International Child Abduction: How The Hague Convention On The Civil Aspects on International Child Abduction Operates in Canada

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Introduction

Mixed unions in Canada are growing five times faster than other couples, a new report from Statistics Canada shows. The 2006 census counted 289,400 mixed couples involving one visible minority and another non-visible minority or two people from different visible minority groups. That was a 33 per cent increase over 2001.[1] There were 360000 mixed-raced couples in 2011.[2]

In the UK headlines stating "Number of child abductions rises by 39 per cent in a year – Foreign Office, "are not uncommon.[3] Sharon Cooke from the UK abduction support charity Reunite, said:"Parental child abduction is becoming an increasing problem as the world is getting smaller and there are more mixed national relationships and marriages."[4]

The writer attended a roundtable discussion involving the Department of Foreign Affairs ("DFAIT") in Ottawa in 2009. The following statistical information was provided:[5]

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[1] http://www.canada.com/life/Mixed+marriage+couples+increasing+rapidly+Canada/29286.
[2] The Globe and Mail, October 3, 2016, Author: Zosia Bielski.
[3] http:www.telegraph.couk/news/uknews/7914799/Number-of-child-abductions-rises; by Caroline Gammell, July 28, 2010.
[4] Supra, footnote 4.
[5] DFAIT Consular Roundtable Discussion, Ottawa, 2009.

- **Between 2004 – 2009 DFAIT consular officers opened 823 new abduction / custody cases;**
- **In 2009 there were 669 active cases;**
- **Out of 335 consular / custody cases closed between 2003 – 2008, 192 were with Hague signatory countries, and 143 were with non-Hague countries;**
- **Canada is one of the top 10 countries making return applications to other countries and one of the top 5 countries receiving return applications from other countries;**
- **Out of DFAIT's active cases 65% are with countries that have acceded to the Hague Convention;**
- **As of August 1, 2016 there were 95 contracting states, which represents approximately 50% of the independent countries in the world today.[6]**

Statistics

Data collection with respect to International Child Abductions has not been consistent. Various organizations collect statistics on International Child Abductions, but none collect comprehensive national data about both Hague and non-Hague cases in Canada. Though the Federal Government does not maintain comprehensive national statistics with respect to the number of Hague Abduction cases, the Department of

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[6] International Movement of Children, Law, Practice and Procedure, 2nd, Nigel Lowe, and Michael Nicholls, Q.C., LexisNexis, 2016; http://www.worldatlas.com/nations.htm.

Justice compiles statistics with respect to Hague requests from Provincial and Territorial Central Authorities in preparation for special commissions of The Hague Conference and the Associated Statistical Surveys mentioned above.[7]

In 2008 Canada received 49 return applications and 13 access applications. This amounted to a 13% decrease in the number of return applications and an 18% increase in access applications from those received in 2003. In total the Canadian Central Authority dealt with 113 incoming and outgoing applications in 2008 which is a 17% decrease from the 136 in 2003.

The overall rate of return in the 49 return applications was 59% compared with 46% globally. This can be compared with the 2003 return rate of 42% and 60% in 1999.

Proportionately fewer applications received by Canada were judicially refused, pending or withdrawn compared with the global figures but more were rejected by the Central Authorities.

A judicial return took 137 days to conclude and a judicial refusal 121 days compared with the global averages of 166 days for a judicial return and 286 days for a judicial refusal.

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[7] Challenges and International Mechanisms to Address Cross-Border Child Abduction, Report of the Standing Senate Committee on Human Rights, July, 2015.

With regard to access applications, access was agreed or ordered in 42% of applications compared with 22% globally. A high proportion of access applications received by Canada were withdrawn, 42%, compared with 30% globally.[8]

Statistics collected by the RCMP Missing Children Registry indicate that 426 cases of victims of parental abductions were reported to police agencies in 1998, an increase of 8% from 1994.[9]

Parental abduction reports increased from 285 to 300 in 2008. 164 of the reports had a Custody Order in place and 136 had no Custody Order in place. 42% of the children were under the age of 5 years, 30% between 6 and 11 years and 28% between 12 and 17 years old. Elementary School aged children were more likely to be abducted than children over 12 years of age. Ontario had 143 reports, Quebec 69, Alberta 29 and British Columbia 25.[10]

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[8] Statistical Analysis Of Applications Made In 2008 Under The Hague Convention, Part III – National Reports drawn up by Profession Nigel Lowe, Cardiff University Law School, Preliminary Document No. 8 C of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention.

[9] http://www.justice.gc.ca/eng/dept-min/pub/fps-sfp/fpd/ch30.html

[10] 2008 Missing Children Reference Report by Marlene Dalley, Ph.D. Research Officer, National Missing Children Services, National Police Services, Royal Canadian Mounted Police.

How has Canada responded to this international problem?

Canada signed the Hague Convention[11] on October 25, 1980 and it came into force in Canada on December 1, 1983 just over 34 years ago.

The Canadian *Criminal Code* provides a criminal response to parental child abduction where there is a custody order in effect (s.282) and for situations where there is no custody order (s.283). In the latter case, consent of the Attorney General is required to prosecute the offence.[12]

Canada is a Federal nation and there is a Central Authority in each Province (there are 2 Central Authorities in Alberta, namely: Calgary and Edmonton) and Territory as mandated by the Hague Convention. While the Hague Convention was ratified by Canada in 1983, it still had to be brought into force by each province and territory in Canada, which occurred between 1983 and 1988. According to the 2008 statistics supplied by the Canadian Central Authorities to the Hague the majority of incoming child abduction cases to Canada came

[11] The Hague Convention on the Civil Aspects of International Child Abduction 1980.
[12] Supra footnote 5.

from the USA, the UK, Australia and France in descending order.[13]

Canadian Custody and Access Law

Custody and access law in Canada is governed by either the Federal Divorce Act, or by provincial legislation. In Alberta the provincial legislation is the Family Law Act. All orders whether made under the Divorce Act or the Family Law Act (the other provinces and territories have similar legislation) are governed by the "best interests of the children" test.

A person granted custody is responsible for the child on a daily basis and makes the major decisions on behalf of the child. The person granted access has the right to visit with and be kept informed about a child's health, education, religion, and general welfare. Federal and provincial legislation enables the courts to structure orders that meet the needs of the child. A court can make an order awarding sole or joint custody pursuant to either Federal or Provincial law. The *Alberta Family Law Act*, refers to parenting as opposed to custody. Therefore appropriate language to bring such an order in line with the Hague Convention would be advisable for enforcement purposes.

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[13] Supra footnote 8.

The distinction between custody and access has significant ramifications for a parent whose child has been abducted, as the Hague Convention return machinery does not mandate the return of a child for a violation of access rights. High conflict cases that require police intervention continue to use "custody and access terms" for clarity and to secure police assistance.

Hague Convention On The Civil Aspects of International Child Abduction

Scope of the Hague Convention

The main objectives are to secure the prompt return of children wrongfully removed or retained in any contracting state and secondly, to ensure that custody and access rights under the law of one contracting State are respected in other contracting States.

The Hague Convention is not intended to deal with the merits of a custody decision but to respect the custody decision of a jurisdiction in which the child resided prior to his or her removal, commonly referred to as "Habitual Residence." The

underlying premise of the Hague Convention is that the courts of the child's place of Habitual Residence are properly equipped to make the appropriate decision about that child's welfare.

How Does The Convention Operate

An application under the Convention is a summary application. Parties are not entitled to a full trial. The usual practice is to present evidence in affidavit and exhibit form. The Convention contains its own code and rules and is intended to be a mechanism for the expeditious enforcement of custody rights and is not intended to be a forum for the determination of custody on the merits. However, there have been exceptions in Alberta. One such case resulted in a lengthy trial involving a return application to France which was denied. The Alberta Court found that the French authorities would not be able to protect the child from sexual abuse, and therefore a defence under article 13(b) of grave risk of harm was upheld. The decision was by our now Associate Chief Justice John Rooke.[14]

[14] D.R. v. A.A.K. (2006) ABQB 286 (Alta. Q.B.).

The Convention is clear in Article 14 that evidentiary burdens and procedural irregularities are not to be an impediment. Article 14 states that:

> In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

The Central Authority in each contracting State is required to receive applications for the return of children and for access to children, to attempt to secure the voluntary return of the child, to provide general information about the child and the State's laws, to initiate necessary proceedings for the return of the child, to help secure legal aid to the parties, and to make the necessary administrative arrangements to secure the safe return of the child: Article 7.

Enforcement

The Convention requires contracting States to designate a Central Authority to discharge duties under Article 7 of the

Convention. In Canada a Central Authority has been designated for each province and territory and a federal Central Authority has also been established. For a list of not only Canadian Central Authorities but for those of other signatory countries, the Hague website is essential.[15] A person claiming that a child has been removed or retained in breach of custody rights may apply to the Central Authority of the child's habitual residence or the Central Authority of any other Contracting State, pursuant to Article 8, for assistance in securing the return of the child.

A court may not determine the issue of custody in the face of an application pursuant to the Convention. This is mandated by Article 16. In most cases the Central Authority will file what is called an "Article 16 Notice" with the court. A copy of such notices are attached.[16] As many judges are not familiar with the Convention, a judge may wish to make temporary orders for custody based on best interest criteria in the legislation of their own jurisdiction. This conduct is remedied by prohibiting the haven State from deciding the merits of the claim for custody of that child subject to the exceptions set out in the Convention. The Convention also mandates the expeditious return of the child to the Contracting State from

[15] http://www.hcch.net/index_en.php?act=conventions.authorities&cid=24.
[16] Appendix A.

which the child was taken. Pursuant to Article 11, if a judicial or administrative decision has not been reached within 6 weeks from the date of the commencement of the proceedings an explanation for the delay may be requested. Although courts are seldom in a position to finally determine a Hague application in this time, this Article is used to ensure the courts deal expeditiously with these cases.

Counsel usually includes this relief in their pleadings by reminding the court that there is no jurisdiction to make any custody orders until the court has determined whether or not the Convention applies.

If an order is obtained returning the child, the parent has the option of not returning with the child as the court can only order the return of the child under the Convention. An order is usually requested that the police in the jurisdiction where the child is located assist in the enforcement of the order to return the child and for an order that the child's passport or other travel documents be returned to the applicant parent to assist in making arrangements for the child to return to the country of its habitual residence. The writer was involved in a high conflict abduction from Hawaii by the mother of the couple's daughter. The mother and child had been living in Fiji

(non-Hague signatory at the time of the application). Through a tip the father, who was still in Hawaii, learned that the mother was coming with the child to Calgary with the daughter for a family wedding. The Court gave an emergency order enabling the police to intercept the mother when she arrived at the Calgary airport and the child was placed into the Central Authority's protective custody pending the Hague hearing. The ultimate result was that the father was successful and the child was ordered returned to Hawaii. The mother chose to accompany the child, and due to the high risk to re-abduct, mother was accompanied by a retired police officer to Hawaii.[17]

Terminology and Structure of the Convention

The following is a brief overview and summary of the Convention.

(i) "rights of custody"

[17] K.J.G. v. K.J.B. [2000] A.J. 290 (Alta. Q.B.) also referred to as Guerrero.

The Convention applies where there has been a "wrongful removal" or "wrongful retention" of a child. A wrongful removal occurs where a party takes a child from the jurisdiction that is the child's habitual residence. A wrongful retention occurs when a child is retained outside the habitual residence, beyond a time agreed upon by the parties or set out in a court order. For example, a wrongful removal is typically without any notice to the left behind parent. A wrongful retention occurs commonly when the left behind parent agrees to the child going abroad for a short holiday or visit.

Article 3 of the Convention states that:

The removal or retention of a child is 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 the removal or retention, those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

"Rights of Custody" are defined in Article 5 as follows:

For the purpose of the Convention:

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular the right to determine the child's place of residence:

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Article 3 states that "rights of custody" may arise by operation of law or by reason of judicial or administrative decision or a legally binding agreement under the law of the relevant State. It is important to note that the Convention speaks in terms of "rights of custody" which is different from the term "custody" as understood under both Canadian federal and provincial legislation. Article 3 also provides that "rights of custody" may be attributed to an "institution or any other body". Therefore once litigation has commenced regarding custody of a child, the removal of that child will be found to be "wrongful" as the "rights of custody" flow to the institution, namely the court.

The most common scenario is the situation where parents are living together and both are exercising parental care and control of the child and one parent leaves with the child. In most jurisdictions, both parents are equally entitled to custody until the Court orders otherwise or the parties enter into an agreement varying the custody arrangements. In Canada, the leading case of *Thompson v. Thompson* [1994]

3S.C.R.551 (Supreme Court of Canada) outlined the situations where the Convention applies as follows:

> 48 It by no means follows, however, that the Convention applies to every case where a child is removed from one country to another where a court order prohibits it. From the emphasis placed in the Convention and the preparatory work on the enforcement of custody, as distinguished from mere access, the proper view would appear to be that the mandatory return dictated by the Convention is limited to cases where the removal is in violation of the custody rights of a person, institution or other body. That is the view adopted by Anton, supra, at pp. 546 and 554-55, who stated:
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> It is clear also from the definitions of custody and access in Article 5 that the removal or retention of a child in breach merely of access rights would not be a wrongful removal or retention in the sense of Article 3.
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> . . .
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> The Convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and is so taken deliberately with a view to render the further enjoyment of access rights impossible.

In practice, these situations can become quite complex because "rights of custody" are determined in accordance with the law in the originating country. In the actual Hague Application that is sent by the requesting state, the "rights of custody" that have been breached are set out. Most applications also include the corresponding operational law from the requesting state. An example of a statement of law prepared by the Central Authority in Ontario is attached.[18]

[18] See Appendix "B".

However, a parent who has removed a child is not precluded from disputing the issue of whether or not "rights of custody" were breached. Sometimes a contrary interpretation of the law is argued based on a legal opinion from a lawyer in the requesting state. If there is any confusion or dispute as to whether or not there was a breach of "rights of custody" or any other question with respect to the wrongful removal or retention, a declaration may be requested from the requesting state under Article 15 which states:

> The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

The writer recently assisted counsel in securing the return of the couple's six year old son to Canada, who had lived equal amounts of time in both Canada and the United States (Minnesota). The Minnesota's Court's decision ultimately focussed on the last joint intention of the parents as to where their son's home was-Alberta, Canada. The parents had never married and the law regarding custody of a child born out of wedlock had undergone a transition after the child's birth. A careful analysis of the law of Alberta was undertaken and provided to counsel in Minnesota.

In the decision of *Thompson v. Thompson*, the Court adopted a quote from Lord Donaldson M.R. from the case of C. v. C., with respect to the difference between the term custody and rights of custody:

> 'Custody', as a matter of non-technical English, means 'Safe keeping, protection; charge, care, guardianship' (I take that from the Shorter Oxford English Dictionary); but 'rights of custody' as defined in the convention includes a much more precise meaning, which will, I apprehend, usually be decisive of most applications under the convention. This is 'the right to determine the child's place of residence'. This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right, in so far as the child is to reside in Australia, the right being that of the mother but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the convention. I add for completeness that a 'right to determine the child's place of residence' (using the phrase in the convention) may be specific, the right to decide that it shall live at a particular address, or it may be general, e.g. 'within the Commonwealth of Australia'.

(ii) Habitual Residence

There is no definition of habitual residence in the Convention. This appears to have been a deliberate decision. The concept of "habitual residence" refers to that place that is the focus of the child's life, where the child's day-to-day existence is centered and this is a factual determination. A finding of a child's habitual residence can be determinative in a case. Because if the child is already located in the country of its

habitual residence then the Convention does not apply and the child would not be mandated to be returned to another jurisdiction.

The term "habitual residence" has undergone a significant change in England as a result of several cases that have come before the UK Supreme Court. It remains to be seen whether the Alberta Courts will divert from Alberta Precedent.

The law in Alberta with respect to "habitual residence" has been outlined in the following cases. Now Associate Chief Justice Rooke in *Proia v. Proia*, [2003] A.J. No. 846 (Alta QB)[19] stated as follows:

> **27 Counsel for Ms. contended (Transcript of Proceedings on February 20, 2002, at 49/18-24) that "habitual residence" means**
>
> > **... the child's usual home or where the child's life is centered. One parent cannot unilaterally change the child's habitual residence by relocating the child.[15] In most, if not all cases, habitual residence will be the place where the child lived with his or her parents in a family setting before the breakdown of the marriage....**

[19] *Proia v. Proia*, [2003] A.J. No. 846 (Alta QB).

I agree with that definition, which is in accord with the case law and commentary referenced, and I find that it applies to the children in this case in Alberta from June 27, 2000.

More recently the Alberta Court of Appeal in *A.S. v. A.W.*, [2013] A.J. No. 316 (Alta CA)[20] made the following observation about "habitual residence:"

> **19 Courts determining where a child is habitually resident all agree that the question is heavily fact-based. The United States Court of Appeals for the Second Circuit in its decision in *Gitter v. Gitter*, 396 F 3d 124 (2nd Cir 2005), relied upon by the appellant, reviewed cases which have held, for example, that habitual residence is to be determined on a "case-by-case basis" after a "fact specific inquiry". In *Mozes v. Mozes*, 239 F 3d 1067, 1073-81 (9th Cir 2001) at para 12, the court explained that the Hague Convention deliberately left "habitual residence" undefined to avoid "idiosyncratic legal definitions of domicile and nationality" which would undermine uniform application of the Convention and encourage forum-shopping by would-be abductors. Courts have interpreted the expression "habitual resident" according to the ordinary and natural meaning of the two words as "a question of fact to be decided by reference to all the circumstances of any particular case": *C. v. S*, [1990] 2 All E R 961 at 965 (Eng H L).**

Courts in the United States have developed three primary but divergent approaches to determine the "habitual residence"

[20] *A.S. v. A.W.*, [2013] A.J. No. 316 (Alta CA).

of a child in a Hague Case. The first approach focuses primarily on parental intention. The parents "last mutual intention" regarding their child's habitual residence is presumed to be controlling, although the presumption can be rebutted in exceptional cases.

The second approach is the "child centered approach." Here the courts look exclusively at the child's objective circumstances and past experiences. The inquiry does not consider parental intent which is deemed entirely irrelevant in determining the child's habitual residence.

The third approach, requires a mixed inquiry into both the child's circumstances and the shared intentions of the child's parents.[21]

The issue of Habitual Residence was determinative in the Proia Case where the father was unsuccessful in his application to compel the return of his two sons to France. The parties had been living in France where the children were born. The joint decision was made to move to Alberta, Canada. The mother and children relocated, and despite the

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[21] The Hague Abduction Convention, 2nd Ed., Jeremy Morley, 2016 American Bar Association, @ pages 84 to 86.

father visiting he unilaterally chose to remain in France. In support of his Hague application he alleged a fraudulent conspiracy on the part of the mother to convince him to allow the move to Alberta (where the mother was from originally) so that she could then separate and take up with another man. The court found the evidence to be contrary to that allegation and denied the father's application with a significant costs penalty against the father.[22]

(iii) Effect of Non-Removal clause

Frequently court orders or agreements between parents have a clause that a child shall not be removed from his or her habitual residence without the written consent of the other parent or court order permitting the removal. The effect of such clauses is still debatable in Canada. In *Thompson v. Thompson,* the Court held that the effect of such a clause where there was a temporary custody order meant that the Court still retained jurisdiction to deal with the issue of residence and therefore the institution still retained rights of custody.

[22] Supra footnote 19; the father was ordered to pay costs of $18,000.00.

The Court left open the issue of the effect of such a clause in a final order of custody but implied that if one parent had final custody even if there was a non-removal clause, the other parent was then an access parent only and the Convention would not require the mandatory return of the child. The court held as follows:

64 It seems to me that when a court has before it the issue of who shall be accorded custody of a child, and awards interim custody to one of the parents in the course of dealing with that issue, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence. It has long been established that a court may be a body or institution capable of caring for the person of a child. .....

65 This Court heard no evidence on the legal effect under Scottish law of the insertion of the non-removal clause in the interim custody order granted to Mrs. Thomson on November 27, 1992. Therefore we must interpret the clause without aid, from general principles and by analogy to Canadian law. Under Canadian law, a non-removal clause may be placed in an interim order of custody to preserve the court's jurisdiction to make a final determination of custody. It seems to me that when a court is vested with jurisdiction to determine who shall have custody of a child, it is while in the course of exercising that jurisdiction, exercising rights of custody within the broad meaning of the term contemplated by the Convention. In the words of Article 3(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". As noted earlier, the travaux préparatoires envision this situation.

66 .....it seems clear that the non-removal clause was inserted into the custody order of November 27, 1992 to preserve jurisdiction in the Scottish court to decide the issue of custody on its merits in a full hearing at a later date. Thus the Scottish court became "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" having custody rights within the meaning of Article 3. The preservation of the access rights of the respondent would be merely a corollary effect of the clause. The appellant's removal of Matthew therefore constituted a breach of the custody right of the Scottish court within the meaning of Article 3 of the

Convention. Article 12 of the Convention, therefore, charges this Court to order his return "forthwith".

67 It will be observed that I have underlined the purely interim nature of the mother's custody in the present case. I would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody. Such a clause raises quite different issues. It is usually intended to ensure permanent access to the non-custodial parent. The right of access is, of course, important but, as we have seen, it was not intended to be given the same level of protection by the Convention as custody. The return of a child in the care of a person having permanent custody will ordinarily be far more disruptive to the child since the child may be removed from its habitual place of residence long after the custody order was made. The situation also has serious implications for the mobility rights of the custodian.

However, the British Columbia Court of Appeal in *Thorne v. Dryden-Hall* (1997) 28 R.F.L. (4th) 297, held that a non-removal clause in a final custody order will be considered a "custody clause" and will be enforced under the Convention. The case was not further appealed to the Supreme Court of Canada. The United States Supreme Court also recently held that a non-removal clause would be considered to provide a "right of custody" to trigger a return under the convention, as it allows for control over the residence of the child: *Abbot case.*[23] Many litigants are now requesting that courts insert such clauses and also requesting orders of joint custody in an attempt to prevent one of the parents abducting the child and then circumventing the provisions of the Convention. Another option adopted by the writer is to include a provision in a

[23] Abbott v. Abbott 1305 S. Ct. 1983 (2010) See excellent analysis of other countries' courts on this issue on the Hague website- http://www.incadat.com/index.cfm?act=search.detail&cid=1029&lng=1&sl=2

court order or agreement, indicating that the rights of the parent in question are in fact "rights of custody within the meaning of the Hague Convention." This writer has yet to see the reaction of the Canadian Courts to such a provision.

EXCEPTIONS TO THE MANDATORY RETURN OF A CHILD

Most of the litigation in Hague Convention cases is a result of a party submitting that the Convention should not apply as the facts fall within one of the exceptions to the mandatory return policy. The burden is on the parent who opposes the return to establish the defence by "a preponderance of the evidence." This burden applies to all the defences except the Grave Risk of Harm. It has generally been accepted that the exceptions should be stringently applied so as to not undermine the goals of the Convention by looking for ways to prevent its application other than those set out in the Convention itself.

The exceptions are as follows:

(a) Grave Risk of harm:

This exception is the most frequently argued. There must be evidence to establish that there is "a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". Article 13(b). The burden to establish this defence is higher than the typical evidentiary burden of "balance of probabilities" or "a preponderance of the evidence", which falls upon the left behind parent. This defence requires "clear and convincing evidence."[24]

In *A.M.R.I. v. K.E.R. 2011* ONCA 417, a case out of Ontario Canada, it was stated that a "child's refugee status gave rise to a rebuttable presumption that her return to Mexico [the habitual residence] would expose her to a risk of persecution and, hence, to risk of harm within the meaning of Article 13(b) of the Hague Convention".[25] The case discussed the interplay between Canada's international obligations under the Hague Convention on the one hand, and the protective provisions of the Refugee Convention on

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[24] Husid v. Daviau [2012] O.J. No. 380 at para. 104.
[25] *A.M.R.I. v. K.E.R.*, 2011 ONCA 417 at para 94.

the other. While acknowledging that neither Convention refugee status, nor a claim for such status displaces Canada's obligations under the Hague Convention, the court also held that "While several cases have confirmed, correctly, that neither Convention refugee status nor a claim for such status displaces Canada's obligations under the Hague Convention, none holds that Canada's non-refoulement obligations are irreconcilable with its obligations under the Hague Convention."[26] After analysing the former interplay with Canada's obligations, and ruling that a rebuttable presumption arose in the case where the child has been granted refugee status, the court went on to say: "... on an application for the return of a refugee child under the Hague Convention, the child's s. 7 Charter rights mandate that a risk assessment be performed regarding the existence and extent of any persisting risk of persecution to be faced by the child on return from Canada to another country."[27] The risk assessment would aid in the ultimate decision of the court.

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[26] ibid at para. 79.

[27] ibid at para. 99.

The Court thus made its findings not on the mere grant of the refugee status, but on the evidence that was submitted and considered in the granting of the refugee status.

In a more recent case out of the United States, *Sanchez v. R. G. L.* 761 F.3d 495; 2014 U.S. App. LEXIS 14849, the Court of Appeal discussed, "whether the children's asylum grant should be considered by the district court"[28] in determining whether the children should be returned to their habitual residence. In its amicus brief, the Government advanced the position that a grant of asylum is not dispositive of, but is relevant, to whether either the Article 13(b) or 20 exception applies.[29] The Court of Appeal ruled that "the asylum grant does not supercede the enforceability of a district court's order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland Security...."[30]

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[28] *Sanchez v. R. G. L.* 761 F.3d 495 (2014) at pg 12.

[29] Ibid.

[30] ibid

Since the asylum finding had not been made until *after* the District Court's hearing, the Court of Appeal remanded the case back to the District Court for reconsideration of whether the Article 13(b) or 20 exception applies. Reconsideration was ordered in light of the grant of asylum, which was new evidence not considered by the district court in its initial hearing. Since the children had now been granted asylum, all available evidence from that proceeding was to be considered by the district court before determining whether to enforce the return order. The mother, who had filed the initial petition for return, eventually withdrew her request for the return of the children, and the question of return became moot at the re-hearing[31].

Recent cases involving children who are granted refugee status in the abducted county, have set a precedent that while the granting of asylum is important for the Hague Convention hearing, it is not dispositive of the case. Courts have

[31] *Sanchez v. Sanchez* 2015 U.S. Dist. LEXIS 68682.

frequently stated that the evidentiary burdens in the asylum proceedings are different, and often lower than the evidentiary burden under the Hague Convention. The prior consideration of a risk of harm in a different forum is relevant; however, it does not abdicate the trial court's duty to make controlling findings on the potential "grave risk of harm" to the child. The ultimate decision to allow or refuse a return of the child under the Hague Convention requires a separate analysis pursuant to the Hague Convention itself, and based on the obligations under the treaty, this job cannot be delegated to the asylum granting bodies. While there is interplay between the granting of refugee status and the grave risk of harm defence under the Hague Convention, each requires a separate analysis; the finding of refugee status is relevant but not conclusive to a finding of grave risk of harm.

The Supreme Court of Canada in *Thompson v. Thompson,* adopted the following test with respect to the "grave risk of harm" exception:

80 It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation. Examples of cases that have come to this conclusion are: Gsponer v. Johnstone (1988), 12 Fam. L.R. 755 (Fam. Ct. Aust. (Full Ct.)); Re A. (A Minor) (Abduction), [1988] 1 F.L.R. 365 (Eng. C.A.); Re A. and another (Minors) (Abduction: Acquiescence), [1992] 1 All E.R. 929 (C.A.); Re L. (Child Abduction) (Psychological Harm), [1993] 2 F.L.R. 401 (Eng. H.C. (Fam. Div.)); Re N. (Minors) (Abduction), [1991] 1 F.L.R. 413 (Eng. H.C. (Fam. Div.)); Director-General of Family and Community Services v. Davis (1990), 14 Fam. L.R. 381 (Fam. Ct. Aust. (Full Ct.)); and C. v. C., supra. In Re A. (A Minor) (Abduction), supra, Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 372:

. . . 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 words 'or otherwise place the child in an intolerable situation'.

81 I hasten to add, however, that I do not accept Twaddle J.A.'s assessment that the risk contemplated by the Convention must come from a cause related to the return of the child to the other parent and not merely from the removal of the child from his present caregiver. As this Court stated in Young v. Young, [1993] 4 S.C.R. 3, from a child centred perspective, harm is harm. If the harm were severe enough to meet the stringent test of the Convention, it would be irrelevant from whence it came. I should observe, however, that it would only be in the rarest of cases that the effects of "settling in" to the abductor's environment would constitute the level of harm contemplated by the Convention. By stating that before one year has elapsed the rule is that the child must be returned forthwith, Article 12 makes it clear that the ordinary effects of settling in, therefore, do not warrant refusal to surrender. Even after the expiration of one year, return must be ordered unless, in the words of the Convention, "it is demonstrated that the child is now settled in its new environment".

One of the frequently quoted cases that dealt at length with the grave risk of harm defence was the case of *Pollastro v.*

***Pollastro*, [1999], O.J. No. 911**[32] **a case of the Ontario Court of Appeal.**

The Canadian position seems to be in accord with many of the Hague signatory countries such as the United States, the UK, and Australia.

(b) Human Rights Issue:

The return of the child "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" Article 20.

This provision was intended to deal with the rare occasion when the return of the child would utterly shock the conscience of the court or offend all notions of due process. In *Borisovs v. Kubiles*, [2013] O.J. No. 863[33] **the Ontario Court of Justice stated as follows:**

> 49 **In the case at bar, the applicant is the perpetrator of the abuse which has resulted in the child's presence in Canada. The respondent and child would face a risk of serious harm in Latvia. State protection would not be reasonably**

[32] Pollastro v. Pollastro, [1999], O.J. No. 911.
[33] Borisovs v. Kubiles, [2013] O.J. No. 863.

forthcoming. Ordering the child's return in these circumstances is not permitted by fundamental Canadian principles relating to the protection of human rights and fundamental freedoms. The exception under Article 20 has been established.

However, there is no reported case in the United States in which a court did not return a child to the habitual residence based on Article 20.[34]

(c) More than one year:

If more than one year has elapsed from the date of the alleged wrongful removal or retention and the child is now settled in the new environment the court is not mandated to return the child: Article 12. See the decision of Madam Justice *Moen in Mauna v. Astorga*, [2011] A.J. No. 464 (AltaQ.B.)[35] **where she states:**

> 21 **It is the interpretation of Article 12 that is at issue before this court. In order for Mr. Mauna to have validly filed his March 1, 2011 application in less than one year, he would have had to have been aware that the children had been wrongfully retained in Canada on March 2, 2010 or later:** *Thomson v Thomson*, **[1994] 3 SCR 551, 119 DLR (4th) 253 at para 83,** *M.(V.B.) v. J.(D.L.)*, **2004 NLCA 56, [2004] 240 Nfld & PEIR 147;** *Blanc v Morgan*, **2010 WL 2696 791 at para 10 (US Dist Ct, Tennessee);** *Hamel-Smith v Gonsalves*, **2000 ABQB 269, 185 DLR (4th) 713 at para 39;** *Lozinska v Bielawski* **(1998), 56 OTC 59 at para 5 (Ont HC) (QL);** *Astudillo v Bayas*, **(1997), 28 OTC 389 at para 6 (Ont HC) (QL).**

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[34] Morley, Supra, footnote 21 at page 252.

[35] Mauna v. Astorga, [2011] A.J. No. 464 (AltaQ.B.).

The time starts to run from the moment the child is wrongfully removed or when the child has been wrongfully retained. It should also be noted that an application under the Convention does not require that the exact location of the child in the destination country has been determined. It is critical to file the Application for Return in the requested state to avoid missing this important limitation under Article 12.

(d) Not exercising custody rights:

The applicant parent was not actually exercising his or her custody rights at the time of removal or retention: Article 13(a).

In a recent British Columbia Supreme Court decision, the Court held:

29 In *Friedrich*, the Court stated:...

- [I]f a person has valid custody rights to a child under the law of the country of the child's habitual residence, that person cannot fail to "exercise" those custody rights under the Hague Convention short of

acts that constitute clear an unequivocal abandonment of the child. [Emphasis added.][36]

Exercising custody rights is a matter of fact in each case. But as these cases generally proceed by affidavit evidence and the burden is on the parent opposing the return this may be difficult to prove.

(e) Consent:

The applicant parent had consented to or subsequently acquiesced to the removal or retention of the child: Article 13(a).

Once again this is a factual determination. The writer was involved in a case where this exact issue arose. The father alleged that the mother surreptiously removed the two daughters from England to Alberta without his knowledge or consent. The conflicting affidavit evidence established that the mother had advised the neighbours not to tell their husbands that the mother was selling the couple's furniture and moving (the parents were separated at the time). The mother alleged that the father told her she could leave England with the children as he was going to start a new life

[36] Medina v. Pallett [2010] B.C.J. NO. 337 (B.C.S.C.).

with another woman. The father denied this and argued many statements were said to each other in anger. What may have been determinative is a sworn statement from the children's nanny in England that she overheard the father tell the mother she could move. The father lost at the initial hearing, and just prior to the Appeal, the parties settled all of their issues in the London Courts and the father agreed to abandon the Appeal and allow the mother and children to remain in Canada.[37] As an aside one of the daughters upon reaching her 15th birthday elected to leave her mother's residence in Alberta and to move to her father's home in London, England.

(f) Age limit:

The Convention only applies if the child is under the age of 16:

Article 4.

The convention ceases to apply once a child has reached the age of 16. In a recent case of *Szabo v. Radi*, AltaQ.B., Action No. FL01-23324, while it was clearly established that the father wrongfully removed his son from Hungary to Canada, and was a fugitive from a prison sentence in that country, the court declined to order the return of the child given that he

[37] Zimmerhansl v. Zimmerhansl [2001] A.J. 896 (Alta. Q.B.)

was turning 16 years of age within a month of the conclusion of the Hague hearing and was adamant that he did not want to be returned to his mother's care in Hungary. The case is unreported.

(g) Child's objection:

A child need not be returned if 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 13 (b)

To determine this exception what is the test and how are the views of the child "objectively" put before the court? No age limit is included so it is up the the individual judge to determine if a child has the maturity at which it is appropriate to take into account his or her views. In Alberta there is a reluctance by judges to personally interview a child in order to ascertain the child's views. However in a case the writer was involved in the Judge in Alberta did just that. He interviewed a rather mature 15 year old girl who professed a desire not to return to her grandfather's home in the United States. The Judge satisfied himself that the child had been unduly influenced by her father with gifts and her views were not appropriate to take into account. In the above-mentioned

Szabo case, Madam Justice Anderson interviewed the 15 year old boy at length, in the court, without counsel or the parties present, and produced the record of the interview for counsel after the interview. In this writer's experience such interviews with a Justice in Alberta are rare. In Alberta, the Court has jurisdiction to appoint counsel for the child to determine the child's true wishes in accordance with the criteria in the Convention. It is becoming more common to have the court appoint counsel for the child. In fact both parents do not have to be in the jurisdiction to be interviewed, and in recent cases the writer has been involved with, the interviewing psychologist has been able to speak to the left behind parent by telephone or other electronic means. Recently the role of the children's lawyer has been limited in Alberta, in Hague Convention cases such that the Alberta Court of Appeal now requires counsel for the child to put the wishes of the child to the court through an expert, usually a psychologist or social worker. There are limited exceptions to putting the child's wishes through an expert.[38]

UNDERTAKINGS

[38] Den Ouden v. Laframboise, [2006] A.J. No. 1605 (Alta CA) and RM v. JS, [2013] ABCA 441.

Courts in all jurisdictions have recognized and the Convention sanctions the use of undertakings by parties to deal with the transitional period between the court making a return order and the time in which the children are placed before the court in the country of their habitual residence. Courts have frequently and appropriately used such undertakings to alleviate the emotional impact on the child and the financial impact of requiring an absconding parent to return to the child's habitual residence. The use of undertakings can provide a number of safeguards and protective measures. These may include the following requirements:

(a) The applicant pay for the respondent and child to travel to the country where the child habitually resides;

(b) The applicant make appropriate housing arrangements for the respondent and the child in the country where the child habitually resides;

(c) The applicant pay the living expenses or spousal and child support for the respondent and child in the country where the child habitually resides

(recognizing the absconding parent, although acting wrongfully, will have economic needs that must be met in the short term);

(d) The applicant commences an application to determine the custodial rights of the child(ren) immediately, if it has not already been commenced. If such a proceeding has been commenced that the applicant arrange an immediate court date;

(e) The applicant not assume custody of the child if he or she obtained a custody order from the court in the child's habitual residence after the wrongful removal or retention or a return to the pre abduction status quo custodial arrangements;

(f) An order that the applicant have no contact with the respondent if the respondent returns to the country of the child's habitual residence;

(g) An order that the applicant have no contact with the child except through an order of the court in the child's habitual residence;

(h) Provisions that neither party molest, annoy or harass the other parent;

(i) Provisions that a parent refrain from the use of physical discipline, alcohol or drug use while the child is in the care of the parent;

(j) A provision to temporarily stay the enforcement for the return of the child pending completion of the child's school year or the ability of the absconding parent to make travel arrangements;

(k) If the Applicant has caused criminal proceedings against the Respondent, that those proceedings be abandoned prior to the return of the Respondent to the country of habitual residence;

(l) **The Court or a neutral party retain all the passports of the Applicant, Respondent and child(ren) pending the conclusion of the custody proceedings in the country of habitual residence and the children not be removed from the jurisdiction of the court of habitual residence.**

A Brief Word About Direct Judicial Communication

Canadian judges communicate directly with courts and judges in other jurisdictions involving allegations of international child abduction. This is often the case when there are concurrent proceedings relating to the same family in each jurisdiction. The writer was recently involved in a cross-border case involving children wrongfully retained in Utah by the mother. The Alberta Judge initiated the communication by contacting the Utah Judge and having the discussion recorded and available for the parties. The discussion led the Utah Judge to the conclusion that proceedings were best left to the Courts in Canada where the children had been living for most of their lives. Judicial communication has been sanctioned by the Canadian Courts.[39]

[39] Hoole v. Hoole, [2008] BCSC 1248 (Justice Donna Martinson).

The British Columbia Supreme Court since 2004 has had in place guidelines for such communication: *Guidelines Applicable to Court to Court Communication in Cross-Border Cases.*[40] Briefly what is direct judicial communication? In Canada it involves:

- **Concurrent proceedings in two different jurisdictions (for the sake of this discussion International Borders although Judges can communicate from different jurisdictions within Canada);**
- **Communication between two Judges;**
- **Within the knowledge of the parties;**
- **Usually within a joint hearing with the parties and their counsel present;**
- **With a purpose to harmonize and coordinate the proceedings;**
- **The Communications do not relate to the merits of each case;**
- **Safeguards to ensure the process is fair and does not interfere with judicial independence of either court;**

[40] www.courts.gov.bc.ca

- **The Canadian approach follows international guidelines developed by Special Commissions convened by the Hague Conference on Private International Law.[41]**

The Canadian approach to direct judicial communication in child custody cases has received international support. The Chief Justice of the Australian Family Court, Diana Bryant, said of the British Columbia judgment in *Hoole:*[42]

> ....[the] Judgment in Hoole v. Hoole [2008] BCSC 1248 is considered particularly noteworthy for its forceful and cogent articulation of the advantages of direct judicial communication. As [the Court] stated, "By communicating directly between judges, courts are fulfilling their mandate under the Hague Convention, or its equivalent, to cooperate to facilitate the prompt and safe return of children. [Judicial Communication] leads to the making of fair, impartial, timely, and well-informed decisions by the judge who should be making the decision, applying the laws of that judge's jurisdiction."

The writer acknowledges the invaluable contribution of the Honourable Justice Donna Martinson to this area.[43]

For a listing of the International Hague Network of Judges see: https://assets.hcch.net/upload/haguenetwork.pdf

CONCLUSION

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[41] Volume XV/Autumn 2009, The Judges' Newsletter, Hague Convention on Private International Law, Special Focus, Direct Judicial Communications on Family Matters and the Development of Judicial Networks.

[42] The Honourable Diana Bryant, Chief Justice of Australia, Direct Judicial Communications in 2010, What Can We Expect? The Judge's Newsletter, Volume XV/Autumn 2009, footnote 3, p. 172 at 173.

[43] With thanks to the Honourable Justice Donna Martinson for her excellent paper "The Canadian Approach to Direct Judicial Communication – Making Concurrent Proceedings Operate Effectively: prepared for the National Judicial Institute Family Law Seminar, Evidence and Procedure, February 9-11, 2011, Calgary, Alberta.

The Convention was an unprecedented effort by the international community to prevent thousands of children each year being uprooted from their homes and hidden away from one of their parents. Despite the Convention, international abductions continue to occur. Effectively combating international child abductions requires more countries to become signatories.

Problems have arisen with respect to the lack of uniformity in the interpretation and application of the Convention as each country has its own laws and viewpoints on how to interpret the Convention. This can be overcome with greater cooperation among signatory countries in exchanging "good practises" at international conferences and through the resources of the Hague itself. This writer has also experienced problems with courts in the jurisdiction of the abductor which may be biased or sympathetic to the abducting parent who is a national of that Country. The exceptions to the mandatory return policy are subject to the interpretation and possible bias of the particular judge hearing the case. The court has the difficult challenge of balancing the need to protect children from being unlawfully abducted against the need to protect a child from a grave risk of harm should the court entertain a

return application where that defence has been raised. At the same time Courts must be careful not to undermine the spirit and philosophy of the convention where a mandatory return is warranted. Despite the difficulties and challenges in interpreting and enforcing a treaty that applies to diverse societies and cultures of the international community, the Convention has been an effective tool in the legal practitioner's hands in combating international child abduction.[44]

[44] The writer acknowledges the excellent paper prepared by the Honourable Justice Roselyn Zisman of the Ontario Court of Justice, for the Tokyo Study Session March 17, 2009 titled "Hague Convention On The Civil Aspects of International Child Abduction." Part of this paper relied upon the report of Justice Zisman, whom the writer had the privilege of working with in Tokyo, Japan in March 2009. The paper has been updated from a number of presentations the writer has prepared for various conferences over the past several years.

APPENDIX "A"

QB Action No.

Provincial Court File No.

IN THE MATTER OF THE INTERNATIONAL CHILD ABDUCTION ACT, S.A. 1986 C. 1-6.5

AND IN THE MATTER OF THE CHILD

BORN

NOTICE

TO: THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY
CALGARY COURTS CENTRE
601 – 5TH STREET S.W.
CALGARY, ALBERTA

AND TO: THE PROVINCIAL COURT OF ALBERTA
FAMILY & YOUTH DIVISION
CALGARY COURTS CENTRE
601 – 5TH STREET S.W.
CALGARY, ALBERTA

NOTIFICATION is given that the Central Authority for the Province of Alberta has received an application pursuant to the provisions of the *International Child Abduction Act*, S.A. 1986, C. 1-6.5 which is brought by , the father of the child, , born , seeking the return of the child to , Nevada, USA.

This Notice is given pursuant to Article 16 of the *International Child Abduction Act*:

> After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

It is therefore requested that any decision on the rights of custody of the child be held in abeyance pending a decision as to whether the child is to be returned to , Nevada, USA.

JONATHAN NICHOLSON
Counsel for the Central Authority
For the Province of Alberta

APPENDIX "A"

HAGUE CONVENTION ON THE CIVIL ASPECTS

OF INTERNATIONAL CHILD ABDUCTION

(Schedule to section 46 of the Children's Law Reform Act,

R.S.O. 1990, c.C.12)

NOTICE

(Pursuant to Article 16 of the Convention)

TO: Superior/Ontario Court of Justice

FROM: Central Authority

Ministry of the Attorney General

P.O. Box 640

Downsview, Ontario M3M 3A3

Attention: Shane Foulds, Counsel

Central Authority for the Province of Ontario, Canada

APPLICANT:

RESPONDENT:

CHILD:

TAKE NOTICE of the alleged wrongful removal and/or retention of the above-mentioned child/children from their place of habitual residence in _____ by the respondent.

The application for the return of the child pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction* is currently being processed and legal counsel for the applicant will bring the necessary court proceedings to attempt to secure the child's return to _____.

Pursuant to the provisions of Article 16 of the Convention, the judicial or administrative authorities of Ontario "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application is not lodged within a reasonable time following receipt of the notice".

DATED at Toronto, Ontario, Canada this _____ day of _____200_.

_____

Shane Foulds, Counsel

Ministry of the Attorney General

Central Authority for the Province of Ontario, Canada

Ministry of the Attorney General

Central Authority for the
Province of Ontario

Hague Convention on the
Civil Aspects of
International Child Abduction
P.O. Box 640
Downsview ON M3M 3A3
Canada

Tel. : 416 240-2411 (The Hague)
Fax.: 416 240-2411 (The Hague)

Ministère du Procureur général

Autorité centrale pour
la Province de l'Ontario

Convention de La Haye sur les
aspects civils de l'enlèvement
international d'enfants
C.P. 640
Downsview (Ontario) M3M 3A3
Canada

Tél. : 416 240-2411 (La Haye)
Télécopieur : 416 240-2411

Superior/Ontario Court of Justice

Attention: Court office

Re: Hague Convention on the Civil Aspects of International Child Abduction

Applicant:
Respondent:

Child:

Our office acts as the designated Central Authority for the province of Ontario under the Hague Convention on the Civil Aspects of International Child Abduction. This Convention is set out in the Schedule to section 46 of the Children's Law Reform Act, R.S.O. 1990, c. 12, and has been law in Ontario since December 1, 1983.

The application for the return of the above-noted children pursuant to the Hague Convention is currently being processed by our office and Ontario legal counsel for the applicant will bring the necessary court proceedings to attempt to secure the child's return to _____.

The purpose of the enclosed Notice is to advise your court that pursuant to Article 16 of the Convention, the courts of Ontario **"shall not decide on the merits of custody until it has been determined that the child is not to be returned under the Convention or unless an application is not lodged within a reasonable time following receipt of the notice."**

Please feel free to contact me directly at (416) 240-2484 or Tina Kapoor at (416) 240-2411 if you have any questions or require any further clarification concerning this particular case, or about the Hague Convention in general.

Thank you for your assistance in this matter.

Yours truly,

Shane Foulds, Counsel

Ministry of the Attorney General

Central Authority for the Province of Ontario, Canada

Encl.

APPENDIX "B"

Of Ontario, Canada

Applicant

- AND -

of Romania

Respondent

AFFIDAVIT OF LAW OF

DATED: March 3, 2009

THIS DOCUMENT IS FILED BY , Counsel

Ministry of the Attorney General

Central Authority for the

Province of Ontario, Canada

Hague Convention on the

Civil Aspects of

International Child Abduction

P.O. Box 640

Downsview ON M3M 3A3

Canada

Tel: 416 240-2411

Fax: 416 240-2411

I, , Barrister & Solicitor, member of the bar of Ontario, Canada solemnly and sincerely swear and declare:

1. **I am a Barrister and Solicitor practicing in Toronto, Ontario, Canada and have had 10 years experience practicing family law. I am lead counsel for the Central Authority for the Province of Ontario, Canada with respect to the *Hague Convention on the Civil Aspects of International Child Abduction*.**

2. **has alleged that her child, , born on January 22, 2005 , was wrongfully removed from Ontario, Canada and retained in Romania in breach of her custody rights.**

3. **The applicable law in Ontario, Canada with respect to child custody and child abduction is the *Children's Law Reform Act, 1990*.**

4. **Section 20 of the *Children's Law Reform Act* states:**

Father and mother entitled to custody

(1) --- Except as otherwise provided in this Part, the father and mother of a child are equally entitled to custody of the child.

Rights and Responsibilities

(2) – A person entitled to custody of a child has the rights and responsibilities of a parent in respect of a person of the child and must exercise those rights and responsibilities in the best interests of the child.

Entitlement subject to agreement or order

(7) Any entitlement to custody or access or incidents of custody under this section is subject to alteration by an order of the court or by separation agreement.

5. **Section 22 of the *Children's Law Reform Act* states:**

(2) Habitual Residence – 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...**

whichever last occurred.

(2) Abduction – The removal or withholding of a child without the consent of the person having custody of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld.

6. **The preamble to the *Hague Convention on the Civil Aspect of International Child Abduction* (hereinafter referred to as the "*Hague Convention*") provides that the underlying purpose of the *Hague Convention* is to "...protect children internationally 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, as well as to secure protection for rights of access...".**

7. **Article 3 of the *Hague Convention* provides that:**

The removal or retention of a child is to be considered wrongful where:

(a) it is a 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...

8. **Article 12 of the *Hague Convention* provides that:**

Where a child has been wrongfully removed or retained in terms of 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, 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.

9. **The evidence of is that her child, , born on January 22, 2005, was wrongfully removed to Romania on or around November 5, 2008. The basis of her assertion is that she is the natural mother of the child, and that child was removed in contravention of the order dated September 18, 2009 wherein the court retained its jurisdiction to determine the residence of the child. This order provided that:**

> **4. (a) The parties shall use their best efforts to relocate to Burlington [Ontario, Canada] within six months such that the children can be together.**
>
> **4. (b) Until the parties are both physically able to relocate to Burlington [Ontario], will reside primarily with the Applicant and will reside primarily with the Respondent and the children will be together on alternating week-ends...**

10. **The leading Canadian case on the issue of Article 3 custody in a *Hague Convention* Application, called *Thompson v. Thompson* [1994] 3 S.C.R. 551. The Supreme Court of Canada (the highest court in Canada) held in *Thompson* that when a court is vested with jurisdiction to determine who shall have custody of a child, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence, therefore custody vests with the court within the meaning of Article 5 of the *Hague Convention*. Therefore the removal of the child in this case is a breach of custody rights within the meaning of Article 5 of the *Hague Convention*.**

11. It is submitted and is my legal opinion that, therefore, this is exactly the type of fact scenario that the *Hague Convention* was enacted to discourage and remedy. Clearly the habitual residence of the children is, and always has been, Ontario, Canada. Under the law of Ontario, Canada, this status cannot be changed by wrongful removal or retention of the children. The Applicant's custody rights, which are clearly present pursuant to the *Children's Law Reform Act*, have been breached by the unlawful retention of the children in Romania, and further that the retention of the children in Romania is wrongful within the meaning of Article 3 of the *Hague Convention*. The removal and retention of the child by the father after November 5, 2008 clearly and unequivocally breaches the Applicant's custody rights and was in contravention with the intention of the Ontario court. It is therefore my opinion as lead counsel for the Central Authority for the Province of Ontario, Canada that the Romanian court should order the immediate return of the children to Ontario, Canada, in order to comply with the provisions of the *Hague Convention*.

Sworn before me at)
the City of Toronto in the)
Province of Ontario)
this 3rd day of March, 2009)

_____

(This form is to be signed before a lawyer, justice of the peace, notary public or commissioner for taking affidavits.)

_____

A Commissioner for Taking Affidavits