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# CANADA

# HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

## Introduction

The problem of international child abduction has received considerable attention in Canada. One reason for this was stated by the Chief Delegate to the 1980 Hague Conference in the following terms:

> [This problem is] serious for a country like Canada, blessed in many ways by its pluralistic ethnic mix, but in the present context afflicted by the fact that one or both spouses may retain recent and substantial connections with their country of origin. This fact makes it attractive and possible to spirit the children away in the hope of achieving a more friendly familial and judicial climate in which to assert custody rights in their favor when their marriages turn sour.[1]

The concern has been demonstrated in Canada's leading role in the encouragement of international legal reform.

## I. Domestic Law and Regulations Implementing the Hague Convention

Although Canada helped initiate and was one of the first countries to sign the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Convention), the subject matter of that treaty falls under provincial jurisdiction. Consequently, rather than attempting to legislate for the entire country through one Federal act that might well have been found to be unconstitutional, Parliament deferred to the provincial Legislative Assemblies. All ten of these bodies responded by enacting implementing laws that came into force between 1983 and 1987. The exact dates of entry are as follows:

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| Alberta | February 1, 1987 |
| British Columbia | December 1, 1983 |
| Manitoba | December 1, 1983 |
| New Brunswick | December 1, 1983 |
| Newfoundland | October 1, 1984 |
| Nova Scotia | May 1, 1984 |
| Ontario | December 1, 1983 |
| Prince Edward Island | May 1, 1986 |
| Quebec | January 1, 1985 |
| Saskatchewan | November 1, 1986 |

As for the territories, the Yukon brought the Convention into force on February 1,1985, and the Northwest Territories followed suit on April 1, 1988.[2]

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[1] *See* H. ALLAN LEAL, INTERNATIONAL CHILD ABDUCTION IN CHILDREN'S RIGHTS IN THE PRACTICE OF FAMILY LAW 211 (Toronto, 1986).

[2] Ann Wilton and Judy Miyauchi, ENFORCEMENT OF FAMILY LAW ORDERS AND AGREEMENTS: LAW AND PRACTICE 2-34.17 (2001).

In implementing an international convention, Canadian legislatures usually enact legislation that incorporates its major features in a more or less paraphrased and sometimes expanded fashion. This common practice was not generally followed in the case of the Convention. Instead, all of the provinces, except Quebec, passed new laws or amended extant legislation to refer to the Convention and include it as an appendix. Thus, a situation in which each province would have different laws, as is generally the case with other areas of family law, was avoided. The specific provincial and territorial laws that directly adopted the Convention in this manner are as follows:

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| Alberta | International Child Abduction Act[3] |
| British Columbia | Family Relations Act[4] |
| Manitoba | Child Custody Enforcement Act[5] |
| New Brunswick | International Child Abduction Act[6] |
| Newfoundland | Act Respecting the Law of Children[7] |
| Northwest Territory | An Act to Adopt the Convention on the Civil Aspects of Child Abduction[8] |
| Nova Scotia | An Act to Implement the Hague Convention on the Civil Aspects of International Child Abduction[9] |
| Ontario | Children's Law Reform Act[10] |
| Prince Edward Island | Custody Jurisdiction and Enforcement Act[11] |
| Saskatchewan | Act Respecting the Application to Saskatchewan of the Convention on the Civil Aspects of Child Abduction[12] |
| Yukon | Children's Act[13] |

[3] 1986 S.A., ch. I-6.5.

[4] R.S.B.C. ch. 128 (1996). Now R.S.B.C. ch. 128 (1996).

[5] C.C.S.M. ch. 360 (1999).

[6] 1982 N.B. Acts, ch. I-12.1.

[7] R.S.N. ch. C-13 (1990).

[8] 1987 S.N.W.T. ch. 20.

[9] R.S.N.S. ch. 67 (1989).

[10] R.S.O. ch. C-12 (1990).

[11] R.S.P.E.I. ch. 33 (1988).

[12] 1986 S.S. ch. I-10.1. Now R.S.C ch. I-10.01 (1995).

[13] R.S.Y. ch. 82 (1986).

Unlike the other provinces, Quebec enacted the Convention by restating its major provisions in a provincial statute.[14] In the event of any inconsistency between the provincial law and the Convention, the former would prevail. However, Quebec's law appears to be substantially the same as that of the other provinces. It did not simply adopt the Convention, because it tries to conduct a separate, but not always different, foreign policy.

The Convention was created to discourage parents from taking children away from their established homes by providing that disputes over custody and access should be resolved by the courts of a child's habitual residence. The courts of the member countries are generally bound to return an abducted child for that purpose or to enforce an extant order. However, there are exceptions to this rule.

Canada has a Central Authority for the Federal Government and for each of the provinces.[15] The Federal Central Authority generally serves as a liaison between foreign Central Authorities and the provincial Central Authorities. The Federal Central Authority can help locate children whose province of residence is unknown.

Foreign Central Authorities can deal directly with provincial Central Authorities. The provincial Central Authorities are all Ministers of Justice, Departments of Justice, or Attorneys General. These offices attempt to secure the voluntary return of abducted children as is required by the Convention.

Assistance in locating an abducted child can be sought through a number of channels. The Child Find organization is a non-profit group that has offices in a number of provinces. Le Reseau Enfants Retour, or the Missing Children's Network Canada, is this organization's Quebec counterpart. Since this Quebec organization receives minimal government funding, it mostly relies on donations from the private sector.[16] Another non-profit group, the International Social Service, has an office in the capital city of Ottawa.

On the Federal level, Canada has a program called "Our Missing Children." Under this program, the Royal Canadian Mounted Police, Revenue Canada, Citizenship, and Immigration, and Foreign Affairs and International Trade cooperate in locating and returning missing children. The Royal Canadian Mounted Police also maintain a Missing Children's Registry. Canada Customs former Project Return program was amalgamated with the Missing Children's Registry at the Royal Canadian Mounted Police's headquarters. The Registry's services include a photo-aging service, investigative research, international networking, and the development and distribution of information related to missing persons.[17] Addresses and phone numbers for assistance in locating abducted children have been published.[18]

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[14] An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction. R.S.Q. ch. A-23.01.

[15] Department of Foreign Affairs (JDS); Lester B. Pearson Building, Tower C; 7th Floor, 125 Sussex Drive; Ottawa, Ontario; K1A 0G2; (613) 992-6486

[16] http://www.nosenfantsdisparu.ca/en/index.html.

[17] *Id.*

[18] Ann Wilton and Judy Miyauchi, ENFORCEMENT OF FAMILY LAW ORDERS AND AGREEMENTS: LAW AND PRACTICE, 2-4.4 to –2-6 (1999).

## II. Domestic Laws Regarding Child Abduction and Parental Visitation

### A. Child Abduction

Canada has general child abduction laws that pertain to persons who are not the subject's parents or guardians and specific laws that apply to a subject's parents and guardians. Under the former, abduction of a person under 16 and abduction of a person under 14 are indictable offenses punishable with imprisonment of up to 5 and 10 years, respectively.[19] These sections have been in force for many years. Because they prescribe penalties that were often thought to be too severe in a family context, parents were not often charged with these crimes. To address this situation, more flexible provisions respecting parents and guardians were created in 1982.

Abduction by a parent, guardian, or person having the lawful care or charge of a person under the age of 14, in contravention of a custody order made in Canada with intent to deprive a parent or guardian of the possession of that person is an offense that can be prosecuted by way of an indictment or in summary proceedings.[20] In the former case, the maximum sentence is 10 years imprisonment, but in the latter case, it is only 6 months.

A parallel provision states that any parent or guardian who "takes, entices away, conceals, detains, receives or harbors" a person under the age of 14 "with intent to deprive a parent or guardian … of the possession of that person" is also guilty of an offense that can be prosecuted by way of an indictment or in summary proceedings. In these cases, the existence of a valid custody order is not required, but no prosecution can be commenced without the consent of the Attorney General of Canada.

The Criminal Code creates one major exception to the abduction offenses. No person who takes, entices, conceals, or detains a young person to protect him from imminent harm can be found to be guilty of an abduction offense. The onus of proving that an abduction was necessary to protect a young person is on the accused.[21] An honest but mistaken belief will bring the accused within the exception if the circumstances thought to have existed would have posed a real danger.[22]

It is not a defense to the abduction provisions to prove that the young person consented to the conduct of the accused.[23]

The Criminal Code contains general provisions that make it an offense to forge a Canadian passport or to make false statements in order to obtain a Canadian passport for another person. This offense is punishable by 2 years imprisonment, if prosecuted by way of an indictment, and 6 months imprisonment, if prosecuted in summary proceedings. Being in possession of a forged passport or a passport that was obtained through false statements is punishable with a sentence of 5 years imprisonment.[24]

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[19] Criminal Code, R.S.C. ch. C-46, ss. 280-281 (1985).

[20] *Id.* § 282(1).

[21] *Id.* § 285.

[22] R. v. Adams, 12 O.R. (3d) 248 (Ont.C.A. 1993).

[23] *Supra* note 16, ch. C-46, § 286 (1985).

[24] *Id.* § 57.

The Criminal Code is a Federal statute that applies throughout Canada. Sanctions that are sometimes referred to as "civil" or "quasi-criminal" in nature can also be imposed under provincial legislation. For example, under the Children's Law Reform Act, the Ontario Court (Provincial Division) can impose sentences of up to Can$5,000 (US$3,750) and imprisonment for up to 90 days for "any wilful contempt of or resistance to its process or orders in respect of custody or access to a child."[25] An order for imprisonment under that section can be made to be conditional upon default, so as to put a party on notice as to the consequences of his actions in contempt of court.[26] Similar penalties are available for violations of a restraining order.[27] Ontario's legislation also provides that a police officer can arrest a person he believes, on reasonable and probable grounds, to have contravened a restraining order without first obtaining a warrant.[28]

### B. Parental Visitation

Custody and access are normally governed by provincial legislation. In British Columbia, the Family Relations Act provides that if the mother and father of a child live apart, the parent with whom the child usually resides may normally exercise custody over him.[29] However, if custody rights exist under a written agreement or under a court order, those rights prevail.[30] There is no presumption in favor of joint custody, but joint custody can be awarded. The Provincial Courts and the Supreme Court have jurisdiction to award custody on application of one of the parties. An order for access may be made whether or not a custody order is made.[31]

Throughout Canada, the general rule is that a parent who has been denied custody is granted access unless access might endanger a child's upbringing.[32] It is generally accepted that it is normally in the best interests of a child to have contact with both parents. The courts can order supervised or unsupervised visits. However, the right of access usually includes the right to take a child to a parent's normal living accommodations.

Orders as to custody and access can be made ancillary to the granting of a divorce under the Divorce Act. The Divorce Act is a Federal law, and orders made under it supercede orders made under provincial family laws.[33] However, after a custody or access order has been made under the Divorce Act, an application to have the issue re-examined under provincial legislation can be filed in an appropriate provincial court. Such an application may be struck out as an abuse of process if the court believes that it has been brought prematurely, but otherwise it will be heard in a similar manner to a request to revise a custody or access order under provincial legislation. The most common standard that must be met in

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[25] *Supra* note 10, ch. C.12, § 38(1) (1990).

[26] *Id.* § 38(2).

[27] *Id.* § 35(2).

[28] *Id.* § 35(3).

[29] *Supra* note 4, ch. 128, § 34(b), (1996).

[30] *Id.* § 34(c) and 34(d).

[31] *Id.* § 35(2).

[32] Roy v. Roy, 19 Man. R. (2d) 278 (C.A. 1983).

[33] 1986 S.C. ch. 4, as amended.

applying to have a custody or access order varied is that there has been a "material change in circumstances that affects or is likely to affect the best interests of [a] child."[34]

The courts generally have broad discretionary powers in deciding applications for custody or access. They are also empowered to appoint trained persons to assess the needs of a child and the ability or willingness of the parents to satisfy those needs.[35]

## III. Court System and Structure–Courts Handling the Hague Convention

Canada does not have parallel systems of Federal and provincial courts. Instead, it has several levels of provincial courts, a national Supreme Court that has jurisdiction to hear appeals from provincial courts, and several specialized Federal courts. Applications to enforce the provisions of the Hague Convention are filed in the superior provincial courts listed in the various provincial laws adopting that Convention. Such applications will be heard by a provincial trial judge. In some provinces, the judge may be a designated family court judge. In all cases, the decision of this judge may be appealed to the Court of Appeal with the leave of the judge or the Court itself. As the highest provincial courts, the Courts of Appeal normally decide cases in panels of three justices. Decisions of the Courts of Appeal may, themselves, be appealed with leave to the Supreme Court of Canada. There are nine judges on Canada's highest court. Appeals accepted by the Supreme Court are almost always heard by all nine judges.

## IV. Law Enforcement System

The heart of the Hague Convention is the general requirement that abducted children under the age of 16 be returned to their habitual residence in compliance with a custody order from that jurisdiction, or for a determination of a custody issue by a court of that jurisdiction. However, this general requirement is subject to exceptions. Even if an application is filed within a year, a court of a Member State can refuse to order a child's return if it would expose him to physical or psychological harm or would otherwise place him in an intolerable situation. These safeguards were needed to secure the agreement of many member states, but they clearly create potential problems. A court that approaches the issue in bad faith defeats the purpose of the Convention by interpreting the exceptions very broadly.

A review of the available Canadian case law[36] indicates that Canada's courts are generally well aware that in order to be effective, the Convention requires not only good faith, but a willingness to approach questions differently than is often the case in domestic disputes. In the leading case of *Thomson v. Thomson*, the Supreme Court held that in weighing Hague Convention applications, judges are not to employ the usual standard of determining what is in the best interests of a child. They must, instead, follow the language of the Convention.[37] In *Thomson v. Thomson*, the Supreme Court held that only rarely will the risk of separation from a current environment raise the level of risk envisioned by the Convention. In that case, an order to return a child to his father in Scotland was issued to a mother who had wrongfully removed him to Manitoba, notwithstanding the fact that the child may have already "settled into" his Canadian environment.

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[34] Children's Law Reform Act, *supra* note 10, ch. C.12, § 29 (1990).

[35] *Id.* § 30(1).

[36] For summaries for the extensive Canadian cases law respecting international child abductions, see *supra* note 2.

[37] [1994] 3 S.C.R. 551.

Aside from the decision in *Thomson v. Thomson*, the Supreme Court of Canada has considered the Hague Convention on only a few occasions. One notable case that was decided by the Court in 1995 involved the removal to Quebec of a child who had been born in Maryland. After the removal, the mother obtained a custody order in Maryland and applied for the child's return under the Convention. The Supreme Court held that there had not been a wrongful removal of the child, because while the mother had access rights, she did not have custody of the child at the time he was brought to Canada. There was no application for a change in custody pending at the time of the removal. Thus, the Convention was found to be inapplicable.

As opposed to the small number of relevant Supreme Court cases, there are a number of reported decisions involving Hague Convention applications from the highest provincial courts. In one notable case involving a wrongful removal from the United Kingdom, a young girl suffering from a debilitating disease was allowed to stay with her Canadian mother. However, the girl's sister was ordered to be returned, as the court found that the two cases had to be weighed independently of one another.[38] The onus of showing that the grave risk of harm that would justify an exception is on the defendant. This means that evidence supporting allegations of potential harm will normally be required.

The issue of whether evidence of spousal abuse may be sufficient to justify a court refusing to order the return of a child on the grounds that such an order would subject him to a grave risk of physical or psychological harm was addressed by the Ontario Court of Appeal in 1999. In the case of *Pollastro v. Pollastro*, the Court found that ordering the return of a child to a violent environment places a child in an intolerable situation that does expose him to a serious risk of psychological and physical harm. The Court also held that as a child's interests may be inextricably intertwined with one parent's psychological and physical security, it is relevant to consider evidence of spousal abuse, even when there is no evidence of child abuse.[39]

In arguing against the position ultimately taken by the Ontario Court of Appeals in *Pollastro v. Pollastro*, the Government suggested that allowing parties to oppose applications for a return of an abducted child on the grounds that return would be potentially dangerous to the abductor would create a defense that could easily be abused. Although this remains a possibility, there have not been a large number of post-1999 cases in which evidence of spousal abuse has been offered in support of the abductors' claims that their cases fall under the exceptions to the Hague Convention. In one reported case in which an abductor tried to claim that she feared that she would be in danger of being harmed by her ex-husband if she had to return to the United States, the Superior Court of Justice in Ontario considered her evidence with great skepticism. One fact that the Court found against her was that she had filed a motion to dismiss an application for an injunction relating to domestic violence. For this and related reasons, the Court held that the alleged fear of spousal abuse had not been proven and that the applicant's children should be returned to the United States. In conclusion, the Court also found that "there [was] no suggestion in the material that the authorities in Florida would not be able to provide security to the respondent and her children."[40]

Another safeguard built into the Convention states that a court may refuse to order the return of a child who objects and who has attained a sufficient degree of maturity. In one reported case, the court

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[38] Chalkley v. Chalkley, [1995] 3 W.W.R. 589 (Man. C.A.).

[39] Pollastro v. Pollastro, [1999] 43 O.R. (3rd) (Ont. C.A.).

[40] Sierra v. Sierra, 2001 O.T.C. LEXIS 427, ¶ 19.

found that a 10 year-old had reached the required degree of maturity, but did not respect her stated wish because it believed the child had been pressured by her mother.[41]

An application made more than 1 year after a child's removal may be rejected if the child is found to be well settled in his new environment. In one reported case, the Quebec court of Appeal held that determining whether a child is well settled requires an examination not only of activities and outward signs, but also of a state of mind.[42]

## V. Legal Assistance Programs

On signing the Hague Convention, Canada made a reservation respecting the cost of legal proceedings. Canada apparently took this view in agreement with the United States that "legal aid should be made available [to a] foreign applicant but on terms that would not bestow on foreign nationals a more advantageous grant in aid than is available to … nationals under the local legal aid plan."[43] Due to its reservation, Canada's provinces are not obliged to assume the cost of legal proceedings to enforce the Hague Convention except to the extent that their legal aid systems provide for financial support. Thus, anyone filing an application in Canada can apply for financial assistance from a provincial legal aid fund. The Central Authorities assist in directing parties to the appropriate offices. A number of variables determine whether a party may be eligible for legal aid and the amount of the support that may be provided. Each province has its own plan.

## VI. Conclusion

It is difficult to determine from the reported cases whether Canadian courts have tended to show a bias in favor of persons who have abducted children to Canada. Most judges have been careful to give compelling reasons for their decisions that are based on factual determinations that cannot be independently assessed. One notable development that does stand out in the reported cases is that a majority of the Hague Convention applications filed in Canada have been filed by fathers. In 2001, the Missing Children Society in the city of Calgary reported that of the 179 cases worked on over the previous 15 years, 112 concerned abductions by mothers and 67 concerned abductions by fathers.[44]At the time the Convention was being considered, most of the cases that had attracted media attention involved fathers abducting children to foreign countries. This points to the fact that the problem of child abductions to Canada appears to typically be of a different nature.

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[41] Thorne v. Drydenhall, 148 D.L.R. 4th 508 (B.C.C.A. 1997).

[42] 58 Q.A.C. 168.

[43] *Supra* note 1, at 232.

[44] Patricia Chisholm, Missing, McLean's, June 4, 2001 at 16..