant factors. Consequently, the practice is that the decision-maker will first identify the benefits and hardships of removal, and then weigh them against all the other relevant factors in a case. But, as the subsequent cases will demonstrate, the practice of undertaking an evaluation of what constitutes a child's best interests and then balancing all relevant factors is not an exact exercise.

In *Arulraj v. Canada*,²⁷ an immigration officer denied the applicant's *H & C* claim and ordered him removed to Germany so that he could then apply for a visa to return to Canada. The

²⁵ (2003), 2 F.C. 555 (C.A.)

²⁶ *Maganga v. Canada (Citizenship and Immigration)*, 2007 FC 94 at para 1.

²⁷ (2006), FC 529 (F.C.)

officer's decision was based on the fact that the applicant's visa request would undoubtedly be approved. On appeal, the applicant argued that the officer failed to properly consider the best interests of his two children. The judge recognized that the officer's decision properly took into account the harm the children would face by removing their father. However, the judge determined that the officer narrowly based his conclusion on the fact that the temporary separation would not impose irreparable harm on the children. As set out in *Hawthorne v. Canada*, the judge stated that the benefit from a continuing presence of a parent must also be recognized and weighed against all other relevant factors.²⁸ Therefore, the officer should have weighed the benefit derived from the child's father remaining in the country versus the formality of deporting him so that he could obtain the appropriate visa to return to Canada. If the officer had balanced the two factors, the best interests of the children would have been served because the father's continued presence supersedes the need for satisfying an administrative formality. Since the officer did not give substantial weight to the "best interests of the child" principle, the judge dismissed the officer's decision.

In *Delcid v. Canada*,²⁹ the applicant commenced an appeal after both her refugee and *H & C* claims were denied. The applicant had come to Canada on a visa from Guatemala, but after the visa expired in 1995, she remained in the country. During her stay in Canada, she gave birth to two children who were both fathered by a Canadian citizen. Given the young age of the children, the applicant stayed at home to care for them while her husband was at work. The immigration officer, whose decision was being challenged, had earlier found that the applicant had demonstrated a lack of respect for Canadian immigration laws, and concluded that in spite of her removal the children would still have the support of their father. The judge on appeal,

²⁸ *Ibid.*, para. 7

²⁹ (2006), 2006 FC 326 (F.C.)

however, determined that the immigration officer had not addressed how the removal of the mother would harm the best interests of the young children. Specifically, the officer did not consider that there would be no one to provide care for the children when the father was at work. Also, the judge concluded that there was no consideration given to the possibility that the applicant might be forced to take the children with her to Guatemala. This would force the children into a foreign country without knowing the language or culture. Based on the lack of consideration for the children's best interests to stay in their country of birth and nationality with their primary caregiver, the judge set aside the officer's decision and remitted the case for re-determination. This case demonstrates that the interests of a child require considering and evaluating all the consequences that arise if a parent is deported. In this case, the officer should have considered and given weight to the benefits of the mother staying in Canada and the hardships the children would face if they were forced to leave their country of nationality.

In *Singh (B) v. Canada*,³⁰ the applicant's *H & C* claim to stay in Canada was rejected. The applicant pleaded that he was the sole financial provider for both his wife and their newborn child and that there was a possibility of torture or persecution if he was returned to India. After weighing the different factors the immigration officer concluded that the risk of maltreatment in India was minimal, and that the interests of the child were not substantial enough to warrant granting the applicant the status to stay in Canada. The decision was appealed based on the immigration officer's lack of consideration for the best interests of the applicant's newborn child. On appeal, the judge ruled that the immigration officer's decision did not properly take into account the financial and emotional consequences the child would face from the removal of his father. Based on the ill health of the applicant's wife, the father was the primary source of financial support for the family and provided important emotional support to his wife. The judge

³⁰ (2005), 2005 FC 718 (F.C.).

determined that based on the family's financial and emotional dependency on the father, the best interests of the child would be served if the father remained in Canada. Without the support of the husband, the wife and newborn child would not have any other means to provide for themselves. The judge concluded that by ignoring the dire financial and emotional implications of the father's removal, the officer was not being "alert, alive and sensitive" to the child's best interests.³¹ The blatant need to have the father stay in Canada should have been given more weight and as a result the judge sent the case back to be re-determined. This decision illustrates that the 'best interests of the child' principle dictates that the decision-maker must make a thorough consideration of the financial and emotional consequences to a child of removing a parent.

The latter cases have each demonstrated how the *CRC* principle has been applied to benefit children. Generally, after the *Baker* decision Canadian courts have upheld *H & C* claims on the basis of the best interests of the child in three circumstances: cases where the best interests of the child were not mentioned, cases where they were mentioned but not considered, and cases in which the child's best interests were considered but measured inadequately.³² Despite the positive treatment toward the well-being of children in numerous cases, Canadian courts have not always ruled that a child's best interests to maintain family unity will automatically negate a parent's removal. Canadian courts have made it clear that the interests of the child will not always prevail when a parent is facing deportation. Two seminal cases illustrate the latter point. In *Legault v. Canada*³³, the Federal Court of Appeal stated that, "[t]he presence of children...does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada, that

³¹ *Ibid*, para 17.

³² *Koud v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 856.

³³ *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 (F.C.A.).

the Minister must exercise his discretion in favour of said parent.”³⁴ In addition, the Federal Court of Appeal in *Owusu v. Canada*³⁵ made it clear that an *H & C* applicant always bears the burden to provide substantiating evidence that attests to the best interests of their child.³⁶ If the applicant does not or cannot provide the evidence, then the claim will not be upheld on the basis of the *CRC* principle. To illustrate how the two cases have been implemented, the following analysis will show how some Canadian cases have ruled that the best interests of the child are not automatically served by keeping a parent in Canada.

In *François v. Canada*³⁷, the judge concluded that the officer reasonably considered all of the evidence that the applicant had brought in support of his *H & C* application. The facts established that the officer took into account that the applicant was married with a child, but that there was a lack of evidence regarding the relationship that he had with his wife and daughter. There was no evidence on the role of the applicant as a provider for the family, no information on his wife's living situation, and little evidence supporting the hardship that the family would suffer if the father was removed. Based on the deficiency of the evidence, the judge concluded that the marriage or the existence of the applicant's Canadian-born child could not alone be determining factors, and as a result dismissed the case. In addition, the judge concluded that the officer did not have a positive responsibility to point out the lack of evidence to the applicant or solicit evidence to help satisfy the father's claim.

In *Bolanos v. Canada*³⁸, the applicant's refugee claim and *H & C* application were denied. During the applicant's *H & C* interview the immigration officer decided that the applicant did not have a valid claim to stay in the country and that the interests of his child did

³⁴ *Ibid.*, para 12.

³⁵ (2004), 2004 FCA 38.

³⁶ *Ibid.*, para 8.

³⁷ (2004), 2004 FC 1227.

³⁸ (2003), 2003 FC 1032.

not trump the decision to deny his residency. The sole issue on appeal was whether the officer failed to take into account the best interests of the applicant's Canadian-born child. The applicant was a 25 year-old male who arrived in Canada from Mexico. While in the country, the applicant married a Canadian citizen and the couple had a son together. However, shortly afterwards they separated. During the appeal, the judge acknowledged that the officer had properly weighed the interests of the child against the applicant's removal. The judge noted that the officer analysed the consequences to the child if his father was removed and took into account the possibility of the child accompanying the applicant to Mexico. After weighing the evidence, the officer determined that the applicant's son would continue to receive a nurturing environment if the applicant was deported. The evidence showed that despite his father's removal from Canada, his wife, his parents and his extended family would all help care for the child. In addition, if the child went to Mexico with his father he would have family support and that he was young enough to adjust to the society of the foreign country with little difficulty. As a result, the benefits and hardships that the child would experience would be minimal, which was not enough to warrant upholding the father's claim to remain in Canada. The judge found that this conclusion was not unreasonable, and consequently dismissed the case.

In *Su v. Canada*,³⁹ an immigration officer denied the applicant's claim for permanent residence based on *H & C* grounds. The applicant appealed the decision based on a belief that the officer failed to consider the best interests of her son. The applicant was a citizen of the People's Republic of China when she entered Canada. Upon her arrival she was issued an order that refused her stay, but she remained in the country. While in Canada, she married a Canadian citizen and gave birth to a son. The applicant submitted that the officer failed to consider the negative emotional consequences that her removal would have on her son and that her husband

³⁹ (2004), 2004 FC 873.

would not be able to care for the child as a single parent. The judge did not agree with the applicant and concluded that the officer gave sufficient careful and detailed consideration to the best interests of the applicant's son. The evidence showed that that father had a role in parenting but there was no evidence that he could not arrange for childcare while he was at work. In addition, if the young child was taken to China the applicant had enough family that could assist in raising the child and integrating him into the new society. In light of the above factors, the judge concluded that the officer's decision was consistent with the *CRC*'s best interests of the child principle. Given that the officer's decision was reasonable, the case was dismissed.

The review of the cases illustrates that a child's interest to have a parent remain in Canada is not paramount. The cases show that the interests of the child will only warrant upholding a parent's claim to stay in the country if the evidence clearly establishes that the benefits and hardships demonstrate a specific need for the parent to remain. However, this does not suggest that Canada has not upheld its *CRC* obligation to take into account a child's best interests. Although a child's interests will not always prevail when a parent is facing deportation, the cases show that the 'best interests of the child' principle will always require a thorough assessment and be given substantial weight; anything short of this is unlawful. This appears to be the balance that the Canadian courts have struck since the *Baker* case introduced the *CRC* into Canada's immigration scheme in 1999.

CONCLUSION

The *Baker* decision and the subsequent jurisprudence have together shown the positive impact that implementing the *CRC* has had on the well-being of children. Overall, the Convention has led to keeping families united by allowing parents to stay in the country with their children. The success of the *CRC* in Canada's immigration system may be a guiding light, and hopefully provides an incentive that fosters other party states to implement the Convention into their domestic legislation. By implementing the *CRC* and thereby taking a child-centric perspective on decisions that affects them, the incorporation of the *CRC* helps to highlight and deal with the specific needs of children. Therefore, as stated at the beginning of this paper, by incorporating the *CRC* a country is making a declaration towards protecting and nurturing the growth of its children.

Regardless of the *CRC*'s obstacle between ratification and implementation, the Supreme Court of Canada's decision in *Baker* has demonstrated that the *CRC* can be upheld without formally incorporating it through a legislative body. Although ratifying the *CRC* does not automatically bind the domestic policies, practices and laws of a nation, the courts can be used to instil its values and principles. The *Baker* case is an example of how citizens can use different avenues of advocacy (i.e. the courts) as a conduit to implement the *CRC* into their domestic laws. The political leaders and legislative bodies of a nation will not always undertake to put the *CRC* into practice, and therefore, it is up to others in society to help push the incorporation of the Convention into the jurisprudence, the legislative and the sociological culture of a nation.