

International Child Abduction
and The Canadian Law

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Introduction

In 1976, Canada, prompted by an increase in the number of violations of trans-border custody orders, proposed that the Hague Conference on Private International Law draft a treaty on international child abduction. The resulting *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can. T.S. 1983 No. 35, came into force on December 1, 1983, with four ratifying countries, including Canada. There are now 53 states party to the *Convention*. It is the only multilateral agreement, which provides assistance in cross-border abduction.

The *Convention's* Objectives

Among its main objectives, the *Convention* aims:

- To deter child abductions;
- To promote co-operation among countries and their respective authorities; and

- To ensure the prompt return of abducted children to their home countries.

To promote co-operation, the *Convention* provides for the creation of Central Authorities responsible for applying the *Convention* in each country where it is in force.

Preliminary Matters

Where a child appears to have been abducted, Canadian courts rely upon the *Convention* to determine whether a Canadian court or foreign court has jurisdiction to decide if, in fact, an abduction has occurred and whether the child should be returned to the other State.

As set out above, the main objective of our court is to discourage abductions of children internationally. Most frequently, our courts are involved in cases of parental abduction. As prescribed by the *Convention*, deference is therefore given to state where a child is habitually resident to determine matters with respect to the custody and access of that child.

The preamble of the *Convention* states its goal is to protect children “from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence”. The objects of the *Convention* as expressed in Articles 1 through 5 are “to secure the prompt return of children wrongfully removed or retained in any Contracting State”. The intent is “to ensure the rights of custody and access and of access under the laws of one Contracting State are effectively respected in the other Contracting State.”

In the province of Ontario, the *Convention* is incorporated into the *Children’s Law Reform Act*, R.S.O. 1990, c.12 at s. 46. Therefore it is binding law in Ontario. Similarly the *Convention* has

been adopted through provincial/ territorial legislation in the other Canadian provinces and territories.¹

Application for the Return of a Child

The *Hague Convention* permits a person who claims that a child has been removed or retained by another party in breach of custody access to justice. It permits an application to the Central Authority in the place of the child's habitual residence or to a Central Authority in any other state, which is a party to the *Convention* (hereinafter contracting state) for assistance in securing the return of the child. The *Convention* requires that each contracting state designate a Central Authority. The function of the Central Authority is to discharge the duties imposed upon the contracting state by the *Convention*. The Central Authority in Canada is located in our national capital, Ottawa. While Canada is a federal system constitutionally, family law is exclusively within the jurisdiction of the provinces and territories. Therefore, each province and territory has a designated Central Authority in addition to the Federal Central Authority.

¹ The *Convention* has also been adopted through legislation in the following Canadian provinces and territories:

Alberta - February 1st, 1987, *The International Child Abduction Act*, R.S.A. 2000, c I – 4;

British Columbia – December 1st, 1983, *The Family Relations Act*, R.S.B.C. 1996, c. 128, s. 55;

Manitoba – December 1st, 1983, *The Child Custody Enforcement Act*, R.S.M. 1987, c. C 360 C.C.S.M. c. C 360;

New Brunswick – December 1st, 1983, *The International Child Abduction Act*, S.N.B. 1982, I-12;

Newfoundland and Labrador - October 1st, 1984, *The Children's Law Act*, R.S.N.L. 1990, c. C - 13 as amended by S.N. 1995 c. 27;

Nova Scotia - May 1st, 1984, *The Child Abduction Act*, R.S.N.S. 1989, c. 67;

North West Territories - April 1st, 1988, *The International Child Abduction Act*, R.S.N.W.T. 1988, c. I-5 as amended by S.N.W.T. 1995, c. 11;

Nunavut - *The International Child Abduction Act*, R.S.N.W.T. 1988, c. I-5, as amended by S.N.W.T. 1995, c. 11, as enacted for Nunavut, pursuant to the Nunavut Act, S.C. 1993, c. 28;

Ontario - December 1st, 1983, *The Children's Law Reform Act*, R.S.O. 1990, c. C12;

Prince Edward Island - May 1st, 1986, *The Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C – 33;

Quebec - January 1st, 1985, *An Act Respecting the Civil Aspects of International and Inter provincial Child Abduction*, R.S.Q. c. A-23.01;

Saskatchewan - November 1st, 1986, *The International Child Abduction Act*, S.S. 1995, c. I-10.1;

Yukon Territory - February 1st, 1991, *The Children's Act*, R.S.Y. 1986, c.22, ss.55-59.

In Canada the Federal Central Authority's role is thus very restricted and exists mostly to provide a liaison function with the Central Authorities of other provinces and nations. In the province of Ontario the designated Central Authority is the Ministry of the Attorney General.

When the Central Authority has received an application that fulfills the requirements stipulated by the *Convention* for assistance in the return of a child, it must take all appropriate measures under Article 10 to secure the return of the child. If the child is not returned on consent, the Authority must seek an order from the courts of the contracting state where the child is located for the return of the child. Thus, jurisdiction is granted to the jurisdiction of the court where the child has been wrongfully taken.

Habitual Residence and Wrongful Removal

In an application under the *Hague Convention*, the court must first determine whether or not the child was wrongfully removed or retained within the meaning of Article 3 of the *Convention*. This determination is done in reference to the law of the child's state of habitual residence. As set out in the *Convention*, the removal or the retention of a child is to be considered wrongful where:

- (a) It is in breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention, and
- (b) At the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

In an Article 3 analysis, the custody rights of the party seeking an order for the return of the child must be determined in accordance with the law of the habitual residence of the child, see *W. (V.) v. S. (D.)*, [1996] 2 S.C.R. 108.

In *W. (V.)* a Maryland court granted custody of a child to the father and granted supervised access to the mother. The father then moved to Michigan with the child. The parties agreed on a schedule of supervised visits and the Maryland court ratified the agreement. However, in the interim the father moved to Quebec with the child without notifying the mother. After that the mother applied to the Maryland court, which awarded custody of the child to her ex parte, "pending any further hearings on the issue of custody and visitation at the request of either party". A year later, the father filed with the Quebec Superior Court for custody of the child and the mother responded by applying for the child's return. With reference to the *Convention*, the Superior Court dismissed the father's claim and ordered the child's return to the United States. The Court of Appeal confirmed the order for return. The Supreme Court of Canada also confirmed the appellate court's decision.

In that decision Justice L'Heureux-Dubé of the Supreme Court of Canada made the following comments:

However, although the *Convention* adopts an original definition of "rights of custody", the question of who holds the "rights relating to the care of the person of the child" or the "right to determine the child's place of residence" within the meaning of the *Convention* is in principle determined in accordance with the law of the State of the child's habitual place of residence...

The *Convention* does not provide a definition of “habitually resident”. However s.22 (2) of the *Ontario Children’s Law Reform Act* provides the following definition:

- (2) A child is habitually resident in the place where he or she resided,
 - (a) with both parents;
 - (b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; or
 - (c) with a person other than a parent on a permanent basis for a significant period of time, whichever last occurred.

In Canadian case law it has been decided that since the *Convention* contains no definition of ‘habitual residence’ the definition must be interpreted using the definition of the term found in provincial legislation, see *Hawke v. Gamble* (1998), 43 R.F.L. (4th) 67, and *Bielawski v. Lozinska*, [1997] O.J. No. 3214, **affirmed**, [1998] O.J. No. 22 (Ont. Div. Ct.).

Hawke involved an application by a father for an order that the mother return the parties' children to Texas. The parties were divorced in Texas where the mother was awarded sole custody of the children and the father was granted access. The mother moved to British Columbia with the children and successfully applied for interim custody on an ex parte basis while the father was denied access. In Texas, the father successfully applied to enforce access and the Texas court granted custody to the father on an interim basis. The father then applied to set aside the ex parte order in British Columbia and to enforce the terms of the Texas order. He was successful. The

mother returned the children to Texas and but brought a motion to transfer jurisdiction to British Columbia. Jurisdiction was transferred; however, the father then obtained a Texas order restraining the mother from pursuing custody in any other jurisdiction. The mother attorned to Texas' jurisdiction and discontinued her applications in British Columbia. The Texas court awarded custody to the father with access to the mother on her consent. For a second time the mother removed the children to British Columbia and obtained an order for interim custody with no access to the father. The father claimed that the mother unlawfully removed the children and that Texas was their home jurisdiction while the mother claimed that she had the right to remove the children to British Columbia where they were habitually resident. She argued that returning the children to the husband in Texas would expose them to a grave risk of harm. The court decided the children were wrongfully removed to British Columbia.

In *Bielawski* a mother applied to a court to have a child returned to her in Poland. The couple met in Canada after seeking refugee status. The child was born in Canada but the mother's refugee application was rejected and she was deported. The child remained in Canada with her father. After some time the father sent the child to live with her mother in Poland. The mother claimed both parties intended the child to live with her until she could lawfully return to Canada, but in contrast, the father asserted that the child was to live with the mother for one year only. The relationship between the parties deteriorated and after about a year and a half, the father went to Poland and abducted the child. The court ordered the father to promptly return the child to the mother at his own expense.

The Court of Appeal of Ontario reiterated principles regarding the determination of habitual residence in the recent case *Korutowska-Wooff v. Wooff*, [2004] O.J. No. 3256. These principles were expressed as follows:

- The question of habitual residence is a question of fact to be decided based on all of the circumstances;
- The habitual residence is the place where the person resides for an appreciable period of time with a “settled intention”;
- A “settled intention” or “purpose” is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family etc.
- A child’s habitual residence is tied to that of the child’s custodian(s).

If it is found that the state from which the child has been removed, and which is requesting the return of the child is the habitual residence of the child, this falls within the definition of a wrongful removal.

According to Article 14, in order to determine if there has been a wrongful removal or retention as defined by Article 3, the state where the child is located may take judicial notice of the legislation and judicial or administrative precedents of the state of the child’s habitual residence. Article 11 of the *Convention* mandates that the court act expeditiously in these proceedings.

Once a Canadian court determines a child has been wrongfully removed from a foreign country that is also a party to the *Convention*, the court is mandated by Article 12 to order the return of the child to that country. The *Convention* dictates that where a child has been wrongfully removed or retained according to Article 3 and, at the date of commencement of the proceedings

before the judicial or administrative authority of the Contracting State where the child is now located, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. This Article functions to prompt a parent to act expeditiously in the reporting of the abduction of the child.

Even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, the judicial or administrative authority shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Therefore, a petitioner's failure to act quickly can provide support to a respondent's claim that the child has become well settled in the new jurisdiction. In *Droit de la famille – 1763*, [1993] R.J.Q. 2076, [1993] R.D.F. 551, affirming [1993] R.D.F. 111, Deschamps J. defined 'settling' of a child as follows:

...the settling of a child entails more than outward signs revealed by the child's activities, because this may well be no more than a superficial reality that conceals deficiencies.

There appears to be a reverse onus on the party objecting to the return of the child to prove that the child is settled.

Place of birth is not in itself a determining factor. More specifically, where a child is born in one country and within days is taken to another country, this does not constitute a wrongful removal.

It has been held by our court that a child cannot be said to be habitually resident in the country of his/her birth, see *H.A.D. v. N.C.M.*, [1993] A.J. No. 761.

In *H.A.D.* an unmarried woman, gave birth to a baby in the state of Georgia in the United States. The baby was delivered to the defendants in California with the consent of the mother. The defendants immediately returned to their home in the Province of Alberta with the baby. Later the defendants filed a statement of claim asking for an order appointing them sole guardians of the baby and giving them sole custody of him. A judge granted the order on the consent of the mother. However, the biological father then filed a statement of claim against the mother and the defendants in the Province of Alberta claiming guardianship and custody of his son, a declaration that the child had been wrongfully removed, and the child's return. At trial the father asked the judge to give him guardianship and custody of the child but the trial judge refused to do this and instead made the adoption order, which the defendants had requested. The father appealed but the Court dismissed this.

In cases where the judicial or administrative authority in the requested State has reason to believe that the child has been wrongfully removed, it may stay the proceedings or dismiss the application for the return of the child.

The Canadian court can also impose undertakings on a party to deal with the transition period between the time when the Canadian court makes a return order and the time at which the child is placed before the court in the country of their habitual residence. See *Thomson v. Thomson*, [1994] 3 S.C.R. 551, and *Finizio and Scoppio-Finizio*, [1999] 179 D.L.R. (4th) 15 (Ont. C.A.).

In *Thompson* the parties were married in Scotland. Upon separation each sought custody of their child. A Scottish court granted interim custody to the mother and interim access to the father and ordered that the child remain in Scotland until a final decision was reached. However, the mother

took the child to Manitoba. She then decided to stay permanently in Canada and applied for custody of her child in that province. At the same time, the father was granted an ex parte custody order in Scotland. Upon application in Manitoba under the *Convention* for the child's return to Scotland, the judge found that the child was wrongfully removed from Scotland within the meaning of the *Convention*. The court ordered his return but gave the mother interim custody for a period of four months to allow her to bring her custody application in Scotland. At appeal, the Court of Appeal of Ontario ordered the return of the child to Scotland immediately with no order of interim custody. The Supreme Court dismissed the appeal of that decision.

In *Finizio* a married couple of eight years residing in Italy separated. Subsequently, the husband physically assaulted the wife resulting in her relocating with their two children, who had dual Italian and Canadian citizenship, to Toronto. The wife had no intention of returning herself or her children to Italy. The husband applied for the return of the children pursuant to the *Convention*. The wife argued that the removal was not wrongful due to the fact that the husband was not exercising his custodial rights at that time. She also claimed there was a grave risk that the return would expose the children to physical or psychological harm or would otherwise place them in an intolerable situation. The trial judge refused to order the return of the children to Italy after making the finding that there had been a wrongful removal, but that a grave risk of harm existed if the children were returned. The husband appealed to the Ontario Court of Appeal and was successful. The children were returned to Italy after the husband agreed to several undertakings.

The *Convention* attempts to prevent an abductor being granted any practical or juridical remedy in a foreign Contracting State other than the child's state of habitual residence through a

prohibition on adjudication of the merits of rights of custody and access. This avoids a court decision in that foreign state. Under Article 17 of the *Convention*, even if a decision relating to custody has been given in the foreign state, the existence of that decision must not prevent the return of the child to the state of habitual residence. However, the judge in the requested state can take into account the reasons for that foreign decision when applying the *Convention*.

If the court determines that there has not been a wrongful removal within the meaning of Article 3, then the *Convention* does not apply, see *W. (V.) v. S. (D.)*, (*above*).

An order of the foreign court is not a pre-requisite to a determination of a wrongful removal. The *Convention* can be invoked even though the parent claiming that the child has been removed wrongfully does not have a custody order from a court in the country of the child's habitual residence. In such a case 'custodial rights' are determined based on the individual circumstances of the case. See, *J.R.C. v. L.C.M.*, [2003] N.J. No. 315 (N.L.S.C.T.D.).

In *J.R.C.* the parties met in the United States. The mother began residing with the father in Louisiana, U.S.A., but both of their children were born in Newfoundland. For two years the parties and their children remained in Louisiana. Subsequently, the mother and the children, with the father's consent, visited Newfoundland. She did not return to Louisiana with the children as agreed upon. The mother claimed there was a grave risk of physical or psychological harm to the children or that they would be placed in an intolerable situation if returned. Also, one child indicated that she did not wish to return to her father. The mother testified that the father was abusive to her and rough with the children, which the father denied, although he admitted he demanded respect from the children. The father wanted the children returned to Louisiana, but he

did not wish to separate them from their mother. Thus, he was prepared to undertake not to enforce his immediate right to custody as long as the mother and children returned to Louisiana. The court ordered the children returned to Louisiana so that a full custody hearing could occur. The mother had not convinced the court that there was a grave risk to the children or that intolerable circumstances would be created if they were returned.

The point in time for the determination of whether there has been a wrongful removal or retention within the meaning of Article 3 is the time of the removal of the child. See *W.(V.) v. S.(D.)*, (*above*). If an order exists in another jurisdiction, it must be carefully examined. The existence of a stand alone ‘chasing order’ for custody issued after a child has been taken out of the jurisdiction does not make a removal wrongful. See *Thomson v. Thomson*, (*Above*).

Where an existing order governs custody and access and a parent removes the child from his/her place of ordinary residence without leave of the court, or, the required consent of the other parent, the act constitutes a wrongful removal in breach of rights of custody. See *H (A Minor), Re*, [1990] 2 F.L.R. 439 (Fam. Div.). If there has been a wrongful removal the court in Ontario is then required to order the return of the child to the state of habitual residence.

It is important to remember that a determination under the *Hague Convention* is not a final determination of custody. Article 16 clarifies that the state being asked to return a child “shall not decide on the merits of rights of custody”. Instead, the purpose and intent of the *Convention* is simply to restore the status quo, which existed prior to any abduction so that the full merits of custody can be determined in the jurisdiction where the child is habitually resident.

Circumstances in Which a Child Need Not be Returned to the State of Habitual Residence

If there was consent or subsequent acquiescence to the removal or retention of a child on the part of the requesting parent, then our courts have held that the return the child to his/her place of habitual residence is not required. The case *Katsigiannis v. Kottick-Katsigiannis*, [2001] O.J. No. 1598 (Ont. C.A.) stands for the principle that the test to determine the issues of acquiescence and consent is subjective and depends on the state of mind of the parent who allegedly acquiesced. However, if that parent behaved in a manner that indicated that the parent was not concerned with the prompt return of the child, then the court will disregard the claims of that parent that he or she did not subjectively intend to acquiesce.

Despite the provisions of Article 12, under Article 13 a court is not bound to order the return of a child if there is a grave risk that his or her return will expose the child to physical or psychological harm or otherwise will place the child in an intolerable situation. Where the person before the court does not have custody rights at the time of removal or retention the court will not order the return of the child once satisfied that;

13 (b) There is 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.

The Supreme Court decision *Thomson v. Thomson*, (above) is the leading case on child abduction in Canada. It establishes in general terms the interpretive framework in the decision making process under the *Hague Convention*. It specifically set out the threshold required to meet the

“harm” or “intolerable situation” envisioned by Article 13(b) of the *Convention*. In that judgment La Forest J. stated:

“The risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree...that not only must the risk be a weighty one, but that it must be one of substantial and not trivial, psychological harm. That, as it seems to me, is the effect of the word “or otherwise place the child in an intolerable situations.”

Accordingly our courts are directed to determine that both the grave risk and the serious harm to the child are substantial in order to refuse to return a child to his or her state of habitual residence even if wrongfully removed. The onus is on the party resisting the child’s return to prove on a balance of probabilities that the threshold in Article 13(b) has been met. The evidence must be considerable. See *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485 (Ont. C.A.) and *Kovacs v. Kovacs* (2002), 59 O.R. (3d) 671.

In *Pollastro* a father applied under the *Convention* for an order requiring the respondent mother return their child to California, U.S.A. The mother claimed that she had fled with the child from California to Canada because the father was violent with uncontrollable anger and was a drug user. The trial judge decided because of this risk of harm the child should not be returned to California.

In *Kovacs* a mother secretly, and without the knowledge of the child’s father, left Hungary with her child. She claimed refugee status for herself and on behalf of the child in Canada. She told the

Court that the child's father had physically abused her and the child. She claimed the state of Hungary was unwilling or unable to stop the abuse. The father, with reference to the *Convention*, asked the Court for the immediate return of the child to Hungary. The court refused to grant the father's request.

The Article 13(b) exception to the presumptive requirement to return a removed child is available when the reason for the child's removal was violence in the home directed at the parent who removed the child. See *Pollastro v. Pollastro* (above).

See also *Finizio and Scoppio-Finizio*, (Above), a decision of the Ontario Court of Appeal, where Macpherson J.A. gives an excellent analysis of the procedure to follow in a 13(b) application, and deals with the definition of "risk" in that Article of the *Convention*. This risk includes a grave risk of psychological harm or the risk of an intolerable situation for the child if returned. See *Kovacs v. Kovacs* (above), and *Chan v. Chow*, [2001] B.C.J. No. 904 (B.C.C.A.).

Miscellaneous Issues

In Canada the age of majority varies from province to province. In Ontario the age of majority is 18 years. Oftentimes support orders require parents to financially support dependent children well beyond the age of majority. Under the *Convention* it is interesting to note that a court has no jurisdiction to order the return of a child who has attained the age of 16 years.

Lastly, the *Convention* does not apply retrospectively. Therefore, the date of entry of a State is important as the *Convention* only applies “as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States” (Article 35).

Conclusion

Canada has played a leading role in an effort to eliminate international child abduction. Since coming into effect, our courts have treated the *Convention* extensively and a wide body of jurisprudence has evolved. The *Convention* has served as a valuable tool for our Canadian courts in an attempt to serve the best interests of children wrongfully removed from their jurisdiction. While the *Convention* is clear and precise, its application is often very difficult not only in application but in enforcement.

In addition to the Central Authorities activities under the *Convention*, Canada has initiated a unique program called ‘Our Missing Children’ to assist in the enforcement of judgments and orders. Under this program, the Royal Canadian Mounted Police (RCMP) and other government agencies operate a unit to locate and return abducted children. The RCMP also operates an

effective Missing Children's Registry to assist in the enforcement of judgments and orders directing the return of children.