



**The Honourable
Madam Justice
Claire L'Heureux-Dubé**

*International Co-operation in
Relation to Children*

**“Cherishing our Children:
The Role of the Hague Convention on the Civil Aspects of Child Abduction”¹**

The Honourable Claire L’Heureux-Dubé
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In March 2000, while the world’s attention was on the Elian Gonzalez custody battle in the United States,² another dispute over the future of a child was much more quietly and efficiently resolved. Three children of a Canadian mother from Toronto were visiting her separated husband in the American state of Delaware in the summer of 1999 when he refused to return them to Canada, despite their wishes. The following spring, the mother filed a suit in Delaware federal court based on the 1980 Hague Convention on the Civil Aspects of Child Abduction. The judge had never dealt with such a case before, but immediately ruled that two of the children “be returned to the sovereign nation of Canada forthwith, supervised by the Royal Canadian Mounted Police and the Canadian Embassy.” The third child had reached the age of 16, the limit of the Convention, and thus made his own decision to return to Canada with his mother. As mandated by the Convention, the judge did not examine the merits of the children’s custody determination in Canada, their place of habitual residence.³ Another American court colourfully described this limitation on the scope of inquiry under the Hague Convention in the context of a case involving Germany: “We are not to debate the relevant virtues of Batman and Max und Moritz, Wheaties and Milchreis. The exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. That

¹ I would like to acknowledge the exceptional assistance of my law clerk, Christopher Rickerd, in the research and preparation of this paper.

² Cuba is not a party to the Hague Convention.

³ *In re the Application of Jovita Thompson v. Compton Courtney Thompson*. (D. Del., CA No. 00-163, March 21, 2000).

decision is a custody matter and reserved to the court in the State of habitual residence.”⁴

The quick resolution of the Delaware case demonstrates the efficacy of the Hague Convention, one of the most successful private international law initiatives of our time. As further illustration that the Convention has had a tremendous impact, statistics show that “prior to the United States becoming a party to the Convention, the return of abducted children was approximately 20 per cent. Today, more than 70 per cent of the cases result in return or access. The rate of return from the United States to other countries is even higher, approximately 90 per cent, including voluntary returns.” By 1999, ten years after the United States joined the Convention, over 2,000 children had been returned to that country.⁵

I am delighted to have the opportunity to discuss this Convention at such a distinguished gathering, which features the work of those who are deeply committed to children’s welfare. The Convention joins two of the themes that matter most to me: children’s rights and international judicial co-operation. As President of the International Commission of Jurists in Geneva, I have a mandate to improve dialogue and interdependence among the world’s judges and lawyers. The Hague Convention exemplifies a level of interaction between courts of different countries that is a model for other areas of the law.⁶ On the theme of international legal cooperation, it is noteworthy that the International Bar Association has a task force of members prepared to

⁴ *Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996)

⁵ Marcia M. Reisman, “Where to Decide the ‘Best Interests’ of Elian Gonzalez: The Law of Abduction and International Custody Disputes.” 31 U. Miami Inter-Am. L. Rev. 323, 350 (2000).

⁶ Recently the Permanent Bureau of the Hague Conference on Private International Law established the International Child Abduction Database (INCADAT), “with the object of making accessible many of the leading judicial decisions made by national courts around the world in respect of the Hague Convention.” See: <http://212.206.44.26/start.htm>

explain the operation of the Convention to jurisdictions that so request. I propose to discuss several examples of this cooperation, including some from my home country of Canada, in order to give you illustrations of the extent to which the Convention is working, and also to point to a few problem areas.

First, I offer a look back at the origins of this treaty.⁷ By the mid 1970s, the problem of international parental child abduction had reached such proportions that the Commonwealth Law Ministers described it as being of “immense social importance and requiring concrete early action.” At a meeting of a Special Commission of the Hague Conference on Private International Law held in January 1976, the Expert of Canada proposed that the Hague Conference undertake the preparation of an international treaty dealing with the problem of the abduction of children by one of their parents. At the Fourteenth Session of the Hague Conference in October 1980, representatives of 28 states prepared a draft Convention, which the Conference adopted by a unanimous vote. Canada was one of four states to sign the treaty on October 25, 1980, marking the first Convention of the Hague Conference ratified by Canada. It came into force in Canada in December, 1983, more than 4 years ahead of the United States, to which the majority of Canadian international parental abductions occur.

The Convention is now in force in 56 countries.⁸ Each country designates a Central

⁷ This discussion draws on the Supreme Court of Canada’s first decision concerning the Hague Convention, *Thomson v. Thomson*, [1994] 3 S.C.R. 551. All Supreme Court of Canada judgments since 1985 are available through the Court’s website, http://www.scc-csc.gc.ca/index_e.htm

⁸ Carol S. Bruch, “International Family Law as the Century Turns.” 33 *Family Law Quarterly* 607, 610 n.14 (1999). See also *Thomson*, *supra* note 7, *per* L’Heureux-Dubé J.: “The increase in rapid international transportation, the freer crossing of international boundaries, the continued decrease in documentation requirements when entering foreign jurisdictions, the increase in “international families”, where parents are of different countries of origin, and the escalation of family break-ups world wide, all serve to multiply the number of international abductions.”

Authority to process requests from either its own citizens or from abroad. A petitioning parent can either go to her or his own country's Central Authority or to that located in the country to which the child has been abducted. In 1996, over 1,000 requests for assistance were received by the reporting Central Authorities. Canada received 26 requests and made 44 requests.⁹ Between 1993 and 1996, Central Authorities in Canada were involved in 145 cases seeking the return of 209 children from Canada and 173 cases seeking the return of 232 children to Canada.

Professor Carol Bruch, a brilliant scholar in this field based at the University of California, Davis, Faculty of Law, has described the late 1970s context in which the Convention originated: "international travel had become easier and more couples were marrying or travelling across national borders. At the same time there was an increase in family separations and divorce, leading to a rise in international child custody disputes."¹⁰ The rationale for the Convention also stemmed from the terrible trauma that can be inflicted on children by parental abductions. Interpol notes that in Canada the frequency of parental abductions follows a seasonal trend; they peak at the end of summer, and at Christmas and Easter vacations.¹¹ Whenever an abduction occurs, emotional upheaval is more than likely to ensue. As the Canadian Parliament's Sub-Committee on Human Rights and International Development reported in 1998: "A child abducted by a parent and taken to a foreign country faces a culture, language and living arrangements that differ significantly from what he or she has been accustomed to; the effects of such social dislocation on the child can be profound. Moreover, the psychological impact of displacement and separation from the absent parent is often manifested in expressions of anger, fear, despair,

⁹ Commonwealth Secretariat, *The Hague Convention on the Civil Aspects of Child Abduction: Explanatory Documentation Prepared for Commonwealth Jurisdictions*. (London: 1997), 3.

¹⁰ Carol S. Bruch, "The Hague Child Abduction Convention: Past Accomplishments, Future Challenges." 1 *European Journal of Law Reform* 97, 98 (1998/1999).

¹¹ See: <http://www.interpol.int/Public/Children/Missing/NationalLaws/mcCanada.asp>

loss and confusion. Thus is particularly true when the child is older (of school age), abducted for a long period of time, abused, or being frequently moved to different locations by the abducting parent to avoid detection.”¹²

The Royal Canadian Mounted Police’s Missing Children’s Registry adds that: “When a child is taken by a parent, there is a misconception that because the child is with his or her parent they must be safe. Often when a child is abducted by a parent the motive is not out of love for the child, but is an act of revenge against the other parent. Unfortunately, children who find themselves in this situation are often neglected by the abducting parent and are the victims of a bitter separation. They are moved constantly from one place to another and take on new identities on a frequent basis. These children are unable to form any long-term relationship due to their fugitive-type lifestyle and are coerced to lie about who they are and where they came from. This type of lifestyle affects the child emotionally and these effects may be apparent long after the child has been recovered.”¹³

The devastation of the parent left behind is also frequently a deplorable result of these abductions: “A parent whose child has been abducted by the other parent is also a victim. The traumatic consequences for searching parents...include a deep sense of loss, frustration and intense anxiety about their child’s physical safety and emotional well-being....As [one parent stated] ‘for a parent and child who are separated, even a day can seem an eternity.’”¹⁴ Even for

¹² See: “International Child Abduction: Issues For Reform.”, Introduction (April 1998): <http://www.parl.gc.ca/InfoComDoc/36/1/FAIT/Studies/Reports/fairp04/04-rap-e.htm>

¹³ Missing Children’s Registry, “Canada’s Missing Children: 1999 Annual Report.” (2000), 9. See: <http://www.ourmissingchildren.ca/en/publications/2000/99rep.pdf>

¹⁴ See: “International Child Abduction,” *supra* note 12, Introduction. The potentially staggering costs of proceeding under the Convention have led commentators to focus on the importance of legal aid to support parents involved in this litigation. See e.g. Andrea Himel, “Parents Stealing Kids: Part III: Protecting Canadian Children from Parental Abduction Through Effective

those parents who find out which country their child has been abducted to, the costs involved in regaining custody can be astounding. One Canadian woman's family spent more than \$100,000 (including \$15,000 in translation fees alone) over a five-month period to get her and her son back to Canada from Greece, a Hague Convention country.¹⁵

The Convention has, despite such problems that unfortunately can accompany international litigation, been a tremendous catalyst for international judicial cooperation. Courts around the world now frequently interact with other legal systems by returning children to jurisdictions in which their custody was determined. They also, however, consistently refer to each other's jurisprudence on the Hague Convention, because there is no international tribunal pronouncing definitively on its provisions. Sometimes there is even direct communication during a case, as when a Québec Superior Court sought clarification in 1996 of a custody order issued by a California court.¹⁶ Global judicial dialogue may not be much of a surprise within traditionally

Prevention and Response Techniques." 18 *Canadian Family Law Quarterly* 269, 308 (2000-2001). Every Canadian province except Manitoba has limited its obligation to pay costs of legal counsel to those that "may be covered by its judicial and legal aid program." By contrast, some countries, including the United Kingdom, Australia, and New Zealand, have not made such a reservation under articles 26 and 42 of the Convention.

See also "Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction." (22-28 March 2001) Available at: <http://www.hcch.net/e/conventions/reports28e.html> Point 3.6 on "The provision of legal aid and advice" states:

3.6 In States where an applicant for a return order is in effect unable to bring his/her application promptly before the courts in the requested State, this constitutes a serious hindrance to the rapid and efficient operation of the Convention. The Special Commission encourages such States to intensify their efforts to obtain legal counsel or advisers in order to avoid serious prejudice to the interests of the children involved."

¹⁵ "International Child Abduction", *supra* note 12, "Shortcomings of the Convention."

¹⁶ *D. c. B.*, see Paul R. Beaumont and Peter E. McEleavy, The Hague Convention on International Child Abduction. (Oxford University Press, 1999), 168.

close-knit legal families, such as the courts of the Commonwealth. For example, a decision by the British House of Lords in February of last year relied on rulings by my own Supreme Court of Canada and also the High Court of New Zealand, as well as one by the Supreme Court of Ireland.¹⁷ At the recent Common Law Judicial Conference on International Parental Child Abduction, held in Washington in September 2000, it was noted that a number of jurisdictions, including England, Australia, New Zealand, Hong Kong and Cyprus, have identified a “liaison judge” as the point of contact for judges in other countries with questions about local conditions.¹⁸ On direct judicial communications, see “Conclusions” (2001), *supra* note 14, points 5.5 to 5.7.

In other countries that have been more reluctant to look to developments abroad, the extent of their courts’ attention to international jurisprudence on the Hague Convention is also pronounced. The United States Court of Appeals for the Second Circuit last fall decided a case that canvassed rulings from Australia, Israel, Canada, France, and the United Kingdom.¹⁹ I was pleased to read that the majority opinion in this American decision upheld the view that I had expressed in a 1996 decision of the Supreme Court of Canada.²⁰ This position takes seriously the limitation of the Hague Convention only to cases disputing custody rights, not access rights to children. I believe that so-called non-removal clauses in custody orders, clauses restricting the geographic mobility of the custodial parent (usually the mother), can be used by abusers in order to maintain continued control over estranged spouses and children.²¹

¹⁷ *In re H (A Minor)*. February 3, 2000. See: <http://194.128.65.4/pa/ld199900/ldjudgmt/jd000203/inreh.htm>

¹⁸ On this conference, see generally: <http://travel.state.gov/execsumm.html>

¹⁹ *Croll v. Croll*, 229 F.3d 133 (2d Cir., 2000).

²⁰ *V.W. v. D.S.* [1996] 2 S.C.R. 108.

²¹ Claire L’Heureux-Dubé, “The Hague Convention on the Civil Aspects of Child Abduction.” in Anne-Marie Trahan (ed.), A New Vision for a Non-Violent World: Justice for Each Child.

I would now like to elaborate the first of my concerns about the Hague Convention, namely that it is not sensitive enough to the needs of mothers who abduct their children in order to escape from abusive situations. There are exceptions written into the Convention prohibiting the return of children in situations in which there is serious risk. Article 13 (b) contains an exception based on “a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” But, as Miranda Kaye of the University of Sydney’s Faculty of Law has observed, “circumstances surrounding abductions are inevitably gendered.” Many Hague Convention cases “are those where women are escaping violence. This context...and its impact on women and children is not being dealt with adequately by courts interpreting the Convention.”²² This article was recently cited by Justice Goldstone in a decision of the Constitutional Court of South Africa. He wrote that “in the application of Article 13, recognition must be accorded to the role which domestic violence plays in inducing mothers, especially of young children, to seek to protect themselves and their children by escaping to another jurisdiction.”²³

Professor Bruch has importantly emphasized the fact that the Convention’s “earlier

(Proceedings of the 4th Biennial International Conference of the International Association of Women Judges.” (Cowansville, Québec: 1999), 227, at 231. In both my domestic and international law opinions on the role of the custodial parent, as well as in my scholarly writings, I have stressed the complete responsibility of the custodial parent for her or his child. See Claire L’Heureux-Dubé, “La garde conjointe, concept acceptable ou non?” (1979), 39 R. du. B. 835, 850-51; *Young v. Young*, [1993] 4 S.C.R. 3 (“It is precisely to ensure the best interests of the child that the decision-making power is granted to the custodial parent, as that person is uniquely situated to assess, understand, ensure and promote the needs of the child.”)

²² Miranda Kaye, “The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four.” 13 *International Journal of Law, Policy and the Family* 191, 205 (1999).

²³ *Sonderup v. Tondelli*, Case CCT 53/00 (December 4, 2000), at para. 34.

prototype (the one in the mind of the drafters) was one in which a non-custodial father became frustrated with the constraints of his visitation opportunities and removed the children from their mother. Although this model never explained all of the cases, it was certainly a common fact pattern. But in recent years, its presence has declined precipitously, at least in Convention cases. The Central Authority for England and Wales reports that 70 per cent of its Convention cases now involve mother-abductors, and 99 of the first 130 cases in which [she] recorded the gender of the abductor (76 per cent) also involve mothers. This is not, however, because mothers have now become non-custodial parents. Rather, it is primary caretaking mothers who increasingly appear as abductors in Convention cases.”²⁴ “Because the difficulties of domestic violence were not clearly in view at the time the Convention was drafted, it contains no specific language addressed to the problem. Difficulties have arisen due to sometimes cavalier judicial decisions in cases of proven spousal abuse.”²⁵

One of Canada’s most insightful jurists, Madam Justice Rosalie Silberman Abella of the Ontario Court of Appeal, was the author of a decision in 1999, *Pollastro*,²⁶ that deserves detailed examination. It sheds light on the responsibility that courts interpreting the Hague Convention must meet in order to protect children from being returned to abusive situations from which their mothers are fleeing. The applicant father lived in California and the respondent mother, Reesa, fled to Canada with her seven-month old son, Tyler, to end her violent marriage. The father repeatedly telephoned the mother’s relatives in Canada and issued threats, as recounted by them

²⁴ Bruch, *supra* note 10, at 102. See also Himel, *supra* note 14, at 311: “the treaty may be detrimental to the interests of certain groups in society, namely women who have followed their husbands to Canada, who have been the primary caregiver to their children, and who return to their homelands seeking social and financial support from their families of origin once their marriages break down. In fact, in many of these cases there may be a history of domestic violence.”

²⁵ Bruch, *supra* note 10, 105.

²⁶ *Pollastro v. Pollastro*. [1999] 43 O.R. (3d) 497.

in court: “He [said] that he did not give a damn about Tyler, he just wanted revenge on Reesa for humiliating him. He could always have another baby...but he wanted to punish Reesa and what better punishment than to take the one thing she loved more than life itself.”

The trial judge’s ruling included the following analysis: “The [mother] alleges...that the threat of physical abuse to a mother can cause psychological damage to the child. She argues that this is one of those exceptional situations in which the court is not bound by the requirement that the child be returned to the habitual residence. A very forceful argument was made by the Applicant regarding the risks, both psychological and physical, to a child whose mother is living in an abusive situation....However....it is settled law that ‘evidence of harm generally goes to the merits of a custody hearing’ and not [to] a Hague Convention application.” Thus, Tyler was initially ordered to be returned to California.

Madam Justice Abella’s reasons rejected this analysis, consistently with my observation in a Supreme Court case that while the Hague Convention’s “preamble refers to the best interests of children generally, and not to the best interests of any particular child, I cannot believe that the intention was to ignore the best interests of individual children.”²⁷ Judge Abella wrote that: “it seems to me a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm....Since the mother is the only parent who has demonstrated any reliable capacity for responsible parenting, Tyler’s interests are inextricably tied to her psychological and physical security. It is therefore relevant in considering whether the return to California places the child in an intolerable situation, to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.” This landmark decision demonstrates the tremendous responsibility placed on the shoulders of

²⁷ *Thomson, supra* note 7.

judges implementing the Convention because once the child is returned, the court no longer has jurisdiction to protect his or her interests or the inextricably linked interests of an abused mother.

A second concern I have about the way in which courts interpret the Hague Convention is that they do not always take seriously the importance of giving voice to children's own opinions. Professor John Eekelaar of Oxford has eloquently argued that: "No society will have begun to perceive its children as right holders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express views, and towards addressing them with respect."²⁸ Article 12 of the *Convention on the Rights of the Child* requires that once a child is capable of forming his or her own views these should be ascertained in any proceedings affecting the child. Article 13 of the Hague Convention allows courts to deny return petitions if a child of sufficient age and maturity objects. A decision in January written by Judge Cabranes of the United States Court of Appeals for the Second Circuit included an important holding: "We agree with the government that...a court may refuse repatriation *solely* on the basis of a considered objection to returning by a sufficiently mature child."²⁹

If the child's true views, as opposed to opinions forced upon them by a parent, are not sought or not probed adequately in conformity with the Convention, heart-rending scenes of forcible removal will occur, putting children's psychological well-being at serious risk. For example, in a British case involving two children, 11-and-a-half and 10-year-old boys, "the abducting mother, prior to the Convention hearing, agreed that it would be in her sons' best interests if they were to return forthwith to their former home in Australia and into the care of their father. Their objections were not conveyed to the judge. When placed on an Australia-bound

²⁸ Beaumont and McEleavy, *supra* note 16, at 177 n.3.

²⁹ *Blondin v. Dubois*, 238 F.3d 153, (2d Cir., 2001). (Original emphasis).

flight they protested, attempting to open one of the doors as the aircraft taxied for take-off.”³⁰ Such an episode shows that there is work to do in order to ensure an appropriate level of children’s participation in the determination of their futures.

A third challenge I see for the Convention is the large number of nonsignatories. “[T]here are still many ‘Haven-States’ where abductors can take children and where the custodial parent will be forced to litigate a custody determination in a foreign country, assuming the child can be located.”³¹ So, “the plight of the victimized parent is one of extreme frustration and all too often ends in despair.”³² The Canadian Parliamentary Sub-Committee I mentioned earlier concluded that: “Cases involving children taken to a non-Hague country, especially countries governed by principles of Muslim law, are particularly difficult to resolve. Religious law and customs governing parental rights, family influence, language barriers and enormous personal expenses are only some of the obstacles confronting the searching parent.”³³ It is a troubling fact that “Without the Hague Convention, women often fail in their attempts to have their children returned from patriarchal societies and they must accept that, once abducted, they may never see their children again.”³⁴

Some innovative negotiation has taken place to surmount these barriers. For instance, Canada in 1998 concluded a bilateral agreement with Egypt providing for improved administrative attention to child abduction cases.³⁵ The Canadian Minister of Foreign Affairs

³⁰ Beaumont and McEleavy, *supra* note 16, at 181.

³¹ Julia A. Todd, “The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention’s Goals Being Achieved?” 2 *Indiana Journal of Global Legal Studies* No. 2 (1995).

³² See: “International Child Abduction,” *supra* note 12, “Chair's Forward.”

³³ *Ibid.*, “International Child Abductions to Non-Hague Countries.”

³⁴ Himel, *supra* note 14, at 306.

³⁵ See also: Bruch, *supra* note 10, at 117. There is also an agreement with Lebanon.

noted that year that “the obstacles to gaining broader adherence to the Convention are real enough. The Convention deals with intensely emotional, psychological, social and family issues – many of which are heavily influenced by religious, cultural and economic concerns. Consequently, many countries are reluctant to yield what they consider private and personal matters to international scrutiny. Nevertheless, for every child who is returned to his or her custodial parent, there is tremendous satisfaction. Two decades after the conclusion of the Convention, this provides all the inspiration we need to continue convincing others to sign and ratify.”³⁶

The new millennium is an auspicious time to celebrate the past century’s remarkable recognition of children’s rights and to consolidate these gains. Interpol held the first international conference on missing and abducted children in 1999. Because of the significant contribution made by the Royal Canadian Mounted Police’s Missing Children’s Registry to this event, a Canadian police officer was chosen to head the missing children’s program of Interpol’s Specialist Group on Crimes Against Children.³⁷ Children are every society’s most precious resource and we must spare no effort to ensure that their lives are improved and safeguarded in this fast-paced and at times merciless modern world. I salute the organizers and participants of this congress and thank you for the invaluable work that you all do on behalf of our most vulnerable and dependent children.

³⁶ “Notes for an Address by the Honourable Lloyd Axworthy Minister of Foreign Affairs to the Conference ‘Children Caught in Between’” Ottawa, November 6, 1998. See: http://www.dfait-maeci.gc.ca/english/news/statements/98_state/98_075e.htm

³⁷ Sgt. John W. Oliver, Royal Canadian Mounted Police’s Missing Children’s Registry. E-mail: mcr.nps@sympatico.ca