

CBA L.@.W. SERIES

The Hague Convention & the
Role of the Child's Lawyer



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INFLUENCE. LEADERSHIP. PROTECTION.

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Agenda & Theme

Focus: Proceedings in Canada to return child

Topics to be addressed

1. Background & Purpose of Hague Convention on Child Abduction
2. Basic Concepts
3. Defenses & Facilitating Return
4. Objections of Child & Rights of Child
 - Role of Child's Counsel: Ethical & practice issues

❖ **Theme:** *Hague* proceedings are intended to be summary and not to directly address the interests of children, but children are profoundly affected by them. The *United Nations Convention on the Rights of the Child* and the *Charter of Rights* give children the right “to be heard” in these proceedings, and counsel for the child may have an important role in *Hague* proceedings.



I. Background & Purpose

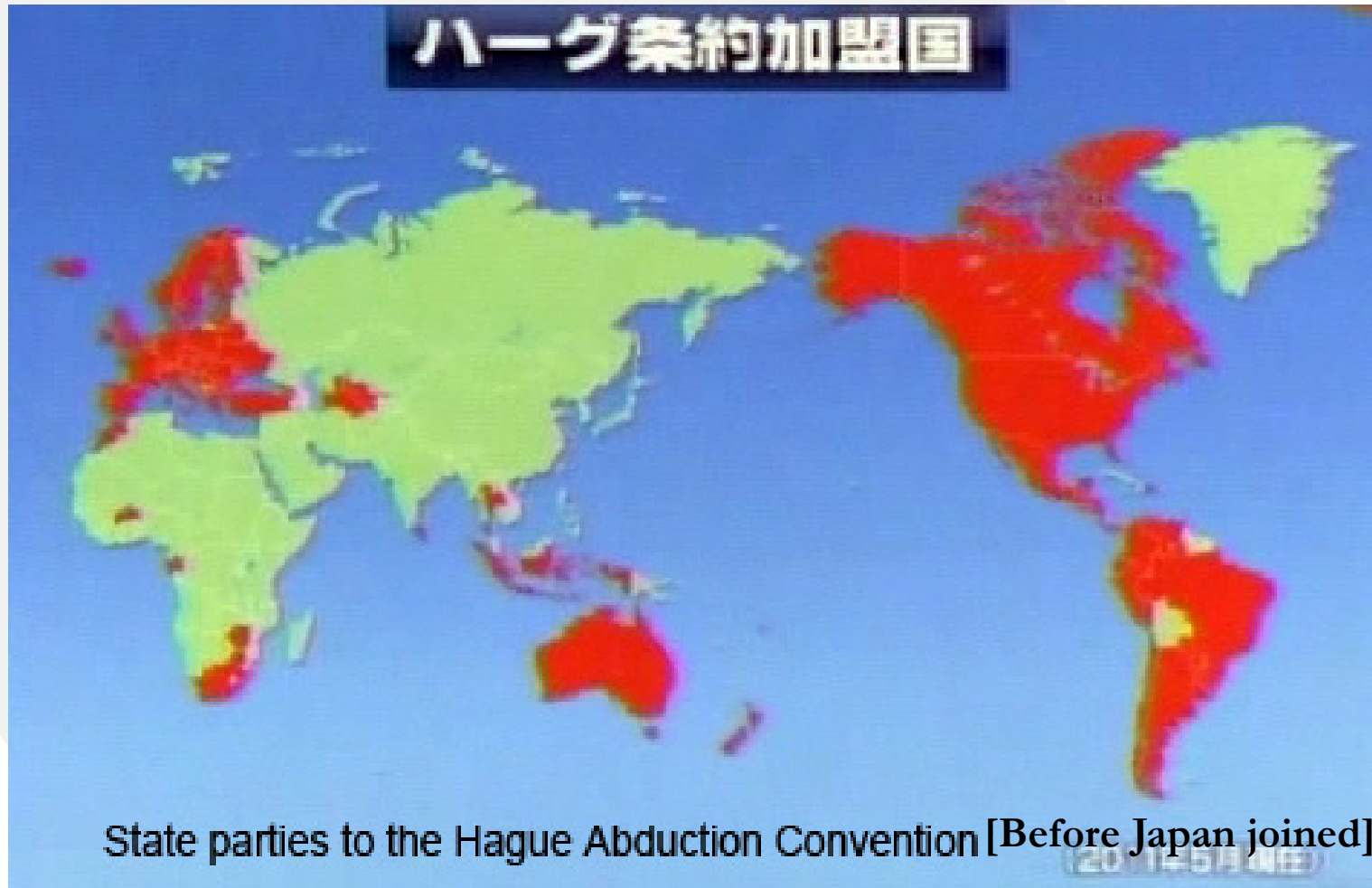


What is the Convention?

- ❖ international treaty
 - negotiated through Hague Conference on Private International Law
 - Canada signed in 1980
 - adopted by statute in each province & territory
- ❖ Over 50 countries have adopted



Hague Signatories – Japan joins April 1, 2014





Basic Principle & Purpose

- ❖ Purpose is to respond to and deter wrongful removal of children by a parent, especially in context of separation
- ❖ Requires return of children “wrongfully removed” in violation of “custody rights” to jurisdiction of “habitual residence”
- ❖ Best interest inquiry & litigation in jurisdiction of habitual residence, and respects for parental rights as determined in that jurisdiction



“Interests of children” NOT “best interests of child”

- ❖ "Other than in exceptional circumstances, the best interests of children in custody matters should be entrusted to the courts in the place of the child's habitual residence" and the interests of children who have been wrongfully removed are "ordinarily better served by immediately repatriating them to their original jurisdiction."
 - *JEA v CLM* (NSCA 2002)
- ❖ "Adhering to this philosophy ultimately discourages child abduction, renders forum shopping ineffective, and provides children with the greatest possible stability in the instance of a family breakdown."
 - 7 ■ *Cannock v. Fleguel* (Ont CA 2008)



Historical Context of HCCA

- ❖ In 1980 “primary concern was to remedy abuses by non-custodial parents who attempt to circumvent adverse custodial decrees”
 - ie mainly used by custodial mothers to address abduction by non-custodial fathers
 - This type of abduction not only violated rights of custodial parents, but was often highly emotionally damaging, hence rhetoric about harm to children



Present context

- ❖ Most often used by fathers with joint legal custody or similar rights to require return by primary care mothers (over 2/3 of cases)
- ❖ Are women and children being forced to return to live close to abusive fathers?
- ❖ New context gives “rise to issues which had not been foreseen by the drafters of the Convention.”
 - 2006 Special Commission
- ❖ What role for rights and wishes of children?
 - Convention on Rights of Child (1990)



Issues in Hague Proceeding

1. Is the child 16 years of age or younger? (Art. 4)
- 2 Was the child “habitually resident” in left-behind jurisdiction?
- 3 Did left-behind parent have “rights of custody” that were actually being exercised? (Art. 3(a))

If answers to these questions are YES, then “wrongful removal”

Is there an exception to return?

- Acquiescence or consent (1 year) (Art 12)
- Grave risk of harm from return (Art 13)
- Mature child objects (Art. 13)
- Would return violate fundamental human rights (Art. 20)



2. Basic Concepts



Art. 3: wrongful removal or retention

Article 3

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.

The **rights of custody** mentioned in sub-paragraph a) above, **may arise in particular by operation of law or by reason of a judicial or administrative decision**, or by reason of an agreement having legal effect under the law of that State.



“Right of custody”

- ❖ “Right of custody” defined by law of habitual residence
- ❖ ,Protect rights of parents with joint legal custody or rights arising upon separation without court order
- ❖ May be established even if there is no formal agreement or order on basis of *de facto* custody or common law or statutory rights of habitual residence
 - *Kirby v. Thuns*, [2008] O.J. No. 3586 (SCJ)



“right of custody” cont’d

- ❖ USA & UK cases have held that “right of custody” includes situation where there is an order preventing removal of child from jurisdiction (*ne exeat*) (Abbott USSC, 2012)
- ❖ In Canada, only protection if interim order of court preventing removal while pending proceedings (*Thompson, SCC, 1996 obiter dicta*)



What procedure: trial or motion?

- ❖ Hague proceedings are intended to be resolved quickly. Hague Secretariat encourages summary proceedings (no oral evidence, affidavits only)
- ❖ Trials take a longer time to schedule & hear; motions take less time to schedule and hear
- ❖ Hearing of oral testimony may be needed if there are “serious credibility” issues
- ❖ Ont CA suggest oral evidence only “exceptional cases.” But “expediency will never trump fundamental human rights.”
 - AMRI v KER, 2011 ONCA 417



Role of central authority

- ❖ Federal states, like Canada, have one in each province or state
- ❖ In some jurisdictions, Central Authority will make the Convention application in court for left behind parent (e.g New Brunswick), but in most jurisdictions role limited to assistance in locating child, providing advice and assisting with communication
- ❖ See Convention website for what each Central Authority will do:
 - ❖ www.hcch.net/index_en.php?act=conventions.authorities&cid=24



Habitual residence is not citizenship

- ❖ Citizenship does not determine the outcome. A child can be a citizen of a different state than the state of his or her habitual residence. The Convention returns children to their “habitual residence”, and not to their place of citizenship.
- ❖ This goes for parents as well. They do not have to be citizens of the place of habitual residence in order for the child to be returned there.
- ❖ Immigration status can complicate practice & returns. Abducting primary caregiver may not be able to return.



Habitual residence

- ❖ A child's habitual residence is tied to that of the child's custodian(s).
- ❖ 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.;
 - *Korutowska-Wooff v. Wooff*, [2004] O.J. No. 3256 (OCA)



Costs & Legal Aid

- ❖ Hague Convention Art 25 obliges countries to offer parties to Hague application same access to legal aid as nationals
- ❖ Applicant left behind parents can seek costs, that may include travel



3. Defenses & Facilitating Return



Delay Art. 12 & Consent or acquiescence – Art.13a

- ❖ Art 12 provides that if child is “settled in new environment” and 1 year or more before application, then court may decline to order return.
 - Knowledge of location is not essential, though may be a factor
- ❖ Art 13 (a) provides that if left behind parent has “consented” or acquiesced” to the move, then court may decline
 - “consent” or “acquiescence” require knowledge of relocation with child
- ❖ “some reasonable delay” in bringing *Hague* application does not mean “consent or acquiescence”
 - *Ibrahim v. Girgis*, [2008] O.J. No. 99 (OCA)



Grave Risk & Child's Objections: Art 13(b)

Hague Convention – Art 13(b)

“the judicial ...authority of the requested State is not bound to order the return of the child if the **person... which opposes its return establishes** that ..

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 judicial or administrative authority may also refuse to order the return of the child if it finds that the **child objects** to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”



Article 13b: Grave risk

- ❖ “Grave risk” of physical or psychological harm or “intolerable situation”
- ❖ Must be something more than “ordinary risk” and disruption of return to care of left behind parent
 - *Thomson v. Thomson*, 1994 SCJ 6
- ❖ War zone and civil unrest are reasons not to return child, but OK to return to Israel despite greater risk of terrorism
- ❖ Lower living standard not reason to refuse return



Grave Risk & Domestic violence: Art 13(b)

- ❖ In the 1980s, most Hague cases took a very narrow approach to Art 13(b). Generally accepted that courts fulfill the objectives of the Convention by narrowly interpreting the exceptions, and not allow “abducting parents” to litigate (or relitigate) the child’s best interests
- ❖ Now much greater recognition of harmful effects of spousal abuse on victims (mainly women) and their children.



Art 13(b) – Challenge of domestic violence cases

- ❖ How does taking parent satisfy the “onus” of establishing domestic violence occurred in another jurisdiction?
- ❖ How can applicant challenge allegations?
- ❖ How to assess whether the police and courts of the jurisdiction of habitual residence can adequately protect the victim and child if return ordered



Borisovs v Kubiles, 2013 ONCJ 85: Art 13(b)

- Mother, child & new partner came to Canada after former husband abused her, threatened to kill her, tried to burn down her apartment etc.
- Evidence that Latvian police and courts would not protect mother from violence of former spouse; suggestions of corruption in Latvia
- **Court accepts: Threat of harm to a primary caregiver is threat to a child.**
- OCL appointed clinical investigator & corroboration from independent sources and police reports in Latvia to help establish domestic violence . Failure of applicant father to fully co-operate with OCL affected his credibility
- Child is 8 years and interviewed by OCL investigator. Child expresses fear of father and reluctance to return. Her views “taken into account” – **overlap of evidence of facts from child and child “objects” to return**
- Usually onus on abducting parent to establish Art 13(b) defence. Presumption under the Hague Convention that requesting states can protect children and parents, but this presumption is rebutted as refugee status in Canada due to non-protection from domestic violence in Latvia.



Interim orders

- ❖ Interim access orders with the “left behind” parent in the requested jurisdiction
 - Need to ensure no “self-help” (supervision)
 - Evidence about contact with child during visits can be significant
- ❖ May need to ensure no further removal by taking parent
 - Surrender of passports
 - Require posting of bond



Role of undertakings, conditions & mirror orders

- ❖ Court making a Hague return order may seek “undertaking” from left-behind parent to not enforce custody order from original jurisdiction to minimize disruption to children upon
 - *Thomson v. Thomson*, [1994] SCJ 6
- ❖ Courts may also ask for undertakings regarding the practicalities of returning the child (paying for flights; interim support, etc.)
- ❖ There may be communication between courts (“on the record”) to facilitate information exchange or have “mirror image” interim order



Settlement & Facilitating Return

- ❖ Hague cases often resolved by negotiation or mediation
 - More control over timing & process for return
- ❖ Conditions for return may be part of settlement
- ❖ Undertakings or mirror orders

- ❖ In more contentious cases, whether settlement or court order, may need to involve Central Authority and child welfare authorities to facilitate return



4. Rights & Objections of Children: Role of Child's Counsel

..



Article 13: “child’s objections”

- ❖ Court may refuse to return child if it “finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”.
- ❖ Views of children 10 – 12 years can be very significant, even 8 or 9 yrs old may be considered, and must be more than wishes but actual “objection”.
- ❖ As with other exceptions, onus is on party seeking for the exception, and onus may be substantial.
- ❖ Concern about influence of taking parent if substantial time since other parent had much contact
- ❖ Views and experiences of child best introduced through court appointed psychologist or social worker.
- ❖ Evidence of child’s experience may also be significant



Child's right to participate: A.M.R.I. v K.E.R.,

- Mexican girl who has 13 years granted refugee status in Canada due to concerns about abuse by mother. Living with paternal aunt in Ontario.
- Mother brings Hague application in Canada. Father gets notice, but not aunt or girl. Hague application granted on “uncontested” basis and girl returned immediately with police assistance.
- Ont CA held that the girl’s Charter s. 7 rights were violated by lack of notice and opportunity to participate in HCCA case.
 - “An order of return under the Hague Convention has a profound and often searing impact on the affected child.”
 - Refugee order creates presumption that Art 13(b) grave risk to the child
- ³² Child was able to come on her own from Mexico to Ontario.



A.M.E.R. v K.E.R. , 2011 ONCA 417

“Given the strong commitment under the Hague Convention to expeditious proceedings and the need for the prompt return of an abducted child, this court has repeatedly recognized that the receipt of **viva voce evidence** on a Hague application should occur **only in exceptional circumstances....**

Where, however, serious issues of credibility are involved, fundamental justice requires that those issues be determined on the basis of an oral hearing... This applies with equal force to the determination of serious credibility issues in Hague applications involving refugee children. **Expediency will never trump fundamental human rights.”**



Alta CA - *R.M. v J.S.* (2013 ABCA 441)

- ❖ Mom lives in East Jerusalem with boy and has *de facto* custody. At age 9 boy has summer visit with Dad in Calgary and he does not want to return. Mom brings Hague application.
- ❖ Trial judge has counsel appointed for child. Counsel for child interviews the boy utilizing a series of questions provided to counsel by a child psychologist. Counsel concluded that the child objected “to being returned [to East Jerusalem] and has attained an age and degree of maturity at which it is appropriate to take account of its views”
- ❖ Counsel for both the child and the father raised arguments under Article 13 about both “grave risk” and the “child’s objections.” Trial judge accepts child’s objection argument. Affirmed by Alta QB
- ❖ Court of Appeal directs that the child be returned “forthwith” to the mother
 - Trial judge gave too much weight to views of child:
 - Trial judge rested his findings on the submissions of the counsel for the child and did not have “evidence” from a mental health professional.



Role of child's counsel in Hague proceedings

- ❖ Explain process to child and obtain views or instructions
- ❖ Retain a mental health professional to interview the child and testify in court about the child's views, perspectives, concerns and capacities;
- ❖ Adduce other evidence and cross-examine witnesses to advance the child's position;
- ❖ Discuss with the child and court whether it is appropriate for the child to meet the judge; and
- ❖ Make submissions on behalf of the child.



Role of child's counsel in Hague proceedings (2)

- ❖ Unless inappropriate, facilitate contact and visits with the left behind parent.
- ❖ Unless inappropriate, try to facilitate settlement



Conclusion

- ❖ With increased international mobility and “international marriages,” number of HCCA applications is increasing;
- ❖ Tension between *Hague Convention* with protection of rights of parent vs *Convention on Rights of Child* and *Charter* recognizing rights of child
- ❖ Courts & counsel need to be sensitive to role and rights of child. May require court to appoint counsel for child .



Questions or Comments





References & Sources

- The Incadat database on International Child Abduction is maintained by the Permanent Bureau of the Hague Conference on International Law and has extensive materials, including a database of cases from signatory countries and *Good Practice Guides*. <http://www.incatat.com>

Recent articles & books

- Bala & Maur, “The Hague Convention on Child Abduction: A Canadian Primer” (forthcoming 2014), *Canadian Family Law Quarterly*.
- Blitt & Biag, “Challenges Facing Counsel for children in the context of the Hague Convention” (Sept 2013), *International Bar Association Family Law Newsletter* 60-66.
- Lowe & Stephens, “Global Trends in the Operation of the 1980 Hague Abduction Convention”(2012), 46 *Family Law Quarterly* 41.
- Schuz, *The Hague Convention: A Critical Analysis* (Oxford UK : Hart Publishing, 2013)
- ³⁹Starr, “Preventing Parental Child Abduction — The Role of the Lawyer in Managing the Risk” (2013) 32 *C.F.L.Q.* 137.



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